









THE  
Calcutta Weekly Notes.

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LAW NOTES

AND

NOTES ~~OF~~ CASES

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

The English Law Courts.

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s. 167—*Bengal Tenancy Act (VIII of 1885), secs. 22 (1), 85, 167*—Purchase of a raiyati holding by a landlord in execution of a decree for rent—Annulment of incumbrance—Notice, if necessary.] An under-raiyati lease if created by an instrument which is not registered is invalid under sec. 85 of the Bengal Tenancy Act, and a landlord purchasing the holding of the raiyat in execution of a decree for arrears of rent is entitled to take khas possession by ejecting such under-raiyat without annulling the same by a notice under sec. 167. The rights under such an under-raiyati lease are not protected by sub-sec. 1 of sec. 22 of the Act. RAJAH PEARY MOHAN MUKHERJEE v. BADAL CHUNDER BAGDI ... 310

s. 167—*Bengal Tenancy Act (VIII of 1885), sec. 167*—Annulment of incumbrance, notice for—Notice, contents of—Notice joint, to several persons.] A notice to annul an incumbrance under sec. 167 of the Bengal Tenancy Act is not bad though it does not specify the particulars of the land held by the tenant or the rent payable by him. Such a notice if addressed to several tenants jointly is not bad if it is served in accordance with the prescribed rules. JOGABUNDHU MAJUMDAR v. RASHO MONJAN DASSYA 272

s. 170—*Bengal Tenancy Act (VIII of 1885), sec. 170*—Civil Procedure Code (Act XIV of 1882), sec. 278—Claim adverse to the tenure or holding, if maintainable when attached in execution of a decree for arrears of rent.] *Held* by THE FULL BENCH (BANNERJEE, J., dissenting)—That sec 170 of the Bengal Tenancy Act bars a claim under sec. 278, C. P. C., to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases and the operation is not confined merely to claims to the tenure or holding but extends to claims based on the ground that the property claimed does not form part of the tenure or holding attached. *Jagabundhu Chattopadhyaya v. Deenu Pal*, 4 C. W. N. 734 (1887), overruled; *Makbul Ahmed v. Rakhal Das Hazra*, 4 C. W. N. 732 (1900), approved of. AMRITA LAL BOSE v. NEMAI CHAND MUKHOPADHYA ... 474

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s. 179—*Bengal Tenancy Act (VIII of 1885), secs. 67, 179*—Interest at a higher rate than 12 per cent. per annum—Permanent lease—contract.] *Held* BY THE FULL BENCH—AMEER ALI, J., dissenting) that sec. 67 of the Bengal Tenancy Act does not control the provisions of sec. 179 of the same Act. That in granting a permanent lease within the terms of sec. 179 of the Bengal Tenancy Act, a condition that interest shall be payable at a higher rate than 12 per cent. per annum, as allowed by sec. 67 of that Act, is permissible. *Basanta Coomarr Roy Chowdhri v. Promotha Nath Bhattacharjee*, 3 C. W. N. 36 : s. 8. I. L. R. 26 Cal. 120 (1898), overruled. MATUNGINI DEBI v. MAKRURA BIBI ... 438

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ART. 3—*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3*—Limitation Act (XV of 1877); Sch. II, Art. 47—Criminal Procedure Code (Act V of 1898), sec. 146.] The limitation as prescribed by Art. 3, Sch. III of the Bengal Tenancy Act begins to run from the date of the actual ouster, and if subsequent to the ouster some dispute arises between the parties and an order is passed under sec. 146, Cr. P. C., attaching the land, the limitation which has already begun to run does not cease, and the Plaintiff does not get a fresh start of limitation from the date when the order under sec. 146, Cr. P. C., is made. DEW NARAIN CHOUHDURY v. C. R. H. WEBB ... 160

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ART. 3—*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3*—Limitation—Dispossession by a co-sharer landlord—Recognition of tenant's title.] Where one of two co-sharer landlords brought a suit to have his right established to sell the occupancy holding of the raiyat in execution of a decree for money obtained by him, and it was proved that although the other co-sharer landlord had dispossessed the raiyat more than 2 years before the institution of the suit, but that notwithstanding the unlawful dispossession, the title of the raiyat was throughout recognised by all parties concerned, and the recognition had been up to within two years of the institution of the suit: *Held*—That the suit was not barred by the two years' rule. SHEIKH SARAFUDDIN MONDUL v. CHANDRA MANI GUPTA ... 405



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<b>CARRIAGE of dangerous goods. See RAILWAY COMPANY</b>	449	<b>s. 13—Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—Decisions in two suits not open to appeal in the same way—Joinder of several causes of action—Claim for cess.] To make a matter res judicata it is not necessary that the two suits should be open to appeal in the same way. A Plaintiff cannot be allowed to evade the provisions of sec. 13 of the Civil Procedure Code by joining several causes of action against the same Defendant in one suit and by bringing his suit in a Court of superior jurisdiction. MUSST. BHUGWANBUTTI CHOWDHURANI v. A. H. FORBES</b>	483
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for a declaration of title to a certain property, when the Court makes a declaration in favour of the Plaintiff as to a certain share of the property and a declaration as to certain other shares in favour of some of the Defendants, the latter declaration is not binding on the other Defendants.

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That an Appellate Court has power under sec. 582 read with sec 53 of the Civil Procedure Code to allow an amendment of the plaint. Where the object of an amendment of a plaint is merely to seek relief ancillary to the principal prayer of the plaint, such amendment does not alter the character of the suit. *Shyam Chand Koondoo v. The Land Mortgage Bank of India*, I. L. R. 9 Cal. 695 (1883); *Dhani Ram Shaha v. Bhagirath Shtha*, I. L. R. 22 Cal. 692 (1895); and *Sieshamma v. Chenappa*, I. L. R. 20 Mad. 467 (1897), referred to. RAJAH PEARY MOHAN MUKHERJEE v. NARENDRA KRISHNA MUKERJEE ... 273

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*Civil Procedure Code (Act XIV of 1882)*, sec. 108—*Sufficient cause—Non-appearance of a guardian of a minor, in a suit whether a good and sufficient cause—Ex parte decree, setting aside of, against one of several Defendants, effect of, as to the decree against other Defendants.* The simple fact that a guardian did not appear in a suit is not good and sufficient cause within the meaning of sec. 108, C. P. C., for setting aside an *ex parte* decree passed against a minor. There are different considerations which bear upon the matter, the question always being whether, in what the guardian did, he acted in the best interest of of his ward. *Kesho Pershad v. Hinday Narain*, 6 C. L. R. 69 (1880) explained. In a case where an *ex parte* decree was set aside against one of the Defendants, and the Subordinate Judge set aside the decree against others who did not appear and one of whom made an application to set aside the *ex parte* decree: *Held—That this was rightly done. Mahomed Hamidulla v. Tohurensa*, I. L. R. 25 Cal. 155 (1897), approved of. AJODHYA PERSHAD SINGH v. SHEO PERSHAD SAHU ... 58

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*Civil Procedure Code (Act XIV of 1882)*, secs. 206, 622, 623—*Order amending decree—Appeal—Second appeal—Review.* An order under sec. 206, C. P. C., amending a decree is not a decree and no appeal lies against such an order and the proper remedy is by an application under sec. 622, Civ. P. C. *Sarta v. Ganga*, I. L. R. 7 All. 875 (1885), referred to and followed; *Joy Kishen Mookerjee v. Ataoor Rohoman*, I. L. R. 6 Cal. 22 (1880) referred to; *Kali Prosunno Basu v. Lal Mohun Guha*, I. L. R. 25 Cal. 258 (1897), distinguished; *Abdul Hayai Khan v. Chaita Kuar*, I. L. R. 8 All. 377 (1886); *Muhammad Sukhman Khan v. Fatima*, I. L. R. 11 All. 314 (1899), explained. RAGHU NATH GHOSHAL v. MAFAKSHAR HOSSAIN CHOWDHURY ... 192

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*Civil Procedure Code (Act XIV of 1882)*, secs. 223, 649—*Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887)*, secs. 13, 17—*Execution of decree—Jurisdiction, transfer of, of Court—Limitation Act (XV of 1877)*, sec. 14.] An execution of a decree of the Court of the Munsif of Nawabgunge having been taken out in the Court of the Munsif of Maldah by reason of transfer of the local jurisdiction of the former by the Local Government under Act XII of 1877, a sum of money was paid in part satisfaction. A second application was objected to on the ground that the Maldah Court had no jurisdiction. A fresh application with a certificate transferring the decree from the Nawabgunge Court was resisted on the ground of limitation: *Held—That the Nawabgunge Court did not cease to have jurisdiction but that the decree could also be executed by the Maldah Court. Luchman Pandeh v. Maddan Mohun Shye*, I. L. R. 6 Cal. 513 (1880), referred to; *Kalipado Mukerjee v. Deno Nath Mukerjee*, I. L. R. 25 Cal. 315 (1897), distinguished. *Held further—That proceedings to enforce a decree taken bonâ fide before a Court which the party bonâ fide believes to have jurisdiction is a proceeding within the meaning of sec. 14 of the Limitation Act. Hira Lal v. Badri Das*, I. L. R. 2 All. 792: s. c. I. L. R. 7 I. A. 167 (1880), referred to. SHEIK JAFAR v. KAMALINI DEBI ... 150

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*Code of Civil Procedure (Act XIV of 1882), secs. 311, 312, 588, 244 (c)*—*Allegation of fraud against decree-holder, without any attempt to prove the same—Irregularity in the publishing or conducting of the sale question of—Second appeal.*] A mere allegation of fraud in an application under sec. 311 of the Code of Civil Procedure without any attempt in any way to substantiate it cannot give a right of second appeal in a case which would not otherwise have arisen. *Nava Kumar Roy v. Golam Chunder Dey*, I. L. R. 18 Cal. 422 (1891); *Abhaya Dassi v. Pudmo Luchun Mondol*, I. L. R. 22 Cal. 802 (1895); *Dairanayagam Pillai v. Rangasami Ayyar*, I. L. R. 19 Mad. 29 (1894), followed; *Rojoni Kant Bagchi v. Hossain Uddin Ahmed*, 4 C. W. N. 538 (1899), explained and distinguished. *UMAKANT ROY v. DENO NATH SANYAL* ... 124

*Civil Procedure Code (Act XIV of 1882), secs. 244, 578, 623—Execution proceedings, re-opening of—Mistake in calculating amount due—Jurisdiction.*] Where the Court passed an order in an execution case stating that the case had been disposed of by reason of both sides having represented to the Court that the decree had been satisfied: *Held*—That an application to allow the execution proceedings to be re-opened was maintainable under sec. 244, C. P. C., on the ground that the decree-holder had acted under a mistake of calculation in fixing the amount that was due. *Fakamuddin Mahomed Ahsan v. The Official Trustee of Bengal*, I. L. R. 10 Cal. 538 (1884) distinguished. Where such an application was made by the decree-holder referring to both secs. 244 and 623, C. P. C., and the first Court thought that the latter section was inapplicable and re-opened the proceedings under sec. 244: *Held*—That even if sec. 623 only was applicable, the order of the first Court could not, having regard to sec. 578, C. P. C., be interfered with in appeal. *NILRATAN KHASNOBISH v. RAM RUTTON CHATTERJI* ... 627

*Civil Procedure Code (Act XIV of 1882), sec. 244—Ijaradar of judgment-debtor, whether a legal representative—Right of suit.*] An ijaradar of

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a property of the judgment-debtor is a representative of the judgment-debtor within the meaning of sec. 244, C. P. C. A suit brought by a decree-holder against the judgment-debtor and his ijaradar to have it declared that the ijarah was null and void is not maintainable as that is a question which should be decided by the Court executing the decree. <i>Lalji Mal v. Nand Kishore</i> , I. L. R. 19 All. 332 (1897); <i>Madho Das v. Ramji Patak</i> , I. L. R. 16 All. 286 (1894); <i>Gur Prasad v. Ram Lal</i> , I. L. R. 21 All. 20 (1898); and <i>Ishan Chunder Sirkar v. Beni Madhab Sirkar</i> , I. L. R. 24 Cal. 62 (1896), referred to. <i>H. MATHEWSON v. GOBARDHAN TRIBEDI</i> ... 654	247.	497
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*Mortgage Priority, relinquishment of—Civil Procedure Code (Act X of 1877), sec. 295—Distribution of sale-proceeds—Suit for refund of money so distributed—Order in a suit—Limitation Act (XV of 1877), Sch. II, Art. 13.*] An order for distribution under sec. 295, Civil Procedure Code, is an order in a suit and as such excluded from the operation of Art. 13 of Sch. II of the Limitation Act. The scheme of sec. 295, Civil Procedure Code, is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the right of the parties, and does not import a conclusive adjudication on those rights, which may be readjusted subsequently by a suit. A suit for refund of money paid to the Defendant under an order of Court made under sec. 295, Civil Procedure Code, on the ground that the Plaintiff was entitled to it in preference to the Defendant, is not a suit to set aside the order of distribution and does not come within the Limitation Act, Art. 13. *Vishnu Bhikaji Phadke v. Achut Jagannath Ghate*, I. L. R. 15 Bom. 438 (1890), approved. *SHANKAR SARUP v. LALA PHUL CHAND* ... 649

*Civil Procedure Code (Act XIV of 1882), sec. 310A—"Whose immovable property is sold," meaning of, in sec. 310A—Sale in execution of rent decree—Simple mortgagee, right of,*

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to apply to set aside sale.] • A simple mortgagee is not a person entitled to have a sale set aside under sec. 310A, C. P. C. *Hamidul Huq v. Matangini Dasi*, 2 C. W. N. cclviii (1898); *Rakhul Chunder Bose v. Dwarka Nath Misser*, I. L. R. 13 Cal. 346 (1886), distinguished. *NITYA NANDA PATRA v. HIRA LAL KARMAKAR* ...

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setting aside a sale does not determine any question as to the relative rights of the parties to the property sold. Those rights remain as they were before. Per AMEER ALI, J.—The words "any person whose immoveable property is sold" in sec. 310A include every person who has an interest in the property in question, whether qualified, partial or absolute. *PARESH NATH SINGHA v. NOBOGOPAL CHATTOPADHYA* ...

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... s. 315—*Civil Procedure Code (Act XIV of 1882), secs. 11, 315—Refund of purchase-money when judgment-debtor has no saleable interest in the property sold—Suit for such refund, whether maintainable—Remedy.* Sec. 315 of the Code of Civil Procedure is not exhaustive and does not confine an execution purchaser to the special remedy provided by that section and a suit lies under sec. 11 of the Code for a claim to get a refund of the purchase-money when the judgment-debtor is found to have no saleable interest in the property sold. *Munna Singh v. Gajadhar Singh*, I. L. R. 5 All. 577 (1833); *Kishun Lal v. Muhammad Safdar Ali Khan*, I. L. R. 13 All. 383 (1891); *Pachayappan v. Narayana*, I. L. R. 11 Mad. 269 (1887), referred to. *HARI DOYAL SINGH ROY v. SHEIKH SAM-SUDDIN* ... 240

... s. 317—*Civil Procedure Code (Act XIV of 1882), sec. 317—Suit for establishment of title against attaching decree-holder to the property purchased in the benami of the judgment-debtor.* In execution of a decree for arrears of rent Plaintiff purchased a property in the benami of his son R. This property was attached in execution of a decree by Defendant No. 1 against R, and the Plaintiff preferred a claim which was rejected; Plaintiff brought the present suit to have his title established; R having died his son was made a party: Held—That sec. 317 of the Civil Procedure Code is no bar to the suit. That the protection afforded by that section only extends to the certified purchaser and not to one who derives title from him. *Raj*

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*Chundra Chuckervarty v. Dina Nath Saha*, 2 C. W. N. 433 (1898); *Dukhoda Sundari Dassi v. Sreemuntha Joadder and others*, 3 C. W. N. 657 (1899); *Theyyavelun v. Kochan*, I. L. R. 21 Mad. 7 (1897), referred to. *NOKORI DHUR v. SARUP CHUNDER DEY* ... 341

—, s. 342—*Civil Procedure Code (Act XIV of 1882), sec. 342—Imprisonment for debt—Period of imprisonment—Jurisdiction.*] The Court cannot fix any term of imprisonment for a debt under sec. 342, *Civil Procedure Code*, when committing a debtor to jail. *Subudhi v. Singi*, I. L. R. 13 Mad. 141 (1889), followed. *SUJAN BIBI v. SAGAR MANDAL* ... 145

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—, s. 372—*Civil Procedure Code (Act XIV of 1882), sec. 372—Appeal—Substitution of proprietors after discharge of an encumbered estate—Chota Nagpur Encumbered Estates Act (VI of 1876, B. (1)).*] An appeal lies against an order directing substitution of parties under sec. 372, C. P. C.; such an order amounts to an order disallowing objections to substitution. In a case where the suit was brought by a manager appointed under the Encumbered Estates Act (VI of 1876), the proprietors of the estate are entitled to be substituted on the record after the discharge of the manager whose interest devolves upon them within the meaning of sec. 372 of the Code of Civil Procedure. *RAJAH SOURINDRA MOHAN TAGORE v. RANI SHIROMONI* ... 307

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—, Ch. XXXIX—*Civil Procedure Code (Act XIV of 1882), Chap. XXXIX—Negotiable Instruments—Summary Procedure—Leave to defend, extension of time to apply for—Limitation Act (XV of 1877), sec. 4 and Sch. II, Art. 159.*] In a suit under Chap. XXXIX, Civ. P. C., the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired to extend the time. *Quære—Whether*

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the Court has power to grant an extension of time if an application for such extension be made before the time fixed by the summons has expired. <b>QUAZIE MAHMUDAB ROHMAN v. SARAT CHANDRA DUTT</b> ...	s. 375.	259
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<i>Civil Procedure Code (Act XIV of 1882), sec. 375—Compromise decree—Extraneous matter.</i> A decree passed on a compromise cannot be regarded as <i>ultra vires</i> simply because it goes beyond the subject-matter of the suit and contains other conditions. The other conditions, if they are the considerations for the compromise of the subject-matter of the suit, must be incorporated in the decree; but if the other conditions are independent of it they may be regarded as surplusage. <b>PURNA CHANDRA SARKAR v. NIL MADHUB NANDI</b> ...	s. 375—	485
<i>Civil Procedure Code (Act XIV of 1882), secs. 394, 395—Report of a Commissioner—Order confirming the report, appeal from—Appeal Court, power of, to deal with findings of fact by the Commissioner.</i> Held per PRINSEP and HILL, J.J. ( <b>MACLEAN, C. J.</b> , dissenting).—In an appeal from a judgment and order confirming the report of a Commissioner appointed under sec. 394, Civ. P. C., it is open to the Court of Appeal to deal with the report on matters of fact, and its powers are not limited to questions of principle when examining such report. <b>Ahmed Nanu Bhai v. Khurap Karim Bhai</b> , 6 Bom. H. C. 149 (1869); and <b>Kankatala v. Polsheth</b> , 6 Mad. H. C. 36 (1870), referred to. The Court whether of first instance or of appeal must be satisfied with the proceedings of a Commissioner before it accepts them and the fact that the judgment of the first Court is in affirmation of the report of a Commissioner does not affect the powers of the Court of Appeal. <b>Moung Tha Hanyeen v. Moung Pan Nyo</b> , 4 C. W. N. 808 (1900), distinguished. <b>Watson v. Aga Mehmed Sherazee</b> , L. R. 1 I. A. 346 (1874), referred to. Per PRINSEP, J.—The Report of a Commissioner requires affirmation by an order of Court to make it operative and cannot be regarded as a judgment of a Court. Per HILL, J.—Under sec. 395, Civ. P. C., the report of a Commissioner if accepted by the Court is only evidence in the suit of facts found by him, but is not a decision upon it, nor can it be treated on the same footing as the ver-	SB. 394, 395—	

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dict of a jury. *Mackintosh v. Great Western Ry. Co.*, 4 Giff. 683 (1887); and *Moung Tha Hnyeen v. Moung Pan Nyo*, 4 C. W. N. 808 (1900), distinguished. *Boroness Wenlock v. River Dee Company*, 19 Q. B. D. 155 (1887), referred to. *Per MACLEAN, C. J.*—If there has been a fair investigation of the matter by the Registrar and his finding has been confirmed by the Judge of first instance, the Court of Appeal ought not to interfere except on the strong ground of manifest error or manifest abuse. It should not interfere merely on the ground that if the matter was *res integra* it would have been disposed to attach more weight to this or that particular piece of evidence. *Mackintosh v. Great Western Ry. Co.*, 4 Giff 683 (1887); and *Moung Tha Hnyeen v. Moung Pan Nyo*, 4 C. W. N. 808 (1900), referred to. *R. M. S. CHITTY v. MAHOMED ESSA SAHEB* ... 692

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*Civil Procedure Code (Act XIV of 1882), sec. 435*—Verification on behalf of a Corporation—Verification of plaint, defective, effect of, on appeal—*Insolvency*—*Civil Procedure Code (Act XIV of 1882), secs. 347, 350, 351, 353 and 578.*] Where a petition by the Bank of Bengal was verified by a person described as the Officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not the officer authorised to sue or verify the petition on behalf of the Bank at Chittagong or that he was not able to depose to the facts of the case: *Held*—That the petition was properly verified under sec. 435. *Civ. P. C.* Defective verification, if there is no reason to suppose that any one is prejudiced thereby, is no ground, at an appellate stage, either for returning the plaint for amendment or for refusing relief on the basis of the alleged defect in the plaint. *Rajit Ram v. Katesar Nath*, I. L. R. 18 All. 396 (1896); and *Basdeo v. John Smidt & ors.*, I. L. R. 22 All. 55 (1890), followed. *RAM KOMAL SAHA v. BANK OF BENGA AND AKYAB* ... 91

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*Arbitration award, if binding on a person not a party to the reference*—*Civil Procedure Code (Act XIV of 1882), sec. 506*—*Acquiescence*—*Conduct of the party.*] Mere silence on the part of a person, not party to an order of reference to arbitration, and his omission to inform the arbitrators that he was not a party to the reference, cannot make the

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award of the arbitrators binding on him even though, during the arbitration, he produced, through a servant, a document before the arbitrators in obedience to a summons and declined to produce others. *Saturjet Pertap Bahadoor Sahi v. Dulhin Gulab Kaer*, I. L. R. 24 Cal. 469 (1897); *Unniraman v. Chathan*, I. L. R. 9 Mad. 451 (1886); *Shita Nath Biswas v. Kishen Mohun Mookerjee*, 5 W. R. 130 (1866); *Govett v. Richmond*, 7 Sim. 1 (1834); and *Taylor v. Parry*, 1 Man. and Grang. 604 (1840), referred to and distinguished. *Dergumbur Chatterjee v. Musst. Ram Prea Debea*, Marshall's Rep. 517 (1863), approved. *BENI MADHAN MITTER v. PRIYA NATH MANDAL* ... 268

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*Civil Procedure Code (Act XIV of 1882), secs. 39, 560*—*Rehearing of appeal, heard ex parte*—*Limitation*—*Amendment.*] An application for rehearing of an appeal presented originally within the period of limitation but returned for amendment and presented after amendment after the period of limitation, cannot be rejected as being out of time. *SHAMA PRASAD GHOSE v. TAKI MULLIK* ... 816

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*Civil Procedure Code (Act XIV of 1882), secs. 562, 566, 578, 588, cl. (28), and 591*—*Appeal—Remand order*—*Jurisdiction.*] The lower Appellate Court erroneously remanded a case under sec. 562 instead of under sec. 566 which it ought to have done, and on appeal to the High Court against the decree of the lower Appellate Court passed on appeal against the decree of the first Court made after such remand, the Appellant took objections to the legality of the order of remand: *Held*—That such objections may now be raised although no appeal had been preferred against the order of remand previously. *Moharajah Moheshur Singh v. The Bengal Government*, 7 Moo. L. A. 283 (1859); and *Savitri v. Ramji*, I. L. R. 14 Bom. 232 (1889) referred to. That the word "jurisdiction" may either

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mean what is ordinarily understood by the term "jurisdiction" when used with reference to the local or pecuniary jurisdiction of a Court or its jurisdiction with reference to the subject-matter of a suit; or it may mean the legal authority of a Court to do certain things. The term "jurisdiction" in sec. 578, C. P. C., is used in the former sense. That sec. 578 of the Civil Procedure Code is applicable in curing the defect of an erroneous order of remand if it does not affect the merits of the case.

*Rameshwar Singh v. Sheodin Singh*, I. L. R. 12 All. 510 (1889); and *Subba Sastri v. Bala Chandra Sastri*, I. L. R. 18 Mad. 421 (1894), dissented from. *Brij Mohan Thakur v. Rai Uma Nath*, I. L. R. 20 Cal. 8 (1892); and *Mohesh Chandra v. Madhub Chandra*, 2 B. L. R., short-notes of cases, p. 13 (1868), distinguished. *Amir Hassan v. Sheo Baksh*, I. L. R. 11 Cal. 6 (1884); and *Mallikarjuna v. Pathaneni*, I. L. R. 19 Mad. 479 (1896), referred to. *Nassurooddeen v. Lal Mahomed*, 13 W. R. 234 (1870); *Saritra v. Ramji*, I. L. R. 14 Bom. 232 (1889); and *Matra Mondal v. Hari Mohan*, I. L. R. 17 Cal. 155 (1889), referred to and approved. *MOHESH CHANDER DAS v. JAHIRUDDIN MOLLAH* ... 509

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ment-debtors thereupon applied to the Subordinate Judge for a refund to them of the proportionate value of the 2 annas share: Held—That the application fell properly within sec. 583, Civ. P. C., and should have been made, not before the Subordinate Judge, but before the District Judge who had "passed the order against which the appeal was preferred." *KHEM NARAIN CHOWDHURY v. MUSST. GANESHO KUAR* ... 287

See s. 583—*Civil Procedure Code (Act XIV of 1882), sec. 583—Application for restitution of property—Execution of decree of Appellate Court—Decree, whether capable of execution against and binding upon person not a party to appeal—Assignment not subsequent to the decree—Lis Pendens—Refund by assignee.* Under sec. 583 of the Code of Civil Procedure, the decree of the Appellate Court has to be executed and by the very scope of the section it can only apply to the parties to the appeal; it cannot be executed against a person who was no party to the decree of the Appellate Court and who has not derived any interest subsequent to such decree. *Bhagwati Prasad v. Jamna Prasad*, I. L. R. 19 All. 136 (1896); and *Sadiq Husain v. Lalla Prasad*, I. L. R. 20 All. 139 (1897) referred to and followed. *B. L. FRIZONI v. RAJA RAM NARAIN SINGH* ... 426

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*Civil Procedure Code (Act XIV of 1882), sec. 583—Jurisdiction—Refund, application for.]* A mortgagee, in execution of a money decree, purchased 2 annas out of 8 annas of certain property mortgaged to him. He subsequently obtained a mortgage decree and in execution the Subordinate Judge passed an order for the sale of the 8 annas. On appeal the District Judge directed that only 4 annas of the property should be sold. On second appeal the High Court held that execution should have been issued after deducting an amount proportionate to the value of the 2 annas share previously purchased by the mortgagee. In the meantime, the 4 annas share had been sold as directed by the District Judge. The judg-

*Civil Procedure Code (Act XIV of 1882), secs. 595, 596 and 600—Appeal to Privy Council—Substantial point of law—Certificate of High Court—Assent of Respondent to the appeal.]* Under sec. 596, Civ. P. C., there is no right of appeal to the Privy Council simply on the ground that a

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substantial point of law is involved. The presence of such a question does not give a right of appeal when the value is below the mark; the requirement of it restricts the right when the higher Court affirms the lower and the dispute either directly or indirectly relates to an amount of Rs. 10,000. Under secs. 595 and 600, Civ. P. C., there is a right of appeal if the High Court certifies that the case is "otherwise" a fit one for appeal. The word "otherwise" refers to special cases, such as, where the point in dispute is not measurable by money, though it may be of great public or private importance. But in all such cases a special certificate to that effect must be granted by the High Court. The mere assent of the Respondent to an appeal does not give the Appellant a right of appeal, which the Code does not allow, or sustain a certificate which is obviously erroneous. BANARASI PARSHAD v. KASHI KRISHN NARAIN 193

*Appeal to His Majesty in Council—Leave to appeal—Concurrent findings of fact—Civil Procedure Code (Act XIV of 1882), sec. 596.* Where there are concurrent findings of the lower Court and of the High Court upon questions of fact and no question of law arises, a certificate granting leave to appeal to His Majesty in Council should not be granted. MUSST. SAKALBOTI MANDARAIN v. BABULAL MUNDAR ... 455

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*Civil Procedure Code (Act XIV of 1882), secs. 595, 596 and 600—Appeal to Privy Council—Certificate where case is "otherwise" fit for appeal.* In considering under what section of the Civil Procedure Code the certificate of fitness was given by the Court, it is the certificate itself which has to be looked at and not the order for the certificate. In granting a certificate under sec. 600, Civ. P. C., the Court must exercise its judicial discretion upon the matter. Unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, the Court must find that leave was not properly given and the appeal must be dismissed. *Banarsi Parshad v. Kashi Krishna Narain*, L. R. 27 I. A. 11 : s. c. 5 C. W. N. 193 (1900), referred to. RADHA KRISHN DAS v. RAI KRISHN CHAND ... 689

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*Execution, stay of—Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882), secs. 603, 608.* An application for stay of execution under sec. 608, C. P. C., cannot be granted before an appeal to the Privy Council is finally admitted under sec. 603, C. P. C. SM. BIBI JARAO KUMARI v. GOPI CHAND BOTHRA ... 562

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*The admission of a review presented out of time without any sufficient cause is a good ground of appeal under sec. 629, cl. (c) of the Code of Civil Procedure. In granting a review the Court should not travel beyond the grounds mentioned in the application for review. PURNA CHANDRA SARKAR v. NIL MADHUB NANDI ... 485*

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CONSENT DECREE—Consent decree, construction of— <i>Solehnama—Mortgage suit—Breach of contract.</i> ] In a suit on a mortgage for Rs. 49,855 and odd, a consent decree was made whereby the Defendants consented to judgment for the entire amount but subject to the proviso that, if on a certain date the Defendants should pay to the Plaintiff the sum of Rs. 35,000, the decree should be considered as satisfied. The decree further, provided that if for the payment of the aforesaid sum it should be necessary for the Defendants to sell any portion of the mortgaged properties, they should give the particulars of the properties to be sold to the Plaintiff who should then appraise the same within 30 days and after crediting the proper price against the Defendants' debt, should execute a deed of release or deed of consent. The Plaintiff, however, refused to appraise any properties when asked to do so, and by reason of such refusal the Defendants were unable to pay up the amount within the date fixed. The Plaintiff thereupon applied for execution for the whole amount of the decree : <i>Held</i> —That by reason of the breach of contract by the Plaintiff, he was only entitled to a decree for Rs. 35,000. That that sum must be regarded as having been tendered and refused on the date fixed for payment thereof and would not therefore carry any interest. <i>HARENDRA LAL ROY CHOWDREY v. MAHARANI DASI</i> ...	536	... s. 578, "Jurisdiction," meaning of. See CIVIL PROCEDURE CODE, s. 562 ...	509
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CONTRACT ACT, s. 30—Contract Act (IX of 1872), sec. 30—Gambling and wagering contract—Suit for value received in "difference" on rice.] There is no difference between the expressions "gaining and wagering" as used in the English Statute and "by way of wager" in sec. 30 of the Contract Act. Two parties may enter into a formal contract for the sale and purchase of goods at a given price and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise and fall of the market. <i>Universal Stock Exchange, Ltd. v. Strachan</i> , L. R. (1896) App. Cas. 166 approved. <i>KONG YEE LONE v. LOW-JEE NANJEE</i>	714
—, s. 135—A surety can contract himself out of the rule which exonerates him from liability if time be given by the creditor to the principal debtor. Where a surety alleged that he signed the bond without reading it and that he was not given to understand that he was contracting himself out of the ordinary rule: <i>Held</i> —That people who induce others to advance money on the faith of their undertakings cannot escape from their plain effect on such plea. It requires a clear case of misleading to succeed on such a plea. <i>HODGES &amp; ANR. v. THE DELHI AND LONDON BANK, LIMITED</i>	1
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—, Contribution, suit for— <i>Joint wrong-doers</i> — <i>Bona fide claim of right</i> .] When a joint decree was passed against several persons, no suit for contribution would lie as between them if they were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. But if they were not guilty of wrong in that sense but acted under a <i>bona fide</i> claim of right and had reason to suppose that they had a right to do what they did, then	

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there is a right of contribution <i>inter se</i> . Some time in 1826 R, the common ancestor of the parties, dispossessed K of a share in a certain property; after an interval of 27 years and 6 months K brought a suit and proved his right and recovered possession; meanwhile, i.e., 5 years after the dispossession R had died and had been succeeded by his sons. There was nothing to shew that R or after him his heirs knew that they were doing a wrongful or unlawful act or that they did not do it under cover of a <i>bona fide</i> claim of right. The circumstances pointed to the opposite conclusion: <i>Held</i> —That in such a case a suit for contribution lay. <i>Merry Weather v. Niran</i> , 8 T. R. 186 (1799); <i>Betts v. Gibbins</i> , 2 A. & E. 57 at p. 74 (1834); <i>Adamson v. Jarris</i> , 4 Bing. Rep. 66 (1827); <i>Pearson v. Skelton</i> , 1 M. & W. 504 (1836); <i>Palmer v. Wick and Pul-tencytown Steam Shipping Company, Ltd.</i> , L. R. App. Cas. for 1894, p. 318 (1894); <i>Sreeputti Roy v. Loharam Roy</i> , 7 W. R. 384 (1867); <i>Saput Singh v. Imrit Tewary</i> , I. L. R. 5 Cal. 720 (1880); and <i>Brojendra Kumar Roy Chowdhury v. Rash Behari Roy Chowdhury</i> , I. L. R. 13 Cal. 300 (1886), referred to. <i>HARI SARAN MAITRA v. JOTINDRA MOHAN LAHIRI</i>	393
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—, s. 32—Evidence Act (I of 1872), sec. 32—Pedigree, admissibility of, to prove relationship—Wajib-ul-urz.] Where a pedigree was tendered in evidence but neither any of the bards who were said to have prepared it nor the Raja who assembled the bards of the family and with their assistance had the pedigree drawn up was called as a witness, and no proof was adduced	

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that they were within any of the descriptions given in sec. 32 of the Indian Evidence Act which made it unnecessary to call them: <i>Held</i> —That the Court below was right in not admitting the pedigree in evidence. The <i>Wajib-ul-urz</i> was too vague to be of any value in support of Appellants' claim. <i>SURJAN SINGH v. SARDAR SINGH</i> ... 49	
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Right of Suit, s. 68—Evidence Act (I of 1872), sec. 68—Transfer of Property Act (IV of 1882), sec. 59—Attesting witness—Mortgage—Writer of the deed.] A person who is present and witnesses the execution of a deed and whose name appears on the document, though he is therein described merely as the writer of the deed is a competent witness to prove the execution of the deed. He need not be described in the deed as an attesting witness. <i>Radha Kissen v. Fateh Ali Ram</i> , I. L. R. 20 All. 532 (1898), referred to. <i>RAJ NARAIN GHOSH v. ABDUR RAHIM</i> ... 454	
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rebut that evidence by oral evidence. Where a deed recited the payment of a certain consideration and the Plaintiff denied the passing of any consideration and adduced evidence in support of his contention under the provisions of sec. 92 of the Evidence Act, it is open to the Defendants to go into oral evidence to show that there was some consideration for the deed though not the same recited in the deed. <i>Lala Himmat Sahai Singh v. Llewellyn</i> , I. L. R. 11 Cal. 486 (1885), <i>Hukum Chand v. Hiralal</i> , I. L. R. 3 Bom. 159 (1876), referred to. <i>KAILASH CHANDRA NROGI v. HARISH CHANDRA BISWAS</i> ... 158	
Right of Suit, s. 92—Evidence Act (I of 1872), sec. 92—Conduct, evidence of, to vary the meaning of a deed—Mortgage—Sale, out-and-out.] Oral evidence as to the acts and conduct of the parties is admissible to show whether a certain deed is, as it purports to be, an out-and-out sale or a mortgage. <i>Priya Nath Shah v. Madhu Sudan Bhuiya</i> , 2 C. W. N. 562: s. c. I. L. R. 25 Cal. 603 (1898), followed. Oral evidence of the intention of the parties is, however, not admissible. <i>Balkishen Das v. Legge</i> , 4 C. W. N. 153: s. c. I. L. R. 27 I. A. 58 (1899), followed. <i>MAHOMED ALI HOSSEIN v. MIR NAZAR ALI</i> ... 326	
Right of Suit, s. 92—Evidence Act (I of 1872), sec. 92—Extrinsic evidence, whether admissible to prove that a conveyance is a mortgage by conditional sale—Bengal Tenancy Act (VIII of 1885), sec. 86—Surrender of occupancy holding.] Sec. 92 of the Evidence Act does not exclude the evidence of acts and conduct of the parties in order to shew that a conveyance is really a mortgage by way of conditional sale. The Full Bench decision in <i>Preo Nath Shah v. Modhu Sudan Bhuiya</i> , 2 C. W. N. 562: s. c. I. L. R. 25 Cal. 603 (1890) has not been in any way overruled by the decision of the Privy Council in <i>Balkishen Das v. Legge</i> , 4 C. W. N. 153: s. c. I. L. R. 27 I. A. 58 (1899). <i>KHONKAR ABDUR RAHAMAN v. ALI HAFEZ</i> ... 351	
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When there still remains something substantial to be done under a decree before it can become thoroughly effectual, that decree has to be "executed" within the meaning of sec. 545, Civ. P. C. A decree directing the issue of a grant of probate to the propounder of a Will is one that is capable of execution and stay of execution of such decree can be granted under sec. 545 of the Civil Procedure Code. An Appellate Court ought to be extremely chary of interfering in matters dependent upon the exercise of the judicial discretion of the Court below, but it can interfere and sometimes has to interfere if it thinks the facts warrant such interference. The principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success. <i>Polini v. Grey</i> , L. R. 12 Ch. Div. 438 (1879) and <i>Wilson v. Church</i> , L. R. 12 Ch. Div. 454 (1879), followed. Terms upon which stay of execution pending an appeal was granted. <i>Musst. Brij Coomaree v. Ramrick Dass</i>	781
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<b>FORECLOSURE—Foreclosure by mortgagee by conditional sale—Pre-emption, suit for—Possession, physical, meaning of—Possession of undivided share of a zemindari, nature of—Limitation Act (XV of 1877), Sch. II, Arts. 10, 120 and 144—Time from which limitation commences.]</b> In Art. 10, Sch. II of the Limitation Act "physical possession" means "personal and immediate" possession. The definition of "actual possession" given by Stuart, O. J., in <i>Jageshar Singh v. Jawahar Singh</i> , L. L. R. 1 All. 311 (1876), is correct and applies with still more certainty to "physical possession." The vendee of a share of a zemindari tenure gets only formal possession and cannot get physical possession of the share purchased by him except by enforcing partition. A suit for pre-emption by a co-sharer where the vendee has only obtained formal possession does not fall under Art. 10 of the Limitation Act, but under Art. 120 thereof. Art. 144 of the Limitation Act does not apply to suits for pre-emption. Where a mortgagee by conditional sale of a share of a zemindari has foreclosed, the period of limitation in a suit for pre-emption by a co-sharer, begins to run from the expiry of the year of grace after which the mortgagee's right of possession becomes mature. <i>Ali Abbas v. Kalka Prasad</i> , L. L. R. 14 All. 405 (1892), approved. <i>BATUL BEGUM v. MANSUR ALI KHAN</i>	888
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—, liability of, after attainment of majority by ward. <i>See</i> GUARDIANS AND WARDS ACT, ss. 34, 41	207	(8) RESTITUTION OF CONJUGAL RIGHTS.	
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<b>GUARDIANS AND WARDS ACT</b> , ss. 34, 38 to 42— <i>Guardians and Wards Act (VIII of 1890), secs. 34, 41, 38-42</i> —Guardianship, termination of—Guardian, liability of, after attainment of majority by ward—Power of District Judge—Jurisdiction.] The summary powers created by sec. 34 of the Guardians and Wards Act cease as soon as the minority of the ward ceases. The object of that section is to give the Court, as representing the interest of the minor, certain summary powers for the protection of his property during minority. Sec. 11 cannot be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of guardianship. <i>NABU BHAPARI v. SHEIKH MAHOMED</i>	207	(10) SUCCESSION to estate of ascetic or Bairagi. <i>See</i> LETTERS OF ADMINISTRATION	873
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		—Adoption—Hindu widow—Successive adoption—Adoption of a second son after death of first, whether divests the mother's estate—Right of reversionary heir.] A Hindu widow adopting a son under the authority of her deceased husband upon the death of a son begotten or adopted whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her and such son takes the estate immediately on his adoption. <i>Musstt. Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhury</i> , 10 M. I. A. 279 (1865), <i>Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi</i> , I. L. R. 1 Mad. 174 (1876), <i>Ramasami Aiyar v. Venkata Ramaiyan</i> , I. L. R. 2 Mad. 91 (1879), <i>Bykant Monee Roy v. Kisto Soonderee Roy</i> , 7 W. R. 392 (1867), <i>Gobindo Nath Roy v. Ram Kanay Chowdhury</i> , 24 W. R. 183 (1875), <i>Puddo Kumari Debi v. Juggut Kishore Acharjee</i> , I. L. R. 5 Cal. 615 (1879), <i>Padma Kumari Debi v. The Court of Wards</i> , I. L. R. 8 Cal. 302 (1881), <i>Tagore v. Tagore</i> , 18 W. R. 359 (1872), <i>Jamnabai v. Ray Chand Nahal Chand</i> , I. L. R. 9 Bom. 225 (1883), and <i>Ravji Vinayakrao Jaggannath Shankarsett v. Lakshmidai</i> , I. L. R. 11 Bom. 381	

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(1887), considered. <i>RAI JATINDRA NATH CHAUDHURI v. AMRITA LAL BAGCHI</i> ...	20	<i>dismissed suit.</i> ] Where a Hindu widow mortgaged a portion of her husband's estate for a small sum of money which might be paid off by the widow in her life-time, a suit by the reversionary heirs, specially when there is a dispute as to who the nearer reversionary heir or heirs are, is premature and not maintainable. A Civil Court has ample discretion under sec. 42 of the Specific Relief Act to exercise jurisdiction vested in it and to decline to set aside, during her lifetime, an alienation made by a Hindu widow when no proper case has been made out by the party seeking to have such alienation set aside. <i>Upendra Narain Myti v. Gopeenath Bera</i> , I. L. R. 9 Cal. 817 (1883) and <i>Isri Dut Koer v. Hansbutti Koerani</i> , I. L. R. 10 Cal. 324 (1883), distinguished. A declaration affecting the Plaintiff in a suit which is dismissed is not legal. <i>CHHOTU MAHTON v. MUSST. SHEO-BARTI KOER</i> ...	445
(2) <b>ALIENATION—Hindu Law—Hindu widow—Alienation, power of, over immoveable property—Bequest by husband—Will, construction of—Grant of absolute power, express or implied—Restrictions imposed upon power of alienation—Indian Succession Act (X of 1885), sec. 82.]</b> Though a mere gift of immoveable property by a Hindu husband to his wife, does not carry with it the power of alienation, yet where any such property is given by the husband similarly enjoy and appropriate at her will the entire aforesaid property in full to the wife with express power of alienation, or when this power is implied by the grant, she would acquire an absolute power of disposal over the property; and when the gift is made by Will, the legatee is entitled, under the provisions of sec. 82 of the Indian Succession Act, to the whole interest of the testator, unless it appears from the Will that only a restricted interest was intended to be given. Where a Will does not in express terms convey any estate of inheritance to a Hindu widow, still the widow will be entitled to alienate the property at her pleasure if there is no restriction imposed by the terms of the Will, so far as the power of alienation is concerned. Upon a construction of the Will in this case which provided as follows:—"If neither of them (the wives) have any children then both my wives will enjoy and appropriate at their will the entire property moveable in equal shares in full proprietary right. In the absence of one, the other will proprietary right. In the event of her death, my next reversionary heir will have such moveable and immoveable property as will remain." <i>Held</i> —That an absolute power of alienation was intended to be conferred on the widows. <i>Lalit Mohon Singh v. Chukkun Lal Roy</i> , 1 O. W. N. 387 : s. c. I. L. R. 24 Cal. 834 (1898), <i>Lala Ramjiwan v. Dalkoer</i> , I. L. R. 24 Cal. 406 (1898) and <i>Rajnarin Bhaduri v. Katayayni Debi</i> , 4 C. W. N. 337 (1900), referred to. <i>SARODA SUNDARI DASBI v. KRISHO JIBAN PAL</i> ...	300	<i>Hindu Law—Estate for life—Grant of a moiety thereof to children of the grantee, effect of—Estate of inheritance—Person unborn at the time of execution of the grant—Equity—Specific performance—Construction.]</i> A grant of the whole of an estate to a person for his life and as to a moiety thereof to his children and descendants after his death, with a restriction as to the power of alienation either by the grantee or his descendants, does not confer on the grantee an inheritable estate as to the latter moiety and an heir of the grantee not in existence at the time of such grant is, in Hindu law, incapable of taking thereunder. <i>Bhoobun Mohini Debia v. Hurrish Chunder Chowdhury</i> , L. R. 5 I. A. 138 (1878), distinguished. The fact that for some time after the death of the grantee, the grantor treated his heir, who was not in existence at the time of the grant, as entitled thereunder, does not create an equity in favour of such heir and the latter is not entitled to specific performance of the agreement under which the grant was made. <i>RAJA PADMANUND SINGH v. HAYES</i> ...	806
<i>Specific Relief Act (I of 1877), sec. 42—Suit to set aside a mortgage—Reversionary heirs—Dispute as to nearer heir—Mortgage for a small amount which may be repaid by widow—Maintainability of suit—Declaration in a</i>		(3) <b>CONSTRUCTION—Oudh Talukdari Estate—Succession—Elder son born of younger wife—Younger son born of first wife—Oudh Estates Act (I of 1866), sec. 22, cl. 11—Nature of estate—Conflict between ambiguous and unambiguous texts of Hindu law—Interpretation, rule of—Communis error facit jus—Oudh Estates Act (I of 1869), list</b>	

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2, secs. 8 and 22, *Manu*, Chap. XI, verses 122 to 125.] An estate taken under cl. 11 of sec. 22 of Act I of 1869 descends as an impartible estate under the provisions of Act I of 1869, list 2, secs. 8 and 22. *Dewan Ran Bijai Bahadur Singh v. Ruz Jagatpal Singh*, L. R. 17 I. A. 173 (1890), followed. The eldest son, though born of a younger wife, is entitled to succeed in preference to the younger son though born of the first wife. The principles, upon which the first-born son has been held to be entitled to succeed, apply equally to a son of a first-married wife and sons of other wives. *Ramakshmi Ammal v. Sivanantha Perumal Sethurayar*, 14 Moo. I. A. 570 (1872) and *Pedda Ramappa Nayani-varu v. Bangari Seshamma Nayani-varu*, L. R. 8 I. A. 1 (1880), referred to and followed. In construing texts of Hindu law where certain verses are inconsistent, and one is reasonably free from ambiguity and the meaning of the others at the best ambiguous and doubtful, the plain language of the one ought not to be overridden or controlled by the obscure utterances of the others. Where it was alleged that the interpolation of the words "but of a lower class" in *Manu*, Chap. IX, verse 122, was by mistake attributed by Sir William Jones to Kalluka Bhatta whereas it was interpolated by a later and inferior commentator and the interpolation had been accepted by the Indian Courts: *Held*—That the maxim *communis error facit jus* is a sound maxim. *Manu*, Chap. IX, verses 122 to 125, discussed. *JAGDIS BAHADUR v. SHEO PERTAB SINGH* ... 602

(4) **MAINTENANCE—Hindu Law—Maintenance, suit for, after dismissal of previous suit for partition—Arrears of maintenance—Maintenance, wrongful withholding of.]** A suit for partition of a zemindary, in which the zemindary was found to be impartible and a decree was made for partition of a portion of the family property unconnected with the impartible zemindary, does not make the family a divided one, and a subsequent claim for maintenance is not inconsistent with the previous claim for partition. The right to arrears of maintenance for any period not excluded by the law of limitation, is not forfeited by the claim for partition made in the previous suit. In order to recover arrears of maintenance it is not necessary to prove a demand for each year's maintenance as it became pay-

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able, and although the non-payment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears, it constitutes a *prima facie* proof of wrongful withholding. Whether such *prima facie* proof has been rebutted or not must depend on the circumstances of each particular case. *Nartaj Kuari v. Deoraj Kuari*, I. L. R. 10 All. 272 (1887), referred to; *Jivi v. Ramji*, I. L. R. 3 Bom. 207 (1879), *Sri Maniyam Mahalakshamma v. Sri Maniyam Venkataratnamma*, I. L. R. 6 Mad. 83 (1882) and *Narayan Rao Ram Chandra Pant v. Rama Bai*, I. L. R. 3 Bom. 415 at p. 421 (1879), discussed; *Motilal Prannath v. Bai Kashi*, I. L. R. 17 Bom. 45 (1892), discussed and a portion doubted. *Quære*—Whether, if the Defendant had been misled by the previous suit for partition into the belief that the claim for maintenance was abandoned and had not in consequence set aside any portion of his annual income so to meet such a claim, he would have a good defence to a subsequent suit for arrears of maintenance. *RAJA YARLAGADDA MALLIKARJUNA PRASADA v. RAJA YARLAGADDA DURGA PRASADA and Same v. RAJA YARLAGADDA VENKATA RAMALINGAMMA* ... 74

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—*Bengal School—Maintenance—Daughter, sonless widowed—Marriage, effect of, on the status of a daughter.]* A widowed daughter-in-law is not bound to reside in the house of her father-in-law. *Rajah Pirthee Singh v. Ramee Raj Kover*, 20 W. R. 21 (1873), followed. When a Hindu maiden marries, she becomes incorporated into her husband's family and it is to that family that she must, in the first instance, look for her maintenance on becoming a widow. A widowed daughter is not, any way, entitled to maintenance from her father's heir, who has succeeded to his estate, unless and until it can be satisfactorily shewn that she is unable to obtain maintenance from the family into which she has married; even then, however, is doubtful if she can succeed against her late father's estate. *Bai Mangal v. Bai Rukhmini*, I. L. R. 23 Bom. 291 (1898), referred to. When an offer has been made by her late father's heirs to provide her with a home and food and raiment, she is not entitled to a separate maintenance from him apart from his house and in a house of her own. *Quære*—Whether under certain circumstances



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there is or is not a legally enforceable right by which a widowed daughter's maintenance can be claimed as a charge on her father's estate in the hands of his heirs. *Khetramani Dasi v. Kashinath Das*, 2 B. L. R. A. C. 15 (1868) and *Bai Mangal v. Bai Rukhmini*, I. L. R. 23 Bom. 291 (1898), referred to. *SREEMUTTY MOKHODA DASSEE v. NUNDO LAL HALDAR* ... 297

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—*Bengal School—Mitakshara—Maintenance—Widowed daughter-in-law, maintenance of—Moral obligation—Heir of father-in-law—Legal obligation—Moral right, forfeiture of—Severance from father-in-law's family.* It is the duty of the father-in-law to maintain his widowed daughter-in-law. This obligation is legally enforceable where the father-in-law has by survivorship obtained property in which his son had a vested interest as in a *Mitakshara* family. Where the father, on the death of his son, does not become entitled to any interest or property which the son had, the obligation to maintain the son's widow is only moral and cannot be enforced in a Court of law. *Khetramoni v. Kashinath*, 2 B. L. R. (A. C.) 15 (1868), followed. The moral obligation in the father to maintain his widowed daughter-in-law becomes a legal obligation in the inheritor of his property. *Janki v. Nandram*, I. L. R. 11 All. 194 (1888) and *Kamini Dassee v. Chandra Pote Mondle*, I. L. R. 17 Cal. 373 (1889), followed. The right to be maintained where it exists is not necessarily forfeited by a widow who resides away from her father-in-law's house as long as she remains chaste. *Raja Pirthee Sing v. Rani Raj Kower*, 20 W. R. 21: s. c. 12 B. L. R. (P. C.) 238 (1873), *Kasturbai v. Shivajiram*, I. L. R. 3 Bom. 372 (1879) and *Gokibai v. Lakhmidas Khimji*, I. L. R. 14 Bom. 490 (1890), followed. If therefore the daughter-in-law remains a dependent member of her husband's family, the mere fact of her residence elsewhere will not disentitle her to maintenance. Where a daughter-in-law leaves her father-in-law's house during his lifetime with the intention of residing permanently in her father's house as a member of his household and demands and obtains from her father-in-law a Government promissory note belonging to her husband which was all the money she considered herself entitled to, and intends to and does sever herself from her de-

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ceased husband's family, though she leaves the house without any quarrel with her father-in-law, she ceases to be a dependent member of her father-in-law's family, and there is no longer any moral liability on the father-in-law to support her. There being no moral liability on the father-in-law, there is no legal liability on the person who takes his property to maintain the widowed daughter-in-law. *SIDDESURY DASSEE v. JONARDAN SARKAR* ... 549

(5) *MARRIAGE—Hindu law—Suit for enforcement of conjugal rights—Act XII of 1887—Husband contracting out of his rights—Public policy—Marriage under the Hindu law.* Where in a suit by a Hindu husband for enforcement of conjugal rights, the wife relied on an agreement, executed at the time of marriage by the guardians of the husband, then a minor, and also by the husband, covenanting that the husband would always live at his mother-in-law's house and that the wife would never be required to leave her parental home and reside elsewhere with her husband: *Held*—That the parties being Hindus, the rule of decision in such a case is, in accordance with sec. 37 of Act XII of 1887, the Hindu law except in so far as it has by legislative enactment been altered or abolished. Under the Hindu law, marriage besides being a contract is a sacrament, it being more religious than secular in character and it is the bounden duty of the wife to live with her husband wherever the latter may choose to reside and to submit herself obediently to the authority of the husband: *Held also*—That the agreement relied on by wife, if permitted, would defeat a rule of Hindu law and is opposed to public policy. *TEKAIT MON MOHINI JOMADAI v. RAI BASANT KUMAR SINGHA* ... 673

See RES-  
TITUTION OF (CONJUGAL RIGHTS) ... 195

(6) *MORTGAGE—Transfer of Property Act (IV of 1882), sec. 85—Parties—Hindu Law—Mitakshara family—Mortgage by father—Suit by mortgagee against father alone—Decree whether binding upon son—Son interested in the property.* In a suit against a Mitakshara father on a mortgage of ancestral property executed by him alone, the son is a necessary party where the mortgagee has notice of his interest. The language of sec. 85 of the Transfer of Property Act is compulsory and all persons having

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an interest in the property mortgaged or, in other words, in the equity of "redemption ought to be made parties to a suit on the mortgage. In a suit by a Mitakshara son for a declaration that a mortgage decree obtained against the father alone is not binding on him on the ground (1) that he was not made a party to that suit and (2) that the debt was for immoral and illegal purposes, where it is found that the debt was not contracted for immoral and illegal purposes, the only remedy the son is entitled to is a right to redeem. *LALA SURAJ PRASAD v. GOLAB CHAND* ... 640

(7) PARTITION, decree for, of family property unconnected with impartible estate whether makes the family a divided one. See HINDU LAW—MAINTENANCE ... 74

*Hindu Law*  
—*Hindu mother, interest of on partition*—*Abatement of suit*—*Arbitrator*  
—*Valuator*—*Civil Procedure Code* (Act XIV of 1882), secs. 506, 522—*Decree upon award of valuator*—*Right to sue, revival of.* Upon a partition, D. was allotted a one-third share of certain premises as a Hindu mother. A suit brought by her to restrain Appellant, who had purchased the two-thirds share of the sons, from encroaching upon her was compromised and by consent an order purporting to be made under sec. 506, Civ. P. C., was made referring it to certain persons to settle the price of D.'s share and interest in the disputed property, and directing that, upon payment by the Appellant to D.'s attorney of the price so settled, D. do convey all her share and interest in the property to the Appellant. After the award as to the price, but before decree thereon, D. died leaving two sons, the present Respondents, who obtained an *ex parte* order reviving the suit in their names. They subsequently applied for a decree upon the award under sec. 522, Civ. P. Code: *Held*—That the order of reference upon the compromise gave D. certain fresh rights in respect of which the right to sue survives to her representatives, the present Respondents. *Oakey and Sons v. Dalton*, L. R. 35 Ch. Div. 700 (1887), *Jones v. Simes*, L. R. 43 Ch. Div. 607 (1890) and *Phillips v. Homfray*, L. R. 24 Ch. Div. 439 (1888), referred to. The persons to whom it was referred to settle the price of D.'s share were rather valuers than arbitrators and the order of reference cannot accordingly be regarded as one under sec. 506, Civ.

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P. C. In re *Carus-wilson v. Greene*, L. R. 18 Q. B. Div. 7 (1886), referred to. No decree on the award of the valuers can be made under sec. 522, Civ. P. C. CHOONEY MONEY DASSEE v. RAM KINKAR DUTT ... 242

(8) RESTITUTION OF CONJUGAL RIGHTS—*Hindu Law*—*Marriage*—*Restitution of conjugal rights*—*Minor wife*—*Decree*—*Restoration to caste and position as wife*—*Adjournment*—*Practice*—*Limitation Act* (XV of 1877), Sch. II, Art. 35.] A suit for restitution of conjugal rights between Hindus is maintainable. *Bazloor Ruheem v. Shumsoonnissa Begum*, 11 M. I. A. 551 (1867). *Chotun Bibee v. Ameer Chand*, 6 W. R. 105 (1866), *Koobur Khansama v. Jan Khansama*, 8 W. R. 467 (1867), *Melaram Nudial v. Thanoo-ram Bamun*, 9 W. R. 522 (1868), *Koroonamoyee Dabee v. Gangadhar Surmah*, 20 W. R. 50 (1873), *Lall Nath Misser v. Sheoburn Pandey*, 20 W. R. 92 (1873), *Gatha Ram v. Moohita Kochin*, 23 W. R. 179 (1875), *Jogendranandini Dassee v. Hurry Doss Ghose*, I. L. R. 5 Cal. 500 (1879), *Yamunabai v. Narayan More-shwar*, I. L. R. 1 Bom. 164 (1876), *Dudaji Bhikaji v. Itukmabai*, I. L. R. 10 Bom. 301 (1886), *Bai Sari v. Sankla Hira Chand*, I. L. R. 16 Bom. 714 (1892), *Fakirgauda v. Gangi*, I. L. R. 23 Bom. 307 (1898), *Paigi v. Sheonarain*, I. L. R. 8 All. 78 (1885) and *Binda v. Kaunsilia*, I. L. R. 13 All. 126 (1890), referred to. Such a suit would lie against a minor wife, if she is of sufficient age to perform her conjugal duties. *Suntosh Ram Doss v. Gera Pattuck*, 23 W. R. 22 (1874), *Kaleeram Dokanee v. Musst. Gendhanee*, 23 W. R. 178 (1875), *Binda v. Kaunsilia*, I. L. R. 13 All. 126 (1890), *Fakirgauda v. Gangi*, I. L. R. 23 Bom. 307 (1898) and *Bazloor Ruheem v. Shumsoonnissa Begum*, 11 M. I. A. 551 (1867), referred to. Art. 35, Sch. II of the Limitation Act does not apply to suits for restitution of conjugal rights between Hindus. Where the minor wife, under the influence of her relatives, has lost caste by living with another person as his wife, a decree for restitution of conjugal rights should not be passed, except upon the condition, that the husband should make all the arrangements necessary for the restoration of the wife to caste and to her position as his wife in his household. *Bazloor Ruheem v. Shumsoonnissa Begum*, 11 M. I. A. 551 (1867), *Paigi v. Sheonarain*, I. L. R. 8 All. 78 (1885) and *Jogendranandini*

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*Dossee v. Hurry Doss Ghose*, I. L. R. 5 Cal. 500 (1879), referred to. In a suit for restitution of conjugal rights, where the validity and legality of the marriage is one of the most essential points in issue, no presumption arises from the mere fact that the marriage was celebrated, that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed. *Inderun v. Rama Swamy*, 12 W. R. 41 P. C. (1869), *Brindabun Chandra v. Chandra Kummokar*, I. L. R. 12 Cal. 140 (1885) and *Administrator-General of Madras v. Anandachari*, I. L. R. 9 Mad. 466 (1886), referred to. If such a marriage was actually and properly celebrated the absence of the consent of the person whose consent ought to have been obtained would not make it illegal or invalid. *Bacc Rulyut v. Jeychand*, Bellais 43: s. c. 1 Mor. N. S. 181 (1843), referred to. *SUBJAMONI DASSEE v. KALI KANTA DAS* ... 105

(9) *SHEBAIL—Hindu Law—Shebail, suit by, for recovery of advances made by him—Dispossession by co-shebail—Limitation Act (XV of 1817), Sch. II, Arts. 36, 120—Parties—Plaint, Amendment of—Appellate Court, power of, to allow amendment—Civil Procedure Code (Act XIV of 1882), secs. 53, 582.]*

J, the grandfather of the Plaintiffs and of some of the Defendants, and great grandfather of the remaining Defendants, established certain idols and dedicated certain properties for their worship, etc., and prescribed a certain order in which his descendants were to become *shebails*. When the office of *shebail* devolved upon Plaintiffs' father B, he was kept out of possession by Defendant P of a portion of the *debutter* estate, and in a suit by B against P, and certain other persons, B having died during the pendency of the suit, it was decreed declaring the properties in dispute to be *debutter* and that B was entitled to be *shebail*. B had to advance money out of his own estate to meet the expenses of the *debutter* estate. The Plaintiffs brought the present suit, as heirs and legal representatives of B, for recovery of the said money, as also for monies realised by P out of the *debutter* estate. The plaint stated that as it was not certain who amongst the Defendants was entitled to be *shebail*, all of them were made parties, but the Court was not asked to determine who was entitled to be *shebail*: *Held*—That the Plaintiffs as creditors of the

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*debutter* estate were not entitled to any relief against Defendant P personally simply on the ground of his having realised money from the *debutter* estate. That the suit against P personally was barred under sec. 36, Sch. II of the Limitation Act. That as to the suit against the *debutter* estate, the period of limitation did not begin to run from the time when the advances were made but from the time when the Plaintiffs' father B died and Art. 120 of Sch. II of the Limitation Act applied to the case. That the suit was not maintainable, inasmuch as it was not stated in the plaint who the person was that was entitled to represent the estate as *shebail* and the Plaintiffs had not asked for the determination of the question as to who was the *shebail* for the time being. RAJAH PEARY MOHAN MUKHERJEE v. NARENDRA KRISHNA MUKHERJEE 273

(10) *SUCCESSION—Bairagi or ascetic—Letters of administration, application for, by his preceptor's preceptor—Succession—Custom, ancient and definite—Dyabhaga, (Ch. XI, sec. 6, para. 35—Vyavastha Darpana, Ch. V, sec. 1, para. 144—Indian Evidence Act (I of 1872), s.c. 42.]* On the death of a *Bairagi* or an ascetic his preceptor's preceptor applied for letters of administration claiming that according to the custom prevailing in the sect of which he and the deceased disciple were, respectively, members, he, as the preceptor of the dead man's preceptor was entitled to his property: *Held*—The custom set up was proved. THE COLLECTOR OF DACCA v. JAGAT CHANDRA GOSWAMI ... 873

*HUNDI—Hundi—Shahjoge hundi—Endorsee for realization—Endorsement, effect of such—Maintainability of a suit by such endorsee for realization—Delivery, title by—Negligence—Payment to wrong person—Forged signature—Hundi made over to servant for realization, effect of—Estoppel.]* A *hundi* payable to *shahjoge* (to the respectable holder) was endorsed by the drawer "*hundi* sent for realization by G (drawer) to B of Calcutta (Plaintiffs)," and sent by him to the Plaintiffs. The Plaintiffs handed the *hundi* to one S, the Plaintiffs' *jemadar*, who had been in the habit of taking *hundis* on their behalf for acceptance and payment, to be taken by him to the Defendants for acceptance. S took the *hundi* to the Defendants but subsequently, one R, who had no authority from the Plaintiffs to receive payment, acting on information either

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from S or some other source, represented himself to the Defendants as a *jenadar* of the Plaintiffs, wrongfully obtained the *hundi* from the Defendants, forged the Plaintiffs' signature to it and obtained payment. The Defendants before such payment, had made no enquiries as to the position or respectability of R and paid the *hundi* on the faith of the forged signature: *Held*—That such an endorsement coupled with the delivery of the *hundi* entitles the Plaintiffs to sue for and receive payment of the *hundi* from the acceptors, though as between the drawer and the Plaintiffs the latter are mere agents or parties with a defeasible title. Such an endorsement is in the nature of a restrictive endorsement, giving the endorsee the right to receive payment of the *hundi* and if necessary to sue the acceptor for the amount, but not to transfer his rights as endorsee to anybody else; and defence which could be available to the acceptor against the drawer would be available against the endorsee. A *hundi* payable *shajoge* is only payable to the respectable holder and is not the same as a *hundi* payable to bearer. *Thakurdass v. Futteh Mull*, 7 B. L. R. 275 (1871), referred to. The *hundi* continued to be *shajoge* even after such endorsement. *Gones Dass v. Luchmi Narayan*, I. L. R. 18 Bom. 570 (1893), referred to. That the Plaintiffs are entitled to claim the amount of the *hundi* from the Defendants, unless they were guilty of such negligence or carelessness as would estop them from disputing the validity of the payment to R. That even if S colluded with R and fraudulently obtained payment from Defendants, there was no negligence on the part of the Plaintiffs in entrusting the *hundi* to S. Even if such an act was negligent, the negligence was not so immediately conducive to the payment of the *hundi* as to estop the Plaintiffs from saying that R had no authority from them to receive payment and that the payment has not been made to them. *Robarts v. Tucker*, 16 Ad. and El., p. 560 (1851). *Bank of Ireland v. Trustees of Evans Charities in Ireland*, 5 H. L. Cas. 389 (1855). *Arnold v. The Cheque Bank*, 1 O. P. D. 578 (1876). *Mayor, etc., Merchants of the staple of England v. Bank of England*, 21 Q. B. D. 160 (1887) and *Bank of England v. Vagliano Bros.*, L. R. (1891) App. Cas. 107, referred to. *Quere*—Whether such a *hundi* would not,

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before acceptance, pass merely by delivery to a respectable holder. *Goursimull v. Dhansuk Das*, 7 B. L. R. 289 foot-note (1865) and *Thakurdass v. Futteh Mull*, 7 B. L. R. 275 (1871), referred to. *BHUPUTRAM v. HARI PRIO COACH* ...

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**INCOME TAX ACT**, s. 47—*Income Tax Act (II of 1886)*, sec. 47—[Principal place of business of a person, power of Governor-General to declare.] Sec. 47 of the Income Tax Act so far as it empowers the Governor-General in Council to declare which of several places of business shall be deemed to be the principal place of business, applies only to the case of a company or a firm and not to the case of an individual carrying on business. *HADJEE AJAM GOLAM HOSSEIN v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL* ... 257

**INCUMBRANCE**, annulment of—Joint notice to several persons, if legal. See **BENGAL TENANCY ACT**, s. 167 ... 272

**INDIAN CONTRACT ACT.** See **CONTRACT ACT**.

**INDIAN LAW REPORTS ACT.** See **LAW REPORTS ACT**.

**INDIAN REGISTRATION ACT.** See **REGISTRATION ACT**.

**INDIAN SUCCESSION ACT.** See **SUCCESSION ACT**.

**INFANT**—*Practice*—Attorney, change of, application by next friend of an infant for—Grant of such application as a matter of course—Appeal from an order refusing change—Appeal, heading of.] A next friend of an infant is entitled to an order for change of attorney on the same terms as any other litigant *qui juris*. It is not necessary for him to shew that such change is for the benefit of the infant, though the Court will interfere and remove the next friend if it appears that in the matter of such an application he was acting in a manner detrimental to the interests of the infant. So long as he continues to be the next friend, he is entitled to appoint and change his own solicitor. *Peyton v. Bond*, 1 Sim. 390 (1827), referred to; *Manick Lal Seal v. Sarat Kumari* .

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<i>Dasi</i> , unreported. Suit No. 338 of 1883. <i>Norris, J.</i> , 23rd August 1883, <i>Ram Chunder Roy v. Pooro Chunder Roy</i> , 4 C. W. N. clxxv (1900) and <i>Sarat Chunder Dawn v. Kristo Dhone Dawn</i> , 5 C. W. N. lxxxiii (1901), dissented from. <i>Semble</i> —An appeal lies from an order refusing change of attorney. <i>DINENDRA NATH DUTT v. T. H. WILSON &amp; Co.</i> ... 464	
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*Inheritance, partial acceptance or renunciation of—Liability of heirs for rent.*] There cannot be a partial acceptance or renunciation of an inheritance, nor can one of several heirs accept a part only of an inheritance to the prejudice of the other heirs and of the creditors of the deceased. An acceptance in part has the effect of an acceptance of the whole and carries with it the same liability. If a person accepts the inheritance in whole or in part he is bound to discharge the liabilities which attach to the ~~tenants~~ tenants from whom he inherits unless he can prove that he has since made a formal surrender of the holding to the landlord. *MOAZAM HASSAIN CHOWDHURI v. BHOUDIN* ... 189

INSOLVENCY— <i>Civil Procedure Code (Act XIV of 1882), secs. 345, 346 and 350—Insolvent, examination of.</i> ] The examination of an insolvent under sec. 350, Civ. P. C., is only necessary where the judgment-debtor is declared an insolvent upon his own application, not where he is adjudicated an insolvent at the instance of the judgment-creditor. <i>GOURI KANT BURMAN v. DAMODAR DAS BURMAN</i> ... 90	
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*Notice of insolvency, irregularity in posting, effect of—Examination of insolvent in application by judgment-creditor—Adjudication order, grounds for setting aside—Fraud—Collusion—Creditor, claim by a—Onus of proving claim when so required under sec. 353, Civ. P. C.—Receiver in insolvency, purchase by.*] The provision of sec. 347 with regard to posting up the notice of insolvency in Court is, especially in the case of an application by the decree-holder, merely of the directory character and does not go to the jurisdiction of the Court to deal with the matter. *Reid v. Croft*, 5 Bing. N. C. 68 (1888) and *Wight v. Maunder*, Beav. 512 (1842), referred to. Non-compliance with the above provision is a mere irregularity, which, in the absence of any proof of prejudice, is cured by sec. 578,

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Civ. P. C. The provisions of secs. 350 and 357, Civ. P. C., relate to an application by the judgment-debtor for relief under Chap. XX and not to an application by the judgment-debtor. An adjudication order can only be set aside on the ground that it has been obtained by a fraudulent representation of indebtedness in favour of the creditor who has obtained the order when there is no debt whatsoever, or for want of jurisdiction. When charges of fraud and collusion are made, they must be put in a sufficiently specific manner to enable the other side to combat them. *Wallingford v. The Mutual Society*, 5 App. Cas. 697 (1881) and *Ganga Narain Gupta v. Tilukram Chowdhry and ors.*, I. L. R. 15 Cal. 533 (1888), referred to. Under sec. 353, Civ. P. C., when any creditor requires any other creditor to prove his claim, the onus is upon the creditor who has to prove his claim to establish it. It is a matter to be dealt with by the Judge upon the evidence forthcoming in the case. The purchase by a Receiver in insolvency of property belonging to the insolvent's estate is irregular and the Court ought not to sanction such a purchase. *RAM KOMAL SAHA v. BANK OF BENGAL OF AKYAB* ... 91

INSOLVENCY ACT, 11 and 12 Vic., c. 21—*Insolvency Act (11 and 12 Vic., c. 21)—Insolvency proceedings—Vesting order—Prior attachment—Priority of claim—Attaching creditor and Official Assignee—Civil Procedure Code (Act XIV of 1882), sec. 244—Official Assignee, whether representative of judgment-debtor—Appeal.*] A vesting order made under the Insolvency Act. 11 and 12 Vic., c. 21, has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at his instance previous to the passing of such order; the Official Assignee stands in the shoes of the insolvent and takes the property subject to any equities which are good against the latter. *Anund Chunder Pal v. Panchoo Lall Soobaloh*, 14 W. R. (F. B.) 33 (1870), followed. *Shib Kristo Shaha Chowdhry v. A. B. Miller*, I. L. R. 10 Cal. (1883), distinguished. Where the objection of the Official Assignee was that the property attached though belonging to the judgment-debtor was not liable to be sold in execution of the decree by reason of a vesting order passed in the insolvency proceedings; *Semble*—That the Official Assignee

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was a representative of the judgment-debtor within the meaning of sec. 244, C. P. C. <i>Kashi Prasad v. Miller</i> , I. L. R. 7 All. 752 (1885) and <i>Sardarmal Jagannath v. Aranyal</i> , I. L. R. 21 Bom. 205 (1896), referred to. <i>A. B. MILLER v. LAKHMONI DEBI</i> ...	761	See <b>SALE</b> ...	10
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—, Mortgage decree, construction of—Interest—Date of payment, meaning of.] There is nothing in the law to prevent interest at the rate stipulated on a bond being decreed up to the date of actual payment. Where a mortgage decree provided for interest to be recovered from the date of the decree till the date of payment: <i>Held</i> —That the words “date of payment” meant the date of actual payment and not the last day fixed for payment in the decree. <i>MANOO LAL v. DURGA PRASAD SINGH</i> ...	653	See <b>CIVIL PROCEDURE CODE</b> , s. 583 ...	287
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— <b>WRONG-DOERS</b> —Contribution. See <b>CONTRIBUTION</b> , <b>SUIT FOR</b> ...	398	<b>LAND</b> , exchange of, without writing or registration. See <b>TRANSFER OF PROPERTY ACT</b> , s. 118 ...	724
<b>JUDGE</b> —Judges who have heard the arguments and who are responsible for the decision can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a Judge of the High Court. <i>JOSEPHINE ROSE HARRISS v. EDWARD BROWN</i> ...	726	<b>LAND ACQUISITION ACT</b> , s. 3 (b). See s. 23 ...	349
		s. 23— <i>Land Acquisition Act (I of 1894)</i> , secs. 3 (b), 23, cl. 4—Fishery—Yearly tenant of a tank, whether entitled to compensation.] A yearly tenant of a tank, is, for the purposes of the Land Acquisition Act, in the same position as a yearly tenant of agricultural land, and equally as much entitled to compensation. <i>NARAIN CHUNDER RORAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL</i> ...	349
		<b>LAND REGISTRATION ACT</b> , s. 78— <i>Land Registration Act (VII of 1878)</i> , sec. 78—Actual registration—Order of Civil Court for registration.] The Land Registration Act requires actual registration of name in order to enable a person to recover rent, and a mere order of the Civil Court for registration is not sufficient. <i>UGRA MOHUN THAKUR v. BADESHI ROY</i> ...	360

**LANDLORD**, dispossession by co-sharer.  
See **BENGAL TENANCY ACT**, SCH. III,  
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**LANDLORD AND TENANT—Forfeiture**  
—Denial of landlord's title before  
suit—Intention—Written statement  
—Landlord and Tenant Act (VIII of  
1869.) A denial of landlord's title,  
in order to operate as a forfeiture  
must be an express denial prior to  
the institution of the suit; a denial  
in the written statement does not  
operate as a forfeiture; and if  
what transpired before suit is ambi-  
guous in its character it would be  
irregular and hardly in accordance  
with the principles of law to refer  
to the written statement to explain  
the intention of the Defendant.  
**SHEIKH NIZAMUDDIN v. MOMTAZUD-**  
**DIN** ... 263

and Tenant Act (X of 1859), sec.  
161—Rent suit—Second appeal—  
Civil Procedure Code (Act XIV of  
1882), sec. 584—Practice—Inference  
from facts in second appeal—Lease,  
termination of, on death of grantor,  
voidable or void—Ratification.] A  
certain Zemindari belonged to three  
ladies A, G and N; N executed an  
*ijara* pottah in respect of her one-  
third share in favour of A and G for  
1289 to 1304, N died in Falgoun  
1303 (February 1897) and was suc-  
ceeded by her daughter M, the  
intervenor Defendant. In the mean-  
time A and G had sublet their *ijara*  
interest in favour of the present  
Plaintiff, who brought the present  
suit for recovery of rent in respect  
of the year 1305 (Uriya style 24 Bhad  
1304 to 12 Bhad 1305). The tenants  
and the intervenor M opposed upon  
the ground that Plaintiff had no  
rights to recover it. Shortly after  
the death of N the revenue payable  
on account of her share fell due and  
it was paid by the Plaintiff in April  
1897 and not by M; one of the terms  
of the *ijara* lease was that out of the  
rent payable the Plaintiff should pay  
the revenue. In Kartick 1304 (Octo-  
ber 1897) two notices were issued by  
M, the material portion of which is  
set out in the judgment. In Novem-  
ber 1897 another list of revenue was  
paid by the Plaintiff and not by M.  
The lower Appellate Court held that  
upon the death of N the *ijara* came  
to an end and that the failure on  
the part of the intervenor to pay the  
revenue could not and did not indi-  
cate that it was her intention to  
allow the lease to run on until the  
year 1304, B. S. : Held—That upon  
the above facts the lower Appellate  
Court did not draw the legitimate  
inference which ought to have been

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drawn. That the lease did not come  
to an end by itself on the death of  
N. *Madhu Sudan Singh v. M. G.*  
*Rooke*, I. L. R. 25 Cal. 1 (1897), re-  
lied upon. That the notices did not  
put an end to the *ijara*. That the  
revenue which was payable by M  
having been paid by the Plaintiff in  
accordance with the lease and from  
the other facts the legitimate infer-  
ence was that the *ijara* was not  
brought to a termination but was  
allowed to run on. **SADAI NAIK v.**  
**SERAI NAIK** ... 279

—Rent-suit—  
Disturbance of quiet possession by  
landlord—Liability to pay rent—  
Eviction, not complete—Landlord  
and tenant—Admissibility in evi-  
dence—Petition of claim on behalf  
of a person by her attorney—Autho-  
rity, want of proof of.] The law  
does not require that there should be  
a complete eviction of the lessee in  
order that he may be exempted  
from liability to pay rent. *Dhun-*  
*put Singh v. Mahomed Kazim Is-*  
*pahain*, I. L. R. 24 Cal. 296 (1896),  
approved. A lessor is not entitled  
to claim rent from the lessee for the  
period during which he wilfully dis-  
turbs the lessee's quiet possession.  
**RANI LALITA SUNDARI v. SURNAMAYI**  
**DASI** ... 353

—Irrigation  
canals—Sanction of Government to  
construct canal through its own  
land—Right of excavators to the land  
through which canal is constructed—  
Landlord's encouragement to an-  
other to lay out money on his land  
under an expectation.] If a man  
under an expectation created and  
encouraged by the landlord that he  
shall have a certain interest, takes  
possession of such land with the  
consent of the landlord and upon  
the faith of such expectation, with  
the knowledge of the landlord and  
without objection by him lays out  
money upon the land, a Court of  
Equity will compel the landlord to  
give effect to such expectation.  
*Ramsden v. Dyson*, 1 E. & I. Ap. 129  
at p. 170 (1865), referred to. In  
1860 Plaintiffs' grandfather obtained  
from the Government sanction to  
construct a canal from the river  
Sutlej for the irrigation of certain  
lands belonging to Government, the  
revenues of which were at that time  
leased to him. He thereupon com-  
menced to construct the canal at  
his own expense, and the canal was  
finally completed by his son. It was  
constructed partly on Government  
lands and partly on the land of  
private owners under arrangements

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between them and the Plaintiffs' father and grandfather: *Held*—That the Plaintiffs had acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed. AHMAD YAR KHAN v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL ... 634

*Permanent tenancy—Long possession and instances of transfer and succession—Notice—Homestead land in Municipal town.*] The fact of long possession and instances of transfer and succession may raise a presumption in favour of the permanency of a tenancy. *Tarak Podo Ghosal v. Shyama Churn Napti*, 8 C. L. R. 50 (1881); *Prosunno Coomaree v. Sheikh Buton Bepary*, I. L. R. 3 Cal. 698 (1877), referred to. DURGA MOHUN DAS v. RAKHAL CHANDRA ROY ... 801

*A landlord is bound to put the tenant into possession of the land let to him and unless and until he does this he is not entitled to the rent.* *Hurish Chunder Koondoo v. Mohinee Mohun Mitter*, 9 W. R. 532, referred to. SHAMA PRASAD GHOSE v. TAKI MULLIK ... 816

*Landlord and tenant—Ejectment—Origin of tenancy—Permanent tenancy—Presumption as to permanent character of tenancy—Estoppel—Acquiescence—Compensation—Confusion of boundaries.*] Where tenancies were created by *kabuliyats* or *pottas* which did not contain any words of inheritance and which limited the tenant's right to the term of the landlord's possession who happened to be a *mutwalli* and there was no recognition of the incidents of old leases in the grant of new leases to new tenants, except payments of rents at unvaried rates for a very long period and the holdings having been the subject of several transfers and the land having been always let out by the *mutwali* in *ijara*: *Held*—That these facts are not sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent, or was subsequently by agreement, converted into a permanent one, and that any presumption arising from long possession is negated where the origin of the tenancy is known. *Caspersz v. Kedar Nath Sarbadhi-*

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*kari*, 5 C. W. N. colxxxix, 858, post (1901); *Durga Mohan Das v. Rakhal Chunder Rai*, 5 C. W. N. 801 (1901), distinguished. In order to raise an estoppel against the landlord, it must be shown that the landlord had purposely allowed or encouraged the tenant to build knowing that the tenant was building on the mistaken notion that he had rights beyond those of a mere tenant from year to year. Where owing to the negligence of the tenant, the land demised becomes confounded with other lands, the tenant, unless he can ascertain the former, is bound to make good to the landlord the quantity of the land to which the latter is entitled. ISMAIL KHAN MAHOMED v. L. P. D. BROUGHTON ... 846

*Ejectment, suit for—Origin and nature of tenancy not known—Evidence of mode of dealing with land demised, of acts and conduct of parties—Permanent tenancy, presumption of—Alternative plea of acquiescence by conduct on failure of proof of substantive defence as to evidence of permanent tenancy, if permissible—Acquiescence, whether a question of fact—Facts justifying inference of permanent tenancy.*] The facts of long possession of a tenancy by the tenants and their ancestors, and of the landlord having permitted them to build a *pucca* house which has existed for a very considerable time and which was added to by successive tenants and of the tenure having been from time to time transferred by succession and purchase in which the landlord acquiesced or of which he could not have been ignorant are sufficient to warrant the Court in presuming that the tenancy is of a permanent nature. *Baboo Dhunput Singh v. Gooman Singh*, 11 Moo. I. A. 433 (1876); *Gungadhar Shikdar v. Ayimuddin Shah Biswas*, I. L. R. 8 Cal. 960 (1882); *Prosunna Coomar Chatterjee v. Jagunnath Bysack and others*, 10 C. L. R. 25 (1881); *Ismail Khan Mahomed v. Joygoon Bibee*, 4 C. W. N. 210: s. c. I. L. R. 27 Cal. 570 (1900), referred to. Where the question was as to whether a tenancy was permanent and the *pottah* relied upon by the tenant was found to be false: *Held*—That it did not prevent the tenant from setting up an alternative case that on the other evidence the tenancy was a permanent one. *Ranje Surnomoyee v. Maharajah Suttees Chunder Roy Bahadoor*, 10 Moo. I. A. 123 at p. 149 (1864), referred to. The question of acquiescence is not

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a question of fact but of legal inference from facts and in a second appeal the judgment of the lower Appellate Court is not final. <i>Beni Ram v. Kundan Lal</i> , 3 C. W. N. 502; s. c. I. L. R. 21 All. 496; L. R. 26 I. A. 58 (1899), referred to. A. CASPERSZ v. KEDAR NATH SARBADHIKARI ...	858	ed Law Reports; it does not prevent the Court from looking at an unreported judgment. <i>Makbul Ahmed v. Bakhal Das Hazra</i> , 4 O. W. N. 732 (1900), dissented from. <i>MAROMED ALI HOSSBIN v. MIR NAZAR ALI</i> ...	326
Landlord and tenant—Enhancement of rent, suit for rent and for—Maintainability of suit—Civil Procedure Code (Act XIV of 1882), sec. 45—Onus—Raiyat at fixed rate.] A suit for both enhancement and arrears of rent at an enhanced rate is maintainable. The causes of action although separate may be combined under sec. 45, O. P. C. In a suit for enhancement of rent the onus is upon the Defendant to prove that he is a raiyat at fixed rate. <i>GUDAR TEWARY v. BRIJNANDAN BISWAS</i> ...	880	<b>LEASE, permanent—Interest.</b> See <b>BENGAL TENANCY ACT</b> , s. 179 ...	438
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Heirs—Partial acceptance or renunciation of inheritance—Liability for rent. See <b>INHERITANCE</b> ...	189	—, Presumption. See <b>LANDLORD AND TENANT</b> ...	801, 846, 858
Liability of hypothecated property on release of principal by act of landlord. See <b>SALE</b> ...	497	—, building and mining, whether rent claimed upon such lease is cognizable by a Revenue Court. See <b>LANDLORD AND TENANT ACT</b> , s. 23 ...	840
Act X of 1859—Sale—Irregularity. See <b>SALE</b> ...	126	<b>LEAVE TO DEFEND</b> , extension of time for—Summary suit. See <b>CIVIL PROCEDURE CODE</b> , CHAPTER XXXIX ...	963
See <b>SECOND APPEAL</b> ...	279	— to sue a Receiver. See <b>PARTIES</b> ...	27
s. 23—Landlord and Tenant Act (X of 1859), sec. 23—Suit for rent upon a lease for purposes other than agricultural or horticultural—Building and mining purposes and the like.] A suit for recovery of rent upon a lease for mining purposes and for purposes of building, making roads, and so forth, the land not being demised for agricultural or horticultural purposes, is not a suit for rent under Act X of 1859 and a Revenue Court has no jurisdiction to entertain it. <i>E. J. ROOKE v. BENGAL COAL COMPANY, LIMITED</i> ...	840	— to appeal to Privy Council—Finding of fact. See <b>CIVIL PROCEDURE CODE</b> , s. 596 ...	455
Act VIII of 1869, B. C.—Denial of landlord's title—Forfeiture. See <b>LANDLORD AND TENANT</b> ...	263	<b>LEGAL PRACTITIONERS ACT</b> , ss. 13, 14—Legal Practitioners Act (XVIII of 1879), as amended by (Act XI of 1896), secs. 13, 14—Professional misconduct—Grossly improper conduct—Legal practitioner advising payment of money to witness to speak the truth or to prevent giving false evidence—False statements by legal practitioner in letter to induce speedy remittance for such purpose.] A legal practitioner by paying or offering to pay money to a witness to induce him to speak the truth or to prevent him from giving false evidence may not be guilty of any offence criminally punishable but is guilty of unprofessional conduct. A legal practitioner in pressing his client for the payment of money to a witness to induce him to keep back unfavourable evidence is guilty of grossly improper conduct in the discharge of his professional duties within the meaning of sec. 14 of the Legal Practitioners Act. IN THE MATTER OF NRITYA GOPAL SEN, A PLEADER ...	45
<b>LAW REPORTS ACT</b> , s. 3—Indian Law Reports Act (XVIII of 1875), sec. 3—Unreported cases—Reports, authorized.] A High Court judgment is none the less an authority because it has not been reported. Sec. 3 of Act XVIII of 1875 was framed to constitute a monopoly, if the Judges so desired, for the authoriz-		Legal Practitioners Act (XVIII of 1879), as amended by (Act XI of 1896), secs. 13, sub-sec. (f), 14—Pleader, when he does something as a litigant or member of the public and not as pleader, is to be regarded as professional misconduct—"Any other reasonable cause," construction of.] An allegation, made by a pleader as a Defendant in a suit and not as a pleader that the Plaintiffs had bribed some officer of the record-room to tamper with certain documents produced at the instance of	

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the Plaintiff did not amount to professional misconduct. That in the words "any other reasonable cause" in sec. 18, sub-sec. (f) of the Legal Practitioners Act, the expression "other" means "other" "*ejus dem generis*," that is, of the class or description of misconduct which is referred to in the preceding sub-sections, that is to say, professional misconduct. The Legal Practitioners Act is aimed against the misconduct of legal practitioners in relation to their professional duties and not in relation to other matters. IN THE MATTER OF JOGENDRA NARAYAN BOSE ... 48

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**LETTERS OF ADMINISTRATION**, application for, by preceptor's preceptor of a Bairagi or ascetic—Letters of administration, application for, by his preceptor's preceptor—Succession—Custom, ancient and definite—*Dyabdhaga*, Ch. XI, sec. 6, para. 35—*Vyavasta Darpana*, Ch. V, sec. 1, para. 144—*Indian Evidence Act* (1 of 1872), sec. 42.] On the death of a Bairagi or an ascetic his preceptor's preceptor applied for letters of administration claiming that according to the custom prevailing in the sect of which he and the deceased disciple were, respectively, members, he, as the preceptor of the dead man's preceptor was entitled to his property: *Held*—The custom set up was proved. THE COLLECTOR OF Dacca v. JAGAT CHANDRA GOSWAMI ... 873

**LETTERS PATENT**, cl. 15—An order made by a Judge of the High Court refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate action is a 'judgment' within the meaning of cl. 15 of the Letters Patent and is appealable. *The Justices of the Peace for Calcutta v. The Oriental Gas Co.*, 8 B. L. R. 433, 452 (1872), commented on and followed. *Hurriah Chunder Chowdhry v. Kali Sundari Debti*, I. L. R. 6 Cal. 594 (1881); on appeal, I. L. R. 10 I. A. 4: s. c. I. L. R. 9 Cal. 482 (1882), referred to. *Srimanta Raja Yarlagadda Durga Prasada v. Srimanta Raja Yarlagadda Mallikarjuna*, I. L. R. 24 Mad. 358 (1901), dissented from. *MUSSAMUT BRU COOMAREE v. RAM-RICK DASS* ... 781

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**LIBEL—Right of suit—Words spoken in answer to a question put by a police-officer conducting an investigation whether actionable—Criminal Procedure Code** (Act X of 1882 and Act V of 1898).] A person who, in answer to a question put to him by a police-officer conducting an investigation under the provisions of the Criminal Procedure Code, stated that the Plaintiff was concerned in the commission of the crime then being investigated, cannot be made liable in an action for damages for words so spoken. *METHURAM DASS v. JAGGAN NATH DASS* ... 804

**LIFE INTEREST—Life estate, grant and gift over of moiety thereof to children.** See HINDU LAW ... 806

*Life interest—Perpetual gift—"Always and for ever," meaning of.* The word "always and for ever," in a Will, award, order of Court or other document, do not *per se* extend the interest given beyond the life of the person who is named. They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or the subsequent conduct of the parties may shew the intention with sufficient certainty, to enable the Courts to presume that the grant was perpetual. *Moulvi Muhammad Abdul Majid v. Mussamat Fatima Bibi*, L. R. 12 I. A. 159 at p. 163 (1885); and *Toolshi Pershad Singh v. Rajah Ram Narain Singh*, L. R. 12 I. A. 205 at p. 214 (1885), referred to. *AZIZ-UN-NISSA v. TASSADUQ HUSAIN KHAN* ... 569

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**ACT—Construction—That the Limitation Act is an Act limiting or restricting a Plaintiff's rights and should be interpreted liberally so as not to curtail or restrict rights**

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unless it is clear that the Legislature intended that this should be done.

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s. 7—*Indian Limitation Act (XV of 1877), sec. 7—Joint decree-holders, one of whom is a minor—Applicability of sec. 7 of the Limitation Act—Execution of decree.* When one of several joint decree-holders is a minor, sec. 7 of the Limitation Act can save an application for execution by the minor decree-holder from being barred by limitation. That section is not limited to a case where either the sole decree-holder is a minor or all the decree-holders are minors. *Seshan v. Raja Gopala*, I. L. R. 13 Mad. 236 (1889) and *Narayanan v. Damodaran*, I. L. R. 17 Mad. 180 (1893), disapproved. *Gobind Ram v. Tatia*, I. L. R. 20 Bom. 383 (1895), and *Zamir Hassan v. Sundar*, I. L. R. 22 All. 199 (1899), approved. *Ananda Kishore Dass Bakshi v. Anando Kishore Bose*, I. L. R. 14 Cal. 50 (1886), referred to. *SURJA KUMAR DUTT v. ABUN CHANDRA ROY* 767

Under sec. 7 of the Limitation Act a person under disability cannot bring his suit after 3 years after the disability ceases. *VASUDEVA PADHI KHADANGA GARU v. MAGUNI DEVAN BAKSHI MAHAPATRULU GARU* ... 545

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s. 28—*Limitation Act (XV of 1877), secs. 7, 18 and 28, and Sch. II, Arts. 142, 144—Joint family—Separate estate—Possession, discontinuance of—Property, extinguishment of right to.* Under sec. 28 of the Limitation Act the right of a person to property is extinguished at the determination of the period limited for bringing a suit for possession of it. *VASUDEVA PADHI KHADANGA GARU v. MAGUNI DEVAN BAKSHI MAHAPATRULU GARU* 545

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— <i>Arbitration—Award, application to set aside—Limitation Act (XV of 1877), Sch. II, Art. 158—Time from when limitation begins to run—Civil Procedure Code (Act XIV of 1882), sec. 516.</i> An application to set aside an award must be made within ten days from the time the award arrives at the Registrar's office for the purpose of being filed, and not from the time when it is filed. <i>SM. NOBIN KALLY DABEE v. AMBICA CHURN BANERJEE</i> ... 813		
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— <i>Limitation Act (XV of 1877), Sch. II, Art. 179—Limitation—Application for execution.</i> Where on an attachment in execution of a decree upon notice under sec. 243, C. P. O., the judgment-debtor pleaded limitation, but, after certain adjournments at the instance of the decree-holder neither party appeared at the hearing and orders were made refusing the application for execution and dismissing the judgment-debtor's objection for default: <i>Held</i> —That the aforesaid order does not preclude the judgment-debtor from urging when subsequently another application for execution is made, that the previous application was barred by limitation. <i>Mungul Pershad Dicht v. Gria Kant Lahiri</i> , I. L. R. 8 Cal. 51 (1881), explained and distinguished. <i>Tilashar Rai v. Parbati</i> , I. L. R. 15 All. 198 (1898), relied upon. <i>Ran Bahadur Singh v.</i>		

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... Art. 179—Decree for rent by a co-sharer landlord for a sum not exceeding Rs. 500 in value—Application for execution—Limitation Act (XV of 1877), Sch. II, Art. 179—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6.] An application for execution of a decree for a sum not exceeding Rs. 500 in value obtained by one of two or more joint-landlords for his share of the rent is not governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act but by the general law of litigation namely, Art. 179 of the second schedule of Act XV of 1877. <i>Prem Chand Nasikar v. Mokshada Debi</i> , I. L. R. 14 Cal. 201 (1887); <i>Jugobundhu Pattuck v. Jadu Ghose Alkishi</i> , I. L. R. 15 Cal. 47 (1887); <i>Beni Madhub Roy v. Joad Ali Sarkar</i> , I. L. R. 10 Cal. 150 (1883); <i>Narain Mahton v. Manofi Pattuck</i> , I. L. R. 17 Cal. 489 (1890); <i>Parneswara Namasudra v. Kali Mohan Namasudra</i> , 4 C. W. N. 801 : s. c. I. L. R. 28 Cal. 127 (1900); <i>Durga Churn Mundal v. Kali Prosunno Sarkar</i> , 3 C. W. N. 586 : s. c. I. L. R. 26 Cal. 727 (1899), referred to. KEDAR NATH CHATTERJEE v. ARDHA CHANDRA ROY CHOUDEHURY ...	763
... Limitation Act (XV of 1877), Sch. II, Art. 179—Application for execution—Nonpayment of process fees—Penalty of appeal—Stay of execution.] The present application for execution of decree was made on the 16th June 1897. The previous application had been made on the 24th January 1893; on the 29th May next the decree-holder put in the costs of the auction sale and the sale proclamation was ordered to be published fixing the 17th July as the date of sale; on the 19th May one of the judgment-debtors made objection to the execution of the decree; on the 3rd June 1893 the objections were disallowed; on the 20th June the objector preferred an appeal to the High Court and on the 4th July the Court ordered that the records be sent up to the High Court and the proceedings be adjourned <i>sine die</i> ; the appeal to the High Court was dismissed on the 19th of June 1894, and on the 6th September 1894 the Court ordered that the records of the case having been received back the decree-holder do put in cost for service of fresh sale proclamation and	

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that the case be put up on the 14th September next when the following order was passed "fees not having been paid, the case is disposed of. The attachment shall continue;" Held—That the present application for execution was barred by limitation and cannot be looked upon as a continuation of the old proceedings. DHUKIRAM SRIMANI v. JOGEDRA CHANDRA SEN ...	347
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— <i>Mesne profits, suit for</i>		to the date fixed for payment.	
— <i>Onus—Notice of vacating possession.</i> In a suit for mesne profits as in other cases it is incumbent on the Plaintiff to establish not only the existence of his right, but also the extent of it. There is nothing in the circumstances of the present case to take it out of this general rule. <i>ISHAN CHANDRA v. AINUDDIN MIA</i> ... 720	720	<i>Amolak Ram v. Lachmi Narain</i> , I. L. R. 19 All. 174 (1896), overruled. <i>Achalabala Bose v. Surendra Nath Dey</i> , 1 O. W. N. 550 : s. c. I. L. R. 24 Cal. 766 (1897); <i>Subbaraya v. Ponnusami</i> , I. L. R. 21 Mad. 264 (1897); and <i>Bakar Sajjad Ali v. Udit Narain Singh</i> , I. L. R. 21 All. 361 (1899), approved. <i>Rameswar Kar v. Syed Mohamed Mehdi Hossain Khan and ors.</i> , 2 O. W. N. 633 : s. c. I. L. R. 26 Cal. 43 (1898), referred to. <i>MAHARAJAH OF BHARATPUR v. RANI KANNO DEVI</i> ... 187	187
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—Joint decree-holders, one of whom is a minor. <i>See LIMITATION ACT</i> , s. 7 ... 767	767	— <i>Mortgage suit—Administration suit—Residuary legatee, mortgage by—Administration, subsequent, of testator's estate—Receiver of testator's estate pending administration—Receiver, sale by, of mortgaged property before completion of administration.</i> Defendant mortgaged certain properties, which he took under the Will of his father to the Plaintiff. Plaintiff brought this suit on the mortgage and obtained a decree and an order for sale by the Registrar. In the meantime a suit for administration of the testator's property had been filed and an order made in that suit appointing a Receiver. Plaintiff now applied that the sale of the mortgaged properties might be held by the Receiver appointed in the administration suit instead of by the Registrar. The administration suit was still pending and administration of the testator's estate had not been completed: <i>Held</i> —That the sale could not be held by the Receiver before the completion of the administration. That till such completion of administration it could not be said that the Defendant was entitled to the mortgaged properties. <i>NETAI CHAND CHUCKERBUTTY v. ANUTOSH CHUCKERBUTTY</i> ... 408	408
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<b>MORTGAGE—Mortgage—Decree on mortgage—Interest up to date of payment—Transfer of Property Act (IV of 1882), secs. 88 and 97—Civil Procedure Code (Act XIV of 1882), Sch. IV, Form No. 109—Construction of decree—Ambiguity.</b> Where there is no ambiguity in a decree the duty of the executing Court is to carry the orders of the decree into effect, as being conclusive between the parties, whether it may or may not be disputable in point of law. It is competent for a Court passing a mortgage decree to give interest beyond the date fixed for payment and up to the date of realization. Having regard to the universality of the long established practice to grant such interest, its continuance for years after the Transfer of Property Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting the practice, the conformity with it of sec. 97 which is <i>pari materia</i> with sec. 88, the presumption that sec. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by form No. 109 of Schedule IV, Civil Procedure Code, sec. 88 of the Transfer of Property Act should not be so construed as to limit the power of the Court to grant interest only up			

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*Purchase with consent of mortgagee—Parties—Contribution—Frame of suit—Apportionment of debt—Redemption.*] The heirs of a mortgagor, against whom a decree on the mortgage had been obtained by the mortgagee, and in execution of which the mortgaged property was sold and a part of which was purchased by the mortgagee himself, and a person who purchased a portion of the mortgaged property with the consent of the mortgagee are not necessary parties in a suit by the mortgagee for contribution or apportionment of the mortgage debt. A suit by the mortgagee framed improperly for a declaration of the rights of the purchasers of portion of the mortgaged property of redemption to the properties purchased by them, who were not made parties in the mortgage suit and for declaration of the mortgagee's absolute right over those properties on the failure of such purchasers to redeem, and for *khas* possession will not lie. The only relief to which the mortgagee in such a case is entitled to is a decree for apportionment of the mortgage debt on the property purchased by the purchasers account being taken in that apportionment as well of the property transferred by the mortgagor to other parties with the consent of the mortgagee, as of the portion of the mortgaged property purchased by the mortgagee himself. *RAMMOY HAZRA v. PREM CHAND NASKAR* ... 423

*Mortgages, prior and subsequent—Redemption—Right of purchaser at a prior mortgage sale to redeem a purchaser at a subsequent mortgage sale.*] Where the Plaintiff purchased certain properties at two mortgage sales, and the Defendant purchased a portion of the same properties at a prior mortgage sale, and the Defendant was not a party to the decrees in execution of which the Plaintiff purchased, and the Plaintiff was not a party to the decree in execution of which the Defendant purchased: *Held*—That the Plaintiff purchased the mortgagee's rights and the equity of redemption in the remainder of the property which was not covered by the Defendant's decree; and that the Defendant was entitled to redeem the Plaintiff by paying off the proportionate amount of the Plaintiff's mortgages due on the property purchased by him and that if the Defendant failed to pay as aforesaid, the Plaintiff would be entitled to pay off the Defendant by paying into

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Court the amount paid by the Defendant for the property. *SHRO PERSHAD SINGH v. BABU TILUK SINGH* ... 232

On 4th May 1883 certain villages were mortgaged to S. for Rs. 15,000. On 30th June 1883, the same were mortgaged to P. for Rs. 7,000. On the 3rd November 1883 a fresh bond executed in favour of S. for Rs. 20,000 which, by its terms, kept alive the bond of 4th May 1883. S. sued on the bond of November 1883 only and not on the bond of May 1883, and obtained a decree on the bond of November. P. also brought a suit on his bond of June 1883 and obtained a decree. *Held*—That the mere suing on the bond of November did not amount to a relinquishment by S. of his rights under the bond of 4th May 1883. There was no necessity for S. to sue on the bond of May in order to obtain a sale for the whole of their debt. *SHANKAR SARUP v. LATA PHUL CHAND* ... 649

Attesting witness—Writer of the deed. *See EVIDENCE ACT, s. 68* ... 454

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first-married wife and sons of other wives. *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*, 14 Moo. L. A. 570 (1872); and *Pedda Ramappa Nayanavaru v. Bangari Seshamma Nayanavaru*, L. R. 8 I. A. 1 (1880), referred to and followed. In construing texts of Hindu law where certain verses are inconsistent, and one is reasonably free from ambiguity and the meaning of the others at the best ambiguous and doubtful, the plain language of the one ought not to be overridden or controlled by the obscure utterances of the others. Where it was alleged that the interpolation of the words "but of a lower class" in Manu, Chap. IX, verse 122, was by mistake attributed by Sir William Jones to Kalluka Bhatta whereas it was interpolated by a later and inferior commentator and the interpolation had been accepted by the Indian Courts: *Held*—That the maxim *communis error facit jus* is a sound maxim. Manu, Chap. IX, verses 122 and 125 discussed. *JAGDISH BAHADUR v. SHEO PERTAB SINGH* 602

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Receiver—Practice—Receiver—Application for leave to sue a Receiver.] The Receiver is not a necessary party to a suit for possession of immoveable property. *KUMAR SUTTYA SUTTYA GHOSAL v. RANI GOLAP MONI DEBI* ... 27

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of mal raiyati—Regulation III of 1872—Partition of mal raiyati land in Chota Nagpur—Partition of trees and land—Ghatwal.] As between two mal raiyats with whom a settlement has been made under Regulation III of 1872 there may be a partition of the waste and jungle lands, though such partition cannot be binding upon the superior landlord, the ghatwal, and will only sub-

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sist during the currency of the settlement. So far as the trees to which the superior landlord is exclusively entitled, they cannot be the subject of partition, but as to the trees which belong to the mal raiyats there may be a partition. *DOMAN PANDEY v. PANCHU KOLE* ... 185

ACT IV of 1893, s. 2—Partition Act (IV of 1893), sec. 2—Preliminary decree—Order for sale—Civil Procedure Code (Act XIV of 1882), sec. 396.] Where in a suit for partition a Commissioner appointed under sec. 396, C. P. C., to make a partition after the preliminary decree had been passed, submitted a report and the Court on consideration of the report was of opinion that the property could not be conveniently partitioned, and then passed an order for sale of the property under the provisions of sec. 2 of the Partition Act (IV of 1893): *Held*—That the Court could pass an order under sec. 2 of the Act for sale of the property, and the fact that a preliminary decree had been passed was no bar to his proceeding under that section. *HIRAMONI DASSI v. RADHA CHURN KAR* ... 128

**PARTNERSHIP**—Partnership in an undertaking—Abandonment by laches—Refusal to advance money in terms of agreement.] That a mere refusal by a partner in an undertaking to advance further sums for the purposes of the undertaking in terms of the partnership agreement, is not an abandonment by him of the undertaking and does not amount to a dissolution of the partnership. Even assuming that the subject-matter of the partnership was as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case whether or no there has been abandonment, or loss of interest by laches. *Norway v. Rowe*, 19 Ves. 144 (1812), referred to. In taking accounts, it is not possible for a Court of Justice to allow expenses to the accountable party, even though honestly incurred for the partnership, where by mixing up his private affairs with those of the partnership, and by his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. *MOUNG THA HNYIN v. MAH THIN MYAH* ... 114

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—, Possession, suit for—Previous suit on the basis of possession without title, dismissal of—Dispossession by Plaintiff in the previous suit—Previous decree, effect of—Title, want of, Plaintiff in subsequent suit.] Defendants brought a suit in 1886 for a declaration of their title and to recover possession of the lands in suit against the Plaintiff. The suit was dismissed, Defendants having failed in that suit to prove their title. Defendants subsequently dispossessed the Plaintiff in 1890; and Plaintiff instituted the present suit in 1896 but could not prove his title: <i>Held</i> —That the effect of the decree in the previous suit was to declare as against the present Defendants, that Plaintiff's possession was lawful, and such being the case and the Defendants being wrong-doers and having no title, the Plaintiff in the present suit, on the basis of the decree in the previous suit and his previous lawful posses-	

**POSSESSION—contd.**

sion, is entitled to recover possession if the lands are the same. *Nisa Chand Gaita & ors. v. Konchiram Bagani*, 3 O. W. N. 568 (1899); *Gobind Chunder Kondoo & ors. v. Taruk Chunder Bose & ors.*, I. L. R. 3 Cal. 145 (1877); *Ismail Ariff v. Mahomed Ghous*, I. L. R. 20 Cal. 834; s. c. I. R. 20 I. A. 99 (1893), distinguished. *FAYLAR RAHMAN CHOWDHRY v. RAJ CHUNDER SEN* ...

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(1) CHANGE OF ATTORNEY by next friend.

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(3) RECEIVER. *See* PARTIES ...

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(4) SECOND APPEAL—Act X of 1859.

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—, Practice—Security for costs—Delay in applying for security.]

An application for security for costs already incurred and estimated costs of appeal should be made promptly. *Pooley's Trustee v. Whetham*, L. R. 33 Ch. D. 76. *BHOONATH LAHIRI v. RADHAPROSAD LAHIRI* ...

—, Practice—Report of Registrar, exceptions to—Exceptions to Report—Vary or discharge a Report, notice of motion to time for giving—

*Belchambers' Rules and Orders, Rules 615 (567, 1st Ed.), 617*—“Fraud, surprise or mistake or such other special ground,” (meaning of—Appeal.) The mere filing of exceptions to a Report cannot be taken or deemed to be notice under Rule 615 (*Belchambers' Rules and Orders*). Rule 615 must be strictly followed if it is desired to discharge or vary a Registrar's Report. The words “fraud, mistake or surprise or such other special ground” in Rule 617 (*Belchambers' Rules and Orders, 1st Ed.*) refer to fraud or mistake or surprise or some other special ground incident to or connected with or which has resulted in the making of the Certificate or Reports itself and not to something which has occurred quite outside or independent of the Certificate or Report. A mistake, though *bond fide*, in not complying with the procedure laid down in Rule 615 is not a special ground for re-opening the Report under Rule 617. *THE ROYAL INSURANCE Co. v. AKHOY COOMAR DUTT* ...

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PREScription— <i>Right of privacy—Suit to prevent opening of windows—Usage, proof of—Prescription.</i> In a suit for closing the window on the wall of the Defendant and for the issue of a permanent injunction restraining the Defendant from opening any windows in future in that wall, on the ground that the privacy of the Plaintiff had been interfered with, it was proved that it had not been usual for windows to be opened out in any one house in the village so as to overlook the female apartments of another but not that the villagers had been in the habit of preventing their co-villagers from opening windows in such a manner: <i>Held</i> —That the usage as to the right of privacy was not proved. That the fact that the Defendant's wall had been standing there over 50 years and during this period no window had been opened was not sufficient to give the Plaintiff a prescriptive right to prevent the Defendant opening a window in that wall. <i>SRI NARAIN CHOWDHRY v. JADU NATH CHOWDHRY</i> ...	147
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PRIVATE INTERNATIONAL LAW— <i>contd.</i> tion of British Indian Court to go into merits of the action in the English Court— <i>Civil Procedure Code (Act XIV of 1882), secs. 2, 13, Expt. 6—Order XI, Rule 1 (e) under the Judicature Act—Residence in England if necessary to fix liability on a foreign judgment—Interest on money decreed, when no provision for such is made in foreign judgment, if recoverable—Order XLII, Rule 16—1 and 2 Vict., c. 110, sec. 17—Indian Interest Act (XXXII of 1839.)</i> As a general rule a Court can exercise jurisdiction over a foreigner only if he is resident within the limits of its territorial jurisdiction. Natives of British India, though foreigners, owe allegiance to the common sovereign of England and British India and are subject to the supreme legislative authority in the British Empire. If therefore the supreme legislature in the British Empire authorises an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction and that foreigner is a native of British India, he cannot treat the judgment passed as a nullity merely because he did not reside within the jurisdiction of the Court which passed it. <i>Order XI, Rule 1 (e)</i> under the English Judicature Act constitutes a legislative Act of the Sovereign power regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary territorial jurisdiction of the English Courts and gives the English Courts jurisdiction over such British subjects in a case which falls within the order. But it is open to a Defendant to show that this is not so and that the English Court had in fact no jurisdiction. <i>Gurdial Singh v. Raja of Faridkot, B. R. 21 I. A. 171: s. c. I. L. R. 22 Cal. 222 (1894), followed and explained.</i> In a suit based on a foreign judgment, the Plaintiff cannot recover more than appears on the face of the judgment and when such judgment is silent as to interest, he cannot make the Defendant liable for interest on the amount of the English judgment, the English statutes as to judgments carrying interests ( <i>Order 42, Rule 16, and 1 and 2 Vict., c. 110, sec. 17</i> ) not applying to India. <i>SYED MOAZIM HOSSEIN KHAN BAHADUR v. RAPHAEL ROBINSON</i> ...	689

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—, <i>Purdanashin lady</i> — <i>Explanation of mortgage deed affecting purdanashin's interest.</i> Case in which it was held on the facts that as there was no explanation of a mortgage deed to a <i>purdanashin</i> lady in so far as it affected her interest, the deed cannot be regarded as having been executed by her with a due understanding of its effects. <i>ANNODA MOHUN ROY CHOWDHURY v. BHUBAN MOHINI DEBI</i> ...	489
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<b>RAILWAY COMPANY</b> — <i>contd.</i> real nature as ought to have called the attention of the railway servants to them, there was no obligation on the Railway Company to prevent such goods from being carried. Railway Companies are not "common carriers" of passengers and it is not for them to prove beyond doubt that they are not responsible for the accident. Evidence must be given of their want of care and diligence. <i>THE EAST INDIA COMPANY v. KALIDAS MUKERJEE</i> ...	449
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—, <i>Receiver's accounts</i> — <i>Exceptions to accounts</i> — <i>Mofussil accounts</i> — <i>Receiver, liability of</i> — <i>Procedure</i> — <i>Practice</i> — <i>Costs</i> — <i>Civil Procedure Code (Act XIV of 1882), sec. 503.</i> A Receiver is responsible for all properties which comes into his custody or management and he is responsible not only for actual sums received by him but for those which might have been received by him but for his wilful neglect and default. <i>Balaji Narayan Patvardhan v. Ram Chandra Gobind</i> , I. L. R. 19 Bom. 660 (1894), referred to. The only question which properly arises on an application by a Receiver to pass his accounts is as to the items of that particular account and involves the inquiry whether all his collections, made on behalf of the property of which he is the Receiver, are duly entered in the accounts and next, whether all his disbursements are payments properly made in respect of that estate. A Receiver's liability is not restricted to matters shewn upon his accounts. If there is any liability attaching to the Receiver other than that which appears on the face of the accounts	

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the proper course is to sue the Receiver for the purpose of establishing that liability. Questions with regard to the soundness or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters that can be disposed of in the shape of exceptions to accounts. Even where a *prima facie* case of the responsibility of the Receiver for malpractices of his servants is made out, an inquiry into such practices is foreign to an application to pass Receiver's accounts. The objection that a Receiver has not included in his accounts collections made in the mofussil, cannot be dealt with upon an application to pass his accounts. If a *prima facie* ground is made out of the accountability of the Receiver for the mofussil collections, the proper course is to either postpone the passing of the accounts until the question of the Receiver's liability is established by suit or to pass the accounts reserving the right of the parties to establish any claim they may make against the Receiver in a suit properly framed for the purpose. **COOMAR SATTYA SANKAR GHOSAL AND ORS. v. RANEE GOLAP-MONKEE DEBER AND ORS.** ... 223

—, *Receiver, appointment of* —[*Waste.*] The suit relates to a certain mohuntship which became vacant by the death of one J, the former Mohunt, who died on the 8th September 1899. M, who was the Plaintiff and the nephew of the deceased, alleged that he was installed as Mohunt on the 2nd September; S, the Defendant, who was in possession alleged that he was installed as Mohunt on the 12th September by a punchayet. Plaintiff applied for appointment of a Receiver and in support of his allegation as to his installation, he relied upon a considerable number of affidavits of most respectable witnesses. It was admitted that S was installed as Mohunt as alleged. There was great reason to believe that since he took possession of the property he had committed gross waste: *Held*—In the circumstances that it was a fit case in which a Receiver should be appointed. In an application for the appointment of a Receiver in a suit where the title to certain properties, in the possession of the Defendant, is in dispute, it is not necessary that a strong case should be made out; it is sufficient if a fair *prima facie* case made out. **Sidheswari Debi v. Abhoyeswari Debi.** I. L. R. 15 Cal. 818 (1888); **Chandidat Jah v. Padmanand Singh,** I. L. R.

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22 Cal. 459 (1895); **Sham Chand Giri v. Bhay Ram Pandey,** 5 O. W. N. 365 (1894), referred to. **MOHUNT SIARAM DAS v. MOHUNT MOHABIR DAS** 362

—, *Receiver, appointment of—Title to property—Removal of property.* In an application for the appointment of a Receiver it is sufficient if a *prima facie* title to the property, over which the Receiver is sought to be appointed, is made out. The fact that a large amount of property is removed by the Defendant under circumstances which may fairly give rise to suspicion, during the pendency of a suit in which the question of title to that property is to be determined, is in itself a sufficient ground for the appointment of a Receiver. **SHAM CHAND GIRI v. BHAY RAM PANDAY** ... 365

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—, s. 32—Registration Act (III of 1877), secs. 21, 32, 34 and 87—Registration after death of executant—Registrar, jurisdiction of—Procedure, defect in.] A Registrar has no power or jurisdiction

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the Appellate Jurisdiction of that Court, but includes its Original Jurisdiction, and under that section the High Court exercising its Original Jurisdiction has concurrent jurisdiction with the District Judge for the purpose of exercising all powers provided by the Act. Proceedings of this description should be initiated by motion on notice and not by rule. The procedure by rule nisi should be confined to applications which are urgent and where relief in the shape of an injunction is required. In the goods of MAHENDRA NARAIN ROY ...	377	_____ joint wrong-doers. ...	393
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		_____ Civil Procedure Code (Act XIV of 1882), sec. 244—Separate suit to set aside decree and sale—Jurisdiction—Fraud—Evidence Act (I of 1872), sec. 44.] A suit to set aside a decree and the sale in execution thereof and to recover the property sold is maintainable, notwithstanding the provisions of sec. 244, C. P. C., and should be brought in the Court in the jurisdiction of which the property is situate, although the decree sought to be set aside was passed by a Court in a different district. It may not be competent to the Court to set aside the decree passed by another Court as fraudulent, but it is competent to the Court to investigate the question as to the character and validity of the decree for the purpose of giving relief to the Plaintiff in respect of the land which he lost by reason of the sale. <i>Mewa Lal Thakoor v. Bhujhun Jha</i> , 22 W. R. 213: s. o. 13 B. L. R. App. 11 (1874), referred to. <i>Abdul Mazundar v. Mohamed Gazi</i> , I. L. R. 21 Cal. 605 (1894); and <i>Pran Nath Roy v. Mohesh Chandra Moitra</i> , I. L. R. 24 Cal. 546 (1897); and <i>Srimati Nistarini Dasi v. Rai Nanda Lal Bose</i> , 3 C. W. N. 670 (1899), followed. <i>KEDAR NATH MUKERJEE v. PRONNA KUMAR CHATTERJEE</i> ...	559
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—, Civil Procedure Code (Act XIV of 1882), sec. 311—Limitation Act (XV of 1877), Sch. II, Arts. 12 (a), 118—Execution proceedings against estate of deceased judgment-debtor without notice to legal representa- tive or making him party, irregulari- ty—Sale in such execution if a nullity or only voidable—Sale, set- ting aside of, for irregularity—Pur- chaser at an execution sale, if bound to enquire into its defect or legality —Want of jurisdiction and error of judgment—Suit for redemption of mortgage in which relief is conse- quential on annulment of sale—Limita- tion—Pleadings—Parties—Frame of suit.] Where a decree had been made against the judgment-debtor and after his death application for execution was made against “the estate” of the deceased and against a person as heir, who was in fact not the heir, and without notices to the proper heirs the property was sold: <i>Held</i> —That such a sale can only be set aside in the regular way by proceedings under sec. 311 of the Code of Civil Procedure or by a regular suit within a year of the confirmation of the sale as provided under Art. 12 (a), Sch. II of the Limitation Act of 1877. <i>Baswantapa v. Ranu</i> , I. L. R. 9 Bom. 86 (1884), distinguished. The fact that the Court proceeded with the execution upon notice to a person not the legal representative is an error of judg- ment and does not amount to adju- dication without jurisdiction so as to render the sale a nullity. Such sale can only be set aside as above stated. A purchaser at an execution sale, who is a stranger to the suit, is not expected to enquire into its accuracy or to judge of its legality and is justified in believing that the Court has done all that which the law re- quires. At the above-mentioned sale	

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the property of the judgment-debtor was purchased by a previous mortgagee thereof and a suit for redemption and accounts was brought by the real heirs ignoring or treating the sale as a nullity: *Held*—That they could not succeed in their suit for redemption unless they first brought a suit or renoued the one they had already brought, for setting aside the sale making the original decree-holder a party thereto. A party seeking relief inconsistent with a previous sale must pray to set it aside. One year's limitation prescribed by Art. 12 (a) of the Act of 1877 is not confined only to suits, which seek no relief other than a declaration that a sale ought to be set aside but apply also to suits where other relief is sought which can only be granted on annulment of the sale. The principle in *Jagadamba Chowdhuri v. Dakhina Mohun*, L. R. 13 I. A. 84 (1886), applies to this case. The doctrine of the Bombay High Court in *Bhagwant Gobind v. Kondi*, I. L. R. 14 Bom. 279 (1889); that where the necessity for impugning the sale is subservient to a suit for redeeming the mortgage, a different period of limitation is to prevail, is unsupportable. *MALKARJUN BIN SHIDRAMPIA v. NARHARI BIN SHIVAPPA* ... 10

—, *Landlord and Tenant Act (X of 1859)*—Sale, setting aside of, by an unregistered tenant—Maintainability of suit.] A private purchaser of a tenure who has not registered his name in the landlord's *sherista* (office) and has not been recognized by him, has no *locus standi* to bring and maintain an action to set aside a sale held in execution of a decree for arrears of rent obtained against the registered tenant. The non-attachment and non-proof of publication of the sale proclamation is no ground for setting aside a sale under Act X of 1859. *PATIL SAHU v. HARI MAHANTI* ... 126

—, Execution sale, application to set aside—Fraud—Irregularity—Code of Civil Procedure (XIV of 1882), secs. 244, 294 and 311—Purchase by the decree-holder benami at a price less than that at which the decree-holder was permitted to bid—Limitation Act (XV of 1877), Sch. II, Art. 178.] The purchase of a property at an execution sale by the decree-holder, in the name of another person, at a price less than that at which the decree-holder obtained permission to bid for the said property, constitutes fraud which would vitiate the sale. *Mahomed Gazee Choudhry v. Ram Lall Sen*, I. L. R. 10 Cal. 757 (1894),



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referred to. Art. 178, Sch. II of the Limitation Act would govern such a case. **SRIMATI SARAT KUMARI DEBI v. NIMAI CHARN DEY SIRCAR** 265

—, *Sale—Right of re-purchaser, provided in a conveyance—Pre-emption—Contract running with land.*] In a conveyance executed by Plaintiffs in favour of Defendant No. 1's father it was provided that in case he sold the property subsequently he would be bound to give preference to the Plaintiffs, i.e., his vendors, to purchase the same for a certain sum, and on their refusal to accept the offer he would be at liberty to sell the same to others. After his father's death Defendant No. 1 without offering to sell the land to the Plaintiffs, though they were willing to purchase it, sold the same to Defendants Nos. 2, 3 and 4 who had notice of the contract: *Held*—That the contract was not binding on Defendant No. 1 and therefore the sale to Defendants Nos. 2, 3 and 4 was not liable to be set aside. **NOBIN CHANDRA SOOT v. NABAB ALI SARKAR** ... 343

—, *Civil Procedure Code (Act XIV of 1882), secs. 235, 247, 284, 287—Execution of decree, application for sale of tenure in—Encumbrance, existence of, notification of—Encumbrance—Arrears of rent due in respect of the tenure—Rules made by the High Court—Omission to state existence of arrears of rent, effect of—Costs recoverable by judgment-debtors against decree-holder, inclusion of, in application for execution, effect of—Liability of hypothecated property on release of principal by acts of landlord.*] Although there is no express provision in the Code of Civil Procedure casting on the decree-holder the duty of notifying encumbrances on any property sought to be brought to sale, the rules made by the High Court under the provisions of sec. 287 of the Code, cast on him the duty of notifying the existence of arrears of rent due to him in respect of the property he seeks to bring to sale. An arrear of rent due in respect of the property sought to be sold is to be regarded as one of the matters to be notified as being material for the purchaser to know in order to judge of the nature and value of the property, and the omission of the decree-holder to notify such arrear due to him at the date of the issue of the proclamation for the sale of the property has the effect of destroying the lien he has upon the property. **Nursing Narain Singh v.**

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**Roghoobur Singh, I. L. R. 10 Cal. 609 (1884); and Kasturi v. Venkatachalupathi, I. L. R. 15 Mad. 412 (1892), referred to and followed.** Under sec. 247 of the Code of Civil Procedure all that the decree-holder is entitled to enforce execution of is the difference between the amount found recoverable by him and the amount which the judgment-debtor is entitled to recover against him. When a decree-holder loses his remedy to enforce his decree for arrears of rent by the sale of the property in default by reason of his own negligence, laches and acts, he cannot be allowed to enforce it as against a third party in whose hands the property passes at the sale and to make any property hypothecated for the rents liable for the whole amount due to him when, by the security bond, the hypothecated property is made liable only for so much of the arrears due as may not be realized by the sale of the property in default. **SRIMATI GIRIBALA DEBI v. SRIMATI RANI MINA KUMARI** ... 497

—, *Sale by Registrar—Dwelling-house—Conditions of sale—Title, abstract of, misstatement in—Acceptance of title by purchaser—Payment into Court of balance—Subsequent discovery of misstatement—Sale, rescission of—Compensation.*] A purchaser of a dwelling-house at a Registrar's sale accepted the conditions of sale whereby he was required to furnish requisitions and objections, if any, within a fortnight after delivery of the abstract (and in this respect time was of the essence of the contract) and he was not entitled to call for any other documents except those abstracted or for the originals of documents of which the vendor had only copies and was to accept the title as shewn in the abstract of title. By the abstract it was presented to the purchaser that he was purchasing the entire sixteen annas of the house and premises. The purchaser accepted the title as shewn in the abstract and paid the balance of the purchase-money into Court without reserving any right to object to the title. He now applied to be discharged from such purchase and for leave to withdraw the purchase-money from Court, on the ground that he had subsequently discovered that only an eight-twelfth share of the house had been sold to him and that he had been misled in the purchase by misrepresentation contained in the conditions of sale and the abstract of title: *Held*—That although there was no fraud on the part of the ven-

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dor, he knew or had the means of knowing, that the sixteen-annas share of the property could not be sold, and if the purchaser's allegations are true, the Court would not enforce the contract. *Lachlan v. Reynolds*, Kay's Rep. 62 (1853); *McCulloch v. Gregory*, 1 Kay & Johnson 286 (1855); *Thomas v. Powell*, 2 Cox. 394 (1794); *Else v. Else*, L. R. 13 Eq. 196 (1872); and *In re Banister*, *Broad v. Munton*, Ch. Div. 131 (1879), referred to. That in the case of a purchase of a dwelling-house, it is impossible to compensate a person in respect of such a material misstatement, and the Court must either enforce the contract or rescind the sale. It is different in the case of land occupied for agricultural or such like purposes where there is a deficiency in area. *Ordered*—That it be referred to the Registrar to enquire and report whether a title can be made to the property by the vendor. Further hearing adjourned until the return of the report. **UPENDRA NATH MITTER v. OBHOY KALI DASSI** ... 593

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... In a suit for rent under Act X of 1859 a second appeal would lie to the High Court against the judgment of a District Judge passed on an appeal in a suit for a sum below Rs. 5,000. *Halloddhar Biswas v. Mohesh Chunder Halder*, S. D. A. for 1831, p. 8, followed. *Rajah Nilmoni Singh Deo Bahadur v. Tara Nath Mookerjee*, L. R. 9 I. A. 174 (1882), referred to. *Khedan Mahato v. Budhan Mahato*, 4 C. W. N. 333 (1900), distinguished. **SADAI NAIK v. SERAI NAIK** ... 279

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**SLANDER**—Slander—Defamation—Unchastity, imputation of—Special damage—Common law of England, application of, in Calcutta—Charter of the Supreme Court, 1726.] No

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damages are recoverable for the mental distress caused by an insult. <i>Girish Chandra Mitter v. Jatadhari Sadukhan</i> , 3 C. W. N. 551: s. c. I. L. R. 26 Cal. 653 (1899), followed. <i>Wilkinson v. Downton</i> , L. R. (1892), 2 Q. B. 57; and <i>Lynch v. Knight</i> , 9 H. L. C. 594 (1861), referred to. Defamatory words imputing unchastity to a woman are not actionable within the limits of Calcutta without proof of special damage. The common law of England, as it prevailed in 1726, applies to natives of India within the limits of Calcutta except in so far as it has been modified by the Legislature or where it is shewn to be unsuitable to this country. <i>Advocate-General of Bengal v. Ranee Surnomoye Dossee</i> , 9 Moo. I. A. 387 (1863), referred to. That an action for slander is only maintainable in Calcutta by virtue of the common law of England introduced by the charter of 1726. <i>SM. BHOONI MONEY DASSEE v. NOTOBAR BISWAS</i> ... 659	
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Succession Certificate Act (VII of 1889), sec. 7—Nature of enquiry—Summary enquiry—Civil Procedure Code (Act XIV of 1882), sec. 141.] There must be an enquiry before a certificate is granted under the Succession Certificate Act, but the enquiry is to be a summary one, and when a Judge has legal evidence before him on which he comes to a proper conclusion, his proceedings cannot be set aside because they seem not to have been of a very protracted nature. Such a decision does not in any way bar the rights of the parties nor does it establish the right of the party to the debt to collect which the certificate is granted. <i>Hurri Krishna Panda v. Balabhadra Panda</i> , I. L. R. 23 Cal. 431 (1896); <i>Radha Rani Dassi v. Brindaban Chandra Bosack</i> , I. L. R. 25 Cal. 320 (1897); <i>Sivamma v. Subbamma</i> , I. L. R. 17 Mad. 477 (1894); <i>Dharmaya Sangappa v. Sayana Malapa</i> , I. L. R. 21 Bom. 53 (1895), referred to. MUSS. JIGRI BEGUM v. SYED ALI NAWAB	494	TENURE. See CESS ACT, s. 4	535
Succession Certificate Act (VII of 1889), sec. 4—Usufructuary mortgage—Right to sue accruing after the death of the mortgagee.] A executed a usufructuary mortgage in favour of B, under which B was not entitled to sue for the mortgage money so long as the property continued in his possession. After B's death, the heirs of B were deprived of a portion of the security at the instance of a third party who successfully claimed a paramount title to that portion of the property. The heirs of B sued to recover the mortgage debt from the mortgagor personally: Held—That sec. 4 of the Succession Certificate Act had no application to the case and the suit was maintainable without a certificate as the heirs of B were not suing to recover a debt due to the deceased mortgagee. UMESH CHANDRA PRAMANICK v. MATHUR MOHAN HALDAR	607	TITLE, abstract of, misstatement in—Sale by Registrar—Acceptance by purchaser. See SALE	593
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		—, Family arrangement—Contract to transfer—Incomplete transfer—Implement of contract to transfer—Pleadings—Burden of proof.] In 1882 a usufructuary mortgage of the disputed properties was executed by Plaintiff's father, his uncle and his cousin, Thirugnana, the present Defendant. In that mortgage a certain sum was stated to have been borrowed "in order that, after a settlement of the differences existing between the members of the family, the same might be paid as a recompense to . . . Ova'a . . . (the Plaintiff's father), one of us, for his transferring even now the right to" the properties to the Defendant "and his addressing an <i>arzi</i> to the Collector stating the said fact." An <i>arzi</i> was submitted to the Collector in which <i>Ova'a</i> stated that he had transferred the properties to the Defendant. He also made a similar statement to the Tahsildar and there was a mutation of names from <i>Ova'a</i> to Thirugnana. At that time Plaintiff was not born. There was no registered deed of transfer and possession was all along with the mortgagee. Plaintiff brought the present suits to redeem the properties. The Defendant Thirugnana, by his pleadings, claimed that the properties had been transferred to him, but in appeal he contended that the transaction amounted to a contract to transfer and he was entitled to call upon Plaintiff to implement that contract: Held—That though there may have been an intention to transfer the property, it was never so transferred in the mode required by law. That the onus of proving a transfer is upon	

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the party who relies upon it. That the Defendant not having raised the issue in the first Court that there was a valid contract to transfer, he cannot now be allowed to raise it and to ask the Plaintiff to implement that contract. <i>Quare</i> —Whether if the documents in proof contained on their face clear evidence of a valuable consideration passing to <i>Ovala</i> , it was not open to the Defendant to ask for implement of contract on appeal. <i>IMMADIPATTAM THIRUGNANA v. PERIYA DORASAMI</i> ...	217
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See <b>s. 85</b>	83
— <i>Transfer of Property Act (IV of 1882), sec. 73—Mortgage—Surplus sale-proceeds at revenue sales—Suit for enforcement of payment of money under a mortgage deed—Limitation Act (XV of 1877), Sch. II, Arts. 120, 132—Interest—Damages.</i> ] Where a property mortgaged to the Plaintiff was sold for arrears of Government revenue and out of the surplus sale-proceeds held in the Collectorate, certain creditors of the mortgagors drew out the amounts of their money-decrees obtained against the mortgagors, and the Plaintiffs sued these creditors for the monies which they had taken out from the Collectorate with interest: <i>Held</i> —That having regard to the provision of sec. 73 of the Transfer of Property Act, a suit, like the present, to enforce payment of money charged upon immoveable property, is governed by Art. 132 of Sch. II of the Limitation Act. <i>Kamala Kant Sen v. Abdul Bakrul alias Habibullah, I. L. R. 27 Cal. 180 (1899)</i> , referred to. That the Court may, in a proper case, award interest by way of damages. <i>Lala Chhajmal Das v. Brij Bhukan Lall, I. L. R. 22 I. A. 199 (1895)</i> , referred to. That under Art. 120 of Sch. II of the Limitation Act, damages for more than six years previous to the institution of the suit cannot be awarded. <i>JOGESHUR BHAGAT v. GHANSHAM DASS</i> ...	356
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<i>father alone—Decree whether binding upon son—Son interested in the property.</i> ] In a suit against a Mitakshara father on a mortgage of ancestral property executed by him alone, the son is a necessary party where the mortgagee has notice of his interest. The language of sec. 85 of the Transfer of Property Act is compulsory and all persons having an interest in the property mortgaged or, in other words, in the equity of redemption ought to be made parties to a suit on the mortgage. In a suit by a Mitakshara son for a declaration that a mortgage decree obtained against the father alone is not binding on him on the ground (1) that he was not made a party to that suit and (2) that the debt was for immoral and illegal purposes, where it is found that the debt was not contracted for immoral and illegal purposes, the only remedy the son is entitled to is right to redeem. <i>LALA SUBRAJ PROSAD v. GOLAB CHAND</i> ....	640
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— <i>Transfer of Property Act (IV of 1882), secs. 60, 85, 91, cl. (a)—Redemption, right of, of purchaser of portion of the equity of redemption—“An interest or charge upon property,” in sub-sec. (a), sec. 91, meaning of—Raiyati interest, if sufficient to entitle one to redeem—Review, granting of, to bring in necessary parties in a suit for redemption if proper after dismissal of suit.</i> ] That the words “any person having any interest in or charge upon the property,” in sub-sec. (a) of sec. 91 of the Transfer of Property Act, means any person having an interest in or charge upon the property which is affected by the mortgage and a raiyati interest is not such an interest. That the Plaintiff as a purchaser of a portion of the equity of redemption was not entitled, against the will of the mortgagee, to redeem the whole; he should be restricted to the redemption of that portion only. <i>Nawab Azmutali Khan v. Jovahir Sing, 13 M. I. A. 415</i> , followed. That having regard to the provisions of sec. 85 of the Transfer of Property Act as to necessary parties, the review granted after dismissal of suit to bring in the heir of one of the mortgagees as a party Defendant was not improper. <i>GIRISH CHUNDER DEY v. JURAMONI DE</i> ...	83
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—Where Plaintiff and Defendants Nos. 4 to 6 were joint owners of a certain property and Plaintiff alone was owner of another property and by an oral arrangement Plaintiff got the former property in its entirety :	s. 118	<i>Right of suit—Damages peculiar to Plaintiff—Special damage.] An action for obstructing a public way is not maintainable if no damage peculiar to the Plaintiff is proved. Mere inconvenience or a remote danger will not make such an action maintainable. Winterbottom v. Lord Derby, L. R. 2 Ex. 316 (1867), followed. MAHOMED ALAM v. DILBAR KHAN ...</i>	285
• <i>Held</i> —That the transaction was an exchange under sec. 118 of the Transfer of Property Act and not a partition and was invalid in not being in writing and registered. <i>Gyan-nessa v. Mobarakannessa</i> , I. L. R. 25 Cal. 210 (1897), distinguished. <i>RAJNARAIN v. KHOBDARI RAI</i> ...	724	<b>WAZIB-UL-URZ, value of, as evidence. See EVIDENCE ACT, s. 60 ...</b>	39
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<b>VERIFICATION IN PLAINT</b> on behalf of Company. <i>See CIVIL PROCEDURE CODE, s. 435</i> ...	91	—, construction of. <i>See ADMINISTRATION SUIT</i> ...	162
—, defective, effect of on appeal. <i>See CIVIL PROCEDURE CODE, s. 435</i> ...	91	—, invalidity of—Grant of probate. <i>See REVOCATION OF PROBATE</i> ...	377, 389
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<b>VYAVASTHA DARPAN, Ch. V, s. 1, para. 144. See LETTERS OF ADMINISTRATION</b> ...	873	—, Will, construction of—Bengali Will—Terms of art—Words of direct and simple gift—Vesting of a bequest, words necessary for— <i>Parjyapta haibek, meaning and effect of—Appointment of guardian with direction to make over gift on legatee attaining majority, effect of—Judges trying a cause consulting another Judge, propriety of—Ex parte hearing—Rehearing, application by Respondent for re-hearing.] In construing Bengali Wills it must be remembered that there is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. The only safe course is to give to the words their plain and ordinary meaning. There are no particular words necessary to the vesting of a bequest or a legacy. The words “Parjyapta haibek” whether it means “descent to” or “devolve or go” or “shall become vested” has the effect of vesting the legacy at once. Where there is a bequest in favour of a person simply it confers a vested interest and the appointment of an executor and</i>	
<b>WAKF. •Wakf-namah •Wakf, validity of—Mutawali, amount to be expended in charitable uses at the discretion of the—Endowment, family—[Charitable uses, gift to.] To be a valid deed of wakf, a deed must have the effect of granting the property in substance to charitable uses. Where its effect is to give the property in substance to the family or leaves the amount to be expended in charitable uses in the absolute and uncontrollable discretion of the mutawali and no one has a right to demand an account, the deed is not a valid deed of wakf: Held—On a consideration of the terms of the deed in question that it did not constitute a valid trust. <i>MST. MUJIB-UN-NISA v. ABDUL RAHIM</i> ...</b>	177		

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—, *Retracted confession, if and when admissible—Admissibility of confession of one person against a co-accused—Corroboration, amount of, necessary—Previous conviction, how proved—Examination of accused to prove such conviction, if proper—Prejudice—Evidence Act (I of 1872), sec. 91—Criminal Procedure Code (Act V of 1898), secs. 310, 342 and 511.* A retracted confession should carry practically no weight as against a person other than the maker; and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. A conviction on an uncorroborated and retracted confession of an accomplice is improper and bad. The accusation made by an accomplice in a confession may be considered against a co-accused if that statement is put in evidence against him, but its evidential value would be of the slightest. Previous convictions should, regard being had to the provisions of sec. 91 of the Evidence Act and sec. 511 of the Code of Criminal Procedure, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous convictions; and an examination of the accused in respect of those convictions is, having regard to sec. 842, Criminal Procedure Code, without legal warrant or justification. *Bisanta Kumar Ghattak v. Queen-Empress*, I. L. R. 26 Cal. 49, referred to. A Sessions Judge is, however, justified, under sec. 310, Criminal Procedure Code, in passing sentence on the accused on an admission by him of previous convictions, and such sentence should not be interfered with unless such irregularity in the enquiry as to previous convictions has prejudiced the accused. *NAZIM v. THE KING-EMPEROR* 670

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s. 79—Warrant, validity of—Endorsement by initials if sufficient—Arrest made in execution of such warrant—Resistance or obstruction to arrest—Penal Code (Act XLV of 1860), secs. 224, 353.] An endorsement in a warrant of arrest should be made properly in accordance with law. When an endorsement is made only by initials which are proved or identified to be of the proper person, the warrant does not become invalid by reason merely of the endorsement being by initials. ABDUL SIKDAN v. MATRU SINGH	447
s. 103—Binding down to keep the peace, order for.] Sec. 166 of the Code of Criminal Procedure may apply to a case in which armed men are assembled with the intention of committing a breach of the peace but no breach of the peace occurs because the assembly does not go so far. <i>See</i> PENAL CODE, ss. 144, 114. SRIHARI SHOME v. LAL KHAN	250
s. 109—Security for good behaviour—"Ostensible means of subsistence," proof of—"Doing no work," if sufficient—"Previous conviction" how far relevant—Procedure.] The fact that a man does no work or that he was once before convicted for bad livelihood does not justify a Magistrate, without being satisfied from evidence that since his release the accused has no ostensible means of livelihood, to order him to furnish security for good behaviour. THE QUEEN-EMPRESS v. ROORAN AGARWALLA	28
s. 110—Magistrate, jurisdiction of, to require security for good behaviour—Residence outside such jurisdiction.] A Magistrate has no jurisdiction to require security for good behaviour under sec. 110, Cr. P. Code, from persons who do not reside within his local jurisdiction but who, it was alleged, habitually committed theft, robbery and house-breaking within such limits. It is only when a person residing within such limits is of such bad repute that a Magistrate is competent to take action under that section. KITABDI v. THE QUEEN-EMPRESS	29
s. 110, cl. (f)—Repute, evidence of, admissibility of.] Evidence of repute is not admissible in cases coming under cl. (f) of sec. 110 of the	

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Code of Criminal Procedure. Where the imputations were that the Petitioners had from some time past made themselves very objectionable in the neighbourhood and that they had been annoying the villagers in various ways, by kicking at their doors at night or throwing brickbats on the roof and annoying respectable women: *Held*—That these imputations, even if proved do not constitute conduct so as to render the Petitioners liable to give security for good behaviour by reason of their being so desperate and dangerous as to render their being at large without security hazardous to the community. **AUKHOY KUMAR CHATTERJEE v. THE QUEEN-EMPRESS** ... 249

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**S. 133—Nuisance, removal of—Proceeding, previous, dropping of, effect of—Magistrate, jurisdiction of, to take fresh proceedings regarding the same matter.]** There is no bar in law to the revival of a proceeding under sec. 133, Cr. P. Code, with regard to the same matter which had been previously dropped, provided there are materials before the Magistrate upon which *prima facie* he could act. The question whether the matter with regard to which proceeding has been instituted does or does not properly come within the purview of sec. 133, Cr. P. Code, must be raised and decided at the trial. **ISHAN CHANDRA CHAKRAVARTI v. PRASANNA KUMAR RAI** ... 173

**S. 133—Public nuisance—Prostitutes, trade and occupation of—Removal of house from road side, order for—"Physical comfort" of the public—Jury, opinion of.]** The mere existence of houses of prostitutes by the road side and the fact that they ply their trade in those houses cannot affect the physical "comfort" of the passers-by. In a proceeding under sec. 133, Cr. P. Code, certain prostitutes were called upon to remove their trade and occupation from the slopes and neighbourhood of a road; they appeared and in shewing cause claimed a jury which was appointed; the jury were of divided opinion and the majority suggested that they should be directed to mend their habits but did not recommend the removal of their houses and the Magistrate made his conditional order of removal of their houses absolute: *Held*—That the order of the Magistrate based upon the report of the jury, was neither reasonable nor legal, and must be set aside. **BASANTA BAISTABI v. THE EMPEROR** ... 566

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**S. 145—Dispute as to possession of lands—Joint possession—Attachment of land and crops—Jurisdiction.]** Where two rival zemindars claimed to hold certain alluvial lands and where it was admitted that they were joint proprietors of Mouza G, but the question also in dispute was whether those lands belonged to Mouza G or to Mouza N, one of the parties claiming that if they belonged to N, he had absolute rights in it, and the Magistrate in a proceeding under sec. 145, Cr. P. Code, passed an order under sec. 146, Cr. P. Code, attaching the lands and also the crops grown upon the lands by the tenants of one of the contending parties: *Held*—That the lands not being in the joint possession of the contending parties the Magistrate had jurisdiction in taking action under sec. 145, Cr. P. Code: *Held also*—That there being no dispute between the tenants *inter se*, the order of the Magistrate as to the attachment of the crops on the land, which belonged to the tenants who grew them, was a bad order for want of jurisdiction and must be set aside. **DEWOMONI CHOWDHURI v. MOZAFAR ALI KHAN** ... 105

**S. 145—Jurisdiction of High Court—Parties, non-joinder of necessary—Object of the law—Breach of the peace, apprehension and prevention of—Magistrate, jurisdiction of.]** Under sec. 145 of the Code of Criminal Procedure a special jurisdiction is vested in the subordinate Criminal Courts under special circumstances and for a special purpose; when either the special circumstances do not exist or when the order made under the section does not attain the purpose for which the jurisdiction is created, then the special jurisdiction vested under the section falls to the ground. The circumstances which give jurisdiction to a Magistrate are circumstances which give rise to an apprehension of a breach of the peace and if there is no apprehension of a breach of the peace, there is no jurisdiction to make an order under the section. In enacting sec. 145, the purpose the legislature had in view was the prevention of a breach of the peace and if that object is not attained by an order purporting to be made under the section, it must be taken to have been without jurisdiction. Non-joinder of persons concerned in a dispute whose presence is necessary for the purpose of preventing an apprehended breach of the peace involves a question of jurisdiction, and the High Court has power to set aside an order made in a proceeding under sec. 145, Cr. P. Code, in which such persons are not made parties. **Laldhari Singh v. Sukhdeo Narain Singh**, 4 C. W. N. 613; s. c. 1 L. R. 27 Cal. 892 referred to and

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followed. *ANESH MOLLAH v. EJAHAH UDDI MOLLAH* ... 428

... s. 145—*Proceeding in respect of several plots of lands—Separate proceedings, if necessary—Prejudice.*] Where a Magistrate drew up one proceeding in respect of several plots of lands claimed to be in the possession of different persons and the parties were not prejudiced by the Magistrate not taking separate proceedings but dealing with the matter in one and the same proceeding; and where the course taken by the Magistrate did not preclude any of the parties from adducing evidence in the case concerning the different plots of land: *Held*—That the procedure taken by the Magistrate did not vitiate the enquiry and the order made therein. *ISWAR CHUNDER CHOWDHURY v. AMBICA CHURN MAZUMDAR* 544

... s. 145—*Dispute as to land—Specification of land, if and when necessary—Civil Court decree for possession—Decree, effect of—Magistrate, duty of—Procedure.*] Although in a proceeding under sec. 145, Cr. P. Code, the disputed land should be thoroughly ascertained by both parties, yet where the parties were not at issue upon the question as to what the disputed lands were and neither the Court nor any body concerned in the dispute was under any misapprehension as to that point, there is no ground for holding that the Magistrate who tried the case had no jurisdiction to make an order under the section for want of proper specification of the lands in dispute. The duty of a Criminal Court in a case under sec. 145, Cr. P. Code, where there is a decree of a Civil Court for possession in respect of the disputed land, is to find which party held such Civil Court decree, and then to maintain that party in possession; it is not necessary that such decree should be a decree for possession as between the parties to the proceeding under sec. 145, Cr. P. Code. *Daulat Koer v. Ramessuri Koeri*, I. L. R. 26 Cal. 625, followed. *S. GORDON SIMS v. JOHURRY LAL* ... 568

... s. 145—*Transfer of case under sec. 145 by District Magistrate to another Magistrate to try it himself or make it over to another—Valid or invalid transfer—Jurisdiction, local—Prejudice—Local inquiry by trying Magistrate.*] In a proceeding under sec. 145, Cr. P. Code, the second party moved the District Magistrate for the transfer of the case to his own file, and the Magistrate transferred it accordingly to the file of the senior Deputy Magistrate at Sudder with instruction to "try it himself or make it over to another Magistrate at Sudder" and the senior Deputy Magistrate made over the case to a Subordinate Magistrate, who tried the case and made an order after holding a local enquiry himself: *Held*

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—That the fact that the subject-matter of the dispute was not within the local jurisdiction of the Subordinate Magistrate who tried the case would not oust his jurisdiction or render him incompetent to try the case, provided that he was vested with the powers of a proper class; and that the order made by him would not, on that account, be bad. Sec. 530 (j) refers to a case where a Magistrate is not competent, by virtue of the position he holds or powers vested in him, to try a case of the character referred to in sec. 145, Cr. P. Code. Sec. 148, Cr. P. Code, does not necessarily imply that the Magistrate before whom the case is, may not himself hold the local enquiry as is provided for in the section. Any mistake made erroneously and in good faith by one Magistrate in transferring a case under sec. 145, Cr. P. Code, to another under sec. 192, is cured by the provisions of sec. 529 (f). *RAJ MOHAN ROY CHOWDHURY v. PROSUNNO CHANDRA CHATTERJEE* ... 686

... s. 145—"Subject-matter of dispute," meaning of—*Whether refers to whole subject-matter or to component parts—Magistrate, jurisdiction of, to make an order under sec. 145 in regard to some and an order under sec. 146 in regard to the remaining plots—Separate and distinct subject-matter—Divisibility of subject-matter—One proceeding in regard to several plots—Irregularity—Prejudice.*] The expression "subject-matter of dispute" used in secs. 145 and 146 of the Code of Criminal Procedure refers to the whole or to any component part or parts thereof. If that component part is distinct and separable from the rest, it cannot rightly be held that because a Magistrate cannot find possession of one of the component parts of the subject-matter in dispute with either party, he is bound to attach the whole, although that component part is distinct and separable from the rest. If the subject-matter in dispute is indivisible and must be dealt with as a whole, it must be dealt with in such a way as to make, in regard to it, one order either under sec. 145 or sec. 146 of the Code, as the circumstances may require. *Katras Jherriah Coal Company v. Shib Krista Daw & Co.*, I. L. R. 22 Cal. 297, explained and distinguished *Rukhal Das Singh and another v. Sheo Pershad Singh*, 24 W. R. Cr. 73, referred to. (*Per TAYLOR, J.*)—That in this case each separate plot may be regarded as a separate subject-matter of dispute and in that case, each separate plot might form a separate, independent proceeding; and the joint trial in one proceeding of several such matters of dispute would at most amount to an irregularity, which in the absence of prejudice shewn, would not vitiate the enquiry. *Iswar Chunder Chowdhury v. Ambica Churn Majumdar*, 5 C. W. N. 544, relied upon. *SADAR ALI v. ABDUL KASIM* 710



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... s. 145—*Dispute as to possession of land—Parties, adding of—Previous proceeding—New proceeding with new parties added, whether can be treated as continuation of previous proceeding—Jurisdiction—Procedure.*] In a proceeding under sec. 145 of the Criminal Procedure Code it is the duty of the Magistrate to find out in the first instance which parties are concerned in the dispute that has arisen, and to serve his order upon such parties and when the matter comes before him for trial, he should determine which of such parties, namely, the parties as mentioned in the first paragraph of sec. 145 of the Code is in actual possession. A Magistrate is entitled to allow a third party to come in in the course of the proceeding only for the purpose of shewing that no dispute likely to cause a breach of the peace really existed or exists. *Query*—Whether such third party should be made a party to the proceeding. A Magistrate has not the power, after recording the proceeding, as he is required to do under the first paragraph of the section, to add, in the course of the investigation, any new party as concerned in the dispute. *Protab Narayan Singh v. Rajendra Narayan Singh*, 1 C. W. N. 3 : s. c. I. L. R. 24 Cal. 55 ; *Janoki Nath Roy v. The Queen-Empress*, 3 C. W. N. 329 ; *Laldhari Singh v. Sukhdeo Narain Singh*, 4 C. W. N. 613 : s. c. I. L. R. 27 Cal. 892, followed. A Magistrate cannot treat a subsequent proceeding as a continuation of an earlier one and he cannot refer back to the possession held by one or other of the parties upon the date of the earlier proceeding in determining which of them should be declared to be in possession on the date of the subsequent proceeding. *BENI SINGH v. UMRAO MAHTO*... 900

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... s. 147—*Construction and meaning of the section—Comparison of the language used in sec. 147 (Act V of 1898), sec. 147 (Act X of 1882) and sec. 532 (Act X of 1872)—Previous law bearing on the subject—Meaning of the terms "such thing shall be done, &c."—Form of the order—Order whether affects persons not parties to the proceedings—Magistrate, power of, to order removal of obstruction to the enjoyment of right of easement—Parties, adding of, in proceeding under sec. 147, Cr. P. C., legality of.*] Where it was found that the first party had a right to the flow of water for purposes of irrigation from a certain channel passing through the village of the second party who obstructed such flow by erecting certain bunds: *Held*—That under sec. 147 of the Criminal Procedure Code

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the Magistrate is competent to direct that the obstruction be removed. A Magistrate is not competent to add parties to a proceeding under sec. 147, Cr. P. C., any more than he is in proceedings under sec. 145 of the Code. That the order of the Deputy Magistrate so far as it purports to affect the persons not parties to the proceedings under sec. 147 is null and void, but that does not render the whole order bad and so far as persons who are parties to the proceedings are concerned it is binding on them. That the finding of the Deputy Magistrate "that the first party have proved an uninterrupted user of water of the channel for twenty years which have they enjoyed as an easement and as of right and that the erection of the bunds led to the dispute" is a sufficient finding that the right in dispute had been exercised within either of the periods mentioned in the proviso to sec. 147, Cr. P. C. *PASUPATI NATH BOSE v. NANDO LAL BOSE* ... 67

... s. 147—*Ease-ment, right of, obstruction to—Right of way, likelihood of breach of the peace concerning—Exercise of right within statutory period—"Such thing shall be done, &c.," meaning of—Order, form of.*] Where one party has a right of way over the land of another who obstructs such right by erecting certain huts and there is a likelihood of a breach of the peace in consequence of such obstruction: *Held*—That a Magistrate is competent, under the provisions of sec. 147, Cr. P. Code, to direct that the obstruction be removed. *Pasupati Nath Bose and anr. v. Nando Lal Bose and anr.*, 5 C. W. N. 67, followed. *LALIT CHANDRA NEOGI v. TARINI PERSEAD GUPTA* 335

... s. 148—*Costs, assessment of, without notice to party affected by the order—Jurisdiction—Revision.*] A Magistrate is not competent to make an order for payment of costs and to assess the same in the absence of and without notice to a party who is, by that order, made liable for the same. *PROKASH CHUNDER SARKAR v. RAMPROSAD PATTUCK* ... 291

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... s. 162. See PENAL CODE, s. 193 ... 65

... s. 164. See CRIMINAL PROCEDURE CODE, s. 526 ... 864

... s. 190—*Cognizance of offence against persons accused but not sent up for trial—Refusal by trying Magistrate to issue processes against such accused persons—Transfer by District Magistrate of case—Warrants, issue of, against accused not sent up—Pending case—Jurisdiction.*] Where several persons were accused of rioting, and only one of the accused was sent up by the Police and convicted of the offence, and the trying

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Magistrate, on application made for summoning the others, refused to summon them, and the District Magistrate transferred the case to his own file and directed the issue of warrants against the accused persons originally charged but not sent up for trial. *Held*—That the order of the trying Magistrate refusing to summon the other accused persons did not finally dispose of the case so as to remove it from his file altogether; and the District Magistrate had ample jurisdiction to transfer the case to his own file under sec. 528 of the Criminal Procedure Code. *Nukheda Singh v. Ripu Mardan Singh*, 4 C. W. N. 239, referred to and followed. That even if the case be treated as not pending in the Court of the trying Magistrate at the date of his order refusing to summon the other accused persons, the District Magistrate had jurisdiction to take cognizance of the case as against the other accused persons under sec. 190 of the Code. *AYEN MAHMAD AKAND v. THE KING-EMPEROR* ... 488

Sec s. 145 ... **s. 192**, sub-sec. 2. 686

... **s. 195**. See PENAL CODE, s. 211 ... 106

... **s. 195**—Sanction to prosecute for bringing a false complaint—Penal Code (Act XLV of 1860), sec. 211—Police-report declaring complaint false—Application for enquiry into the complaint—Complaint—Judicial determination.] An application for an enquiry into their complaint, made by persons in shewing cause why they should not be prosecuted for bringing a complaint declared by the Police to be false is in effect in the nature of a complaint, and a sanction for prosecution for bringing a false complaint cannot be given until and unless that complaint is judicially determined. "Judicial determination" of a complaint does not necessarily mean the trial of the persons against whom the complaint is made but the final determination of the matter of the complaint by the officer holding the enquiry, upon evidence produced before him. *Queen-Empress v. Sham Lal*, I. L. R. 15 Cal. 707, *Sheikh Kutab Ali v. Empress*, 3 C. W. N. 490, followed. *SAHIRAM AGARWALLA AND JIBUN KAMAR* ... 254

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... **s. 205**. See PENAL CODE, ss. 174, 177 ... 181

... **s. 208**. See CRIMINAL PROCEDURE CODE, s. 216 ... 110

... **s. 209**. See CRIMINAL PROCEDURE CODE, s. 436 ... 574

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**s. 215**—Commitment in the absence of accused, whether legal—Witness, examination of, in the absence of accused, if proper—Cross-examination of prosecution witnesses—Postponement, application for, refusal of—Transfer—Credible information of order of stay of proceedings by High Court, procedure on receipt of—Bias—Cancellation of bail and remand to custody on application for time to move for transfer.] It is illegal to make a commitment in the absence of the accused. A Magistrate acts injudiciously in proceeding with a case after he has been credibly informed by a telegram from one of the accused to his Mukhtear that a Rule for the transfer of the case from his file and for stay of further proceedings had been granted by the High Court. *Ratnessari Pershad Narayan Singh & anr. v. Empress*, 2 C. W. N. 498, referred to. It is illegal to examine an additional witness in the absence of the accused; and a Magistrate, by refusing an application for postponement of a case, further proceedings in which have been stayed by an order of the High Court, to enable the accused to cross-examine the witnesses for the prosecution with a view to obtain before commitment, a cancellation of the charges framed against him, and that the Magistrate might receive the orders of the High Court, and by taking such precipitate action in the matter shows his bias against the accused. It is desirable to transfer a case from the file of a Magistrate who on an application made by the accused under sec. 526, cl. (8), for stay of proceedings pending an application to the High Court for transfer, immediately cancelled their bail and committed them to custody. *IN THE MATTER OF SURJYA NARAIN SINGH* ... 110

... **s. 215**—Commitment, quashing of, when may be made—Points of law—Statements made by witnesses—Absence of evidence to go to a jury—Contradictory statements in cross-examination—Penal Code (Act XLV of 1860), sec. 193—False evidence in a judicial Proceeding—High Court, powers of, to quash commitment.] Absence of evidence to warrant a commitment is a point of law and may furnish a good ground for the quashing of a commitment. Under the present Code of Criminal Procedure a Court of Session does not possess the power to withdraw a case from the jury on any ground whatsoever. Where the case is such that the Sessions Judge would, if he possessed the power of withdrawing the case from the jury, exercise that power, the High Court will exercise its powers of revision. *JOGESHWAR GHOSH v. THE KING-EMPEROR* ... 411

... **s. 232**—Under sec. 232 of the Criminal Procedure Code the Appellate Court has power to order a

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new trial of a case in making an order on appeal. *Govind Prasad Panday v. The Empress.* See PENAL CODE, ss. 499, 500 ... 819

234 ... s. 233. See s. 294, 866

234—*Joinder of separate and distinct charges—Offences unconnected with one another—Confession of co-accused pleading guilty—Corroboration—Irregularity—Admissibility of confession of one accused against another on a different charge—Prejudice.*] A was charged with three separate acts of criminal breach of trust as a public servant, under sec. 409, I. P. Code, and B was charged with abetting these particular acts of criminal breach of trust by A and also upon an alternative charge under secs. 411 and 380, I. P. Code, in respect of a document found in his house and entirely unconnected with the acts in respect of which A was charged; both were tried together and A was convicted and sentenced on his plea of guilt and a confession made by A implicating B was used against B; B was convicted and sentenced separately for abetment of the criminal breach of trust by A as also on the alternative charge under secs. 411 and 380, I. P. Code: *Held*—That in the absence of any corroboration of the confession of A relating to the specific acts of criminal breach of trust, B cannot be convicted of abetment of those acts by A. That the finding of the document in the house of B cannot by itself form any such corroboration. That the joint trial of B for the abetment of criminal breach of trust and for offences under secs. 411 and 380, I. P. Code, which were quite unconnected with the acts of criminal breach of trust, was improper and B was prejudiced by such joint-trial by reason of the confession of A having been used and treated as a substantial part of the evidence against him in support of the second charge. *NIKUNJA BEHARY ROY v. THE QUEEN-EMPRESS* ... 294

234—*Joinder of a multitude of charges—Irregularity—Illegality—Trial, illegality in the mode of, if curable—Power of Appellate or Revisional Court to cancel illegality and to appropriate verdict of jury only to what is legal—Functions of Judge and jury.*] Disobedience to the express provision of the law as to the mode of a trial cannot be regarded as a mere irregularity and as such is not curable under sec. 537 of the Code of Criminal Procedure. The joinder, at one trial, of more charges than three for offences of the same kind and extending over a period longer than a year, contravenes sec. 234 of the Code of Criminal Procedure and is an illegality not curable under sec. 537. When the course pursued at the trial was illegal, a Court of Appeal or Revision cannot amend it by

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arranging afterwards what might or might not have been properly submitted to the jury and thereupon support the conviction or appropriate the finding of guilty to so much of it as was legal. Meaning of the word irregularity discussed. *Smurthwaite v. Hannay*, L. R. (1894), A. C. 494, referred to *Abdur Rahman v. The Empress*, 4 C. W. N. 657: s. C. I. L. R. 27 Cal. 489, disapproved. *N. A. SUBRAMANIA v. THE KING-EMPEROR* ... 866

s. 234... s. 235. See ... 294

s. 250—*Compensation for vexatious accusation—Imprisonment in default of payment of compensation—Simultaneous order.*] It is only after an attempt has been made to realize the compensation awarded that a Magistrate is competent to pass an order of imprisonment for default. A simultaneous order of imprisonment in default of payment of compensation is illegal. *PRIYA NATH BOSE v. ROY BASANTA KUMAR SINGH* ... 213

s. 250—*Compensation for frivolous and vexatious accusation, objection against failure to record and consider—Simultaneous order of imprisonment in default of compensation.*] A Magistrate ought to record and consider any objection made and urged by the complainant against the making of an order for compensation for bringing a frivolous and vexatious accusation, and a failure to do so makes the order bad in law. An order of imprisonment in default of payment of compensation cannot, under the terms of sec. 250 of the Code of Criminal Procedure, be made unless and until it is found that the payment of the compensation cannot be enforced by legal process. *SUCHANDI KOLATINI v. DOM KOLITA* ... 214

s. 250—*Compensation for frivolous and vexatious accusation—Information given by a Police constable, whether comes within sec. 250—Complaint.*] Sec. 250 of the Code of Criminal Procedure does not apply to a case instituted on information given by police-officer acting as such. *Ramjeevan v. Durgu Charan*, I. L. R. 21 Cal. 979, followed. *SHEOBARAN OJHA v. NUNMONIA DOSHAD* ... 376

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s. 421.—The law gives to the Appellate Court the power of dismissing summarily an appeal upon going through the judgment, if the Court is satisfied that there is no sufficient reason shown for the interference of the Appellate Court; and the fact that the Appellate Court admitted one Appellant's appeal does not affect the order summarily dismissing another Appellant's appeal. <i>Jagat Chandra Sarma v. Lal Chand Dass.</i> See PENAL CODE, ss. 161, 265...		
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s. 423.—Right of way, interference with—Order for preserving statu quo ante on conviction, if proper—Appellate Court, power of, to set aside such order—Penal Code (Act XLV of 1860), sec. 341—Wrongful restraint.] Where a person blocked up a private way, along which the complainant had a right to go, by raising a wall and was convicted of the offence of wrongful restraint under sec. 341 of the Penal Code and an order was passed by the trying Magistrate directing the accused to remove the obstruction and not to interfere with the complainant's right of way and, on appeal, the Appellate Court set aside the order directing the removal of the obstruction and preventing the accused from interfering with the complainant's right: <i>Held</i> —That the order of removal of the obstruction was a necessary corollary to the previous conviction of the accused and was a proper order. That though an Appellate Court has, under sec. 423 of the Code of Criminal Procedure, the power of making any amendment or any consequential or incidental order that may be just and proper, such Court cannot make an order which would make the entire proceeding infructuous and absurd. That the order of the Appellate Court setting aside the order of removal of obstruction was neither proper nor just. <i>DEBENDRA CHANDRA CHOWDHURY v. MOHINI MOHAN CHOWDHURY</i> ... 432		
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s. 436.—Discharge of accused of an offence triable exclusively by Court of Session—Murder—		

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Commitment made by District Magistrate—"Order him to be committed for trial," meaning of—Magistrate, competency of, to himself commit—Magistrate power of—Evidence of witness partly against and partly in favour of accused—Evidence of witness as to what he heard from deceased—Hearsay evidence—Evidence Act (I of 1878), secs. 6, 8, 11, 14.] Under sec. 436 of the Code of Criminal Procedure the Sessions Judge and the District Magistrate have co-ordinate powers either to order a commitment upon the evidence already taken or to direct a fresh enquiry. <i>Queen-Empress v. Krishnabhat</i> , I. L. R. 10 Bom. 319, referred to it. It is improper to accept a portion of the evidence given by a witness which is in support of the case for the prosecution and to discard or discredit the other portions which go against it; and so far as the accused is concerned, he is entitled to ask the Court to consider all the facts deposed to by that witness and to shew to the Court that his evidence, taken as a whole, is in material contradiction of the evidence of the other witnesses. A statement of a witness as to what he heard from the deceased when it does not relate to the cause of his death or the circumstances of the transaction which resulted in his death is hearsay and is not admissible; they must be proved in the ordinary way, viz., by evidence of a primary character and not by hearsay testimony. <i>THE QUEEN-EMPERESS v. SURENDRA NATH SARKAR</i> ... 574		
s. 437.—Further enquiry—Magistrate, power of, to direct further enquiry into offences some of which formed component parts of an offence of which accused was acquitted—Indian Penal Code (Act XLV of 1860), secs. 147, 323, 342—Rioting, acquittal of—Fresh trial for causing hurt.] Where an accused person was tried on a charge of being a member of an unlawful assembly with the common object of assaulting the complainant but was acquitted of the offence of rioting and subsequent thereto the District Magistrate directed a further enquiry into the offences under secs. 323 and 342, I. P. Code, committed in the same occurrences: <i>Held</i> —That the offence under sec. 323, I. P. Code, being one of the offences which formed the subject of the previous trial, the matter cannot be re-opened until the order of acquittal shall have been set aside. That no order within the terms of sec. 437 Cr. P. Code, having been passed in respect of the offence under sec. 342, I. P. Code, the District Magistrate was not competent to order further enquiry in regard to that offence. <i>JATIRAM ALOM GANBURAH v. RAJ KUMAR UMAR SINGH</i> ... 72		
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s. 439— <i>High Court, power of to deal with accused person not appealing—Conviction, setting aside of, of accused not appealing while dealing with an appeal on behalf of persons appealing.</i> [The High Court has power under sec. 439 of the Code of Criminal Procedure, in a proper case, to deal with the case of accused persons not appealing against their conviction, while considering and trying the appeal preferred by some other persons; and cl. (5) of the section does not in any way affect the jurisdiction vested in the High Court to deal with their case. <i>Broja Rakhai Mozumdar v. The Empress</i> ... 330		
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s. 477—"May commit," meaning of—*Procedure to be observed under the section—Charge, framing of, if essentially and absolutely necessary—Preliminary enquiry, necessity of—Penal Code (Act XLV of 1860), secs. 193, 466, 471—Wilful perjury—Forger—Using a forged document knowing it to be forged.* [Sec. 477 of the Code of Criminal Procedure is an empowering section, and authorises a Court of Session when an offence referred to in sec. 195 of the Code has been committed before it or brought under its notice as mentioned in the section, to charge the offender and to commit or admit to bail and try him upon its own charge. The word "may" in sec. 477 ought not to be read as meaning *must*; there is no warrant for the view that it should be so read. Having regard to the phraseology of the law, if a Court of Session proceeds to take action under sec. 477 of the Code, it must in the first instance frame a charge so as to enable the accused to know the exact nature of the offence he is alleged to have committed; the Court of Session may then either commit the accused for trial before itself upon the charge so framed or admit him to bail for the same purpose. A charge is a precise formulation of the specific accusation made against a person, who is entitled to know its nature at the earliest stage. A preliminary enquiry is only necessary for the purpose of determining whether there is a *prima facie* case against the person accused; it is improper and illegal for a Sessions Judge to have a person arrested and committed to jail in view of

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an enquiry preliminary to commitment before a charge is actually framed or a commitment made. The elements of fraud or dishonesty, as explained in the Penal Code, must be present in the mind of the person accused to bring his act under secs. 466 and 471 of the Penal Code. <i>In the Matter of W. Y. Reilly v. The King-Empress</i> ... 609		609
s. 477— <i>Bail, order for, before commitment—Preliminary enquiry—Charge, framing of, if absolutely necessary—Jurisdiction—Penal Code (Act XLV of 1860), sec. 193—False evidence, giving of.</i> [Sec. 477 of the Code of Criminal Procedure contemplates that there should be a charge upon which the commitment is based; in other words, the person accused of having committed the offence should know the specific nature of the accusation against him so as to be able to answer it. Where an order was made directing a witness to give bail before a Court of Session, and to appear when called upon before such Court to answer charges under sec. 193, I. P. Code, without any reference to the specific false statements alleged to have been made by the witness in the course of a judicial proceeding, it was held that the order could not be regarded as a commitment under sec. 477, Cr. P. Code. Such an order is not warranted by law and is without jurisdiction. <i>Mohim Chander Mozumdar v. The King-Empress</i> 615		615
s. 477— <i>False evidence, giving of—Criminal Procedure Code (Act V of 1898), sec. 477—Security to appear when called upon to answer charges yet to be framed.</i> [There is no warrant in law for an order by a Sessions Judge directing a witness alleged to have given false evidence in a judicial proceeding before him to give security to appear before him when called upon to answer charges yet to be framed under sec. 193 of the Indian Penal Code. <i>Krista Chandra Bhadra v. The King-Empress</i> ... 630		630
s. 477— <i>Commitment to Court of Session for giving false evidence—Preliminary enquiry, if necessary—Sessions Judge, jurisdiction or power of, as a Court of Appeal to order commitment—Difference in procedure between the provisions of sec. 476 and 477—Applicability of the sections—Penal Code (Act XLV of 1860), sec. 193—False evidence, giving of.</i> [Sec. 477 of the Code of Criminal Procedure deals with cases which transpire before the Court of Session itself, and in which the Sessions Judge is in a position to declare, without any further enquiry, that the person against whom action is necessary under that section has in fact committed an offence mentioned in sec. 195, Cr. P. Code. <i>The Queen v. Nomal</i> , 12 W. R. Cr. 69, referred to. Where evidence was given by a witness before a Deputy Magistrate, which was in conflict with the statements of certain other witnesses, and		

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the Deputy Magistrate did not believe the statements of that witness, and the Sessions Judge, on appeal, was inclined to take the same view, and committed that person to take his trial before the Court of Session on a charge of giving false evidence in a judicial proceeding: *Held*—That there was no fact before the Sessions Judge upon which he could come to the conclusion that the offence of giving false evidence had been committed either before him or before the Deputy Magistrate. That the only conclusion to which he could come was that the offence of giving false evidence might have been committed before the Deputy Magistrate and that the case could not be ripe for commitment until a further enquiry was made in the matter and an opportunity given to the person to show that his statements were not untrue to his knowledge. That the section applicable to the facts of the present case was sec 476, and that the commitment of the Petitioner under sec. 477 was illegal. *IN THE MATTER OF UMESH CHANDRA CHAKRAVARTI* ... 630

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... , s. 522—Order for restoration of immoveable property.] The term "criminal force" used in sec 522 of the Code of Criminal Procedure must be understood as defined in sec 350 of the Penal Code and to justify an order for the restoration of possession of immoveable property under sec 522, Cr. P. Code, the dispossession must have been by the actual use of criminal force and not merely by the show of such force. *Ram Chandra Boral v. Jityandria*, 2 C. W. N 305: s. c. I. L. R. 25. Cal. 434, and *Ishan Chandra Kolla v. Dina Nath Bhadak*, 4 C. W. N. 307, followed. See PENAL CODE, ss. 114, 144 ... 250

... , s. 522—Possession, restoration of, of immoveable property—Object and scope of the law—Jurisdiction of Criminal Court.] The object of the provisions of sec. 522 of the Code of Criminal Procedure is to enable the Criminal Court, by a summary order, to restore the state of things which existed at the time of the dispossession by the convicted person or persons, and the Criminal Court cannot go behind the state of affairs at the time of the forcible ejection which led to the criminal prosecution. Sub-sec. (2) of sec. 522 provides that any right or interest which a third party may have in the property cannot be affected and such third party, in the case of eviction under an order under sec. 522, must seek his remedy in the Civil Court. *Narayan Govind v. Visaji*, I. L. R. 23 Bom. 494, referred to and explained. *RAMESWAR MARWARI v. BISWA NATH BANERJEE* ... 874

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... , s. 523—Disposal of property taken by Police as stolen property—Adjudication of theft case if absolutely necessary before order for disposal of property—Stay of proceedings in case—Speedy remedy, whether may justify order made at request of parties—Jurisdiction.] A Magistrate has jurisdiction to make an order under sec. 523 of the Code of Criminal Procedure for disposal of property taken charge of by the Police as stolen property when he considers that an immediate order is necessary to save the property from possible loss or decay before a formal adjudication of the case of theft, specially when the case has broken down by reason of non-prosecution and when both the parties apply to the Magistrate for such an order. *NASIB ALI MOZUMDAR v. RUKHMINI MOHAN ENDA* ... 415

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... , s. 526—Charter Act (24 and 25 Vict., Ch. 104)—Letters Patent, sec. 29—Case under sec. 145, Criminal Procedure Code, transfer of—High Court, power of, to transfer such cases—"Case" and "criminal case," meaning of, as used in the Code, whether co-extensive and interchangeable—Bias, reasonable apprehension of, in an officer trying a case—Absence of real bias—Expediency of transfer—Inconvenience to parties or witnesses—Previous law.] (Per GHOSH, J.)—It is doubtful whether the Legislature meant to confer on the High Court the power by sec. 526 of the Code, of making a transfer of a case other than that in which a person is charged with an offence. The High Court has the power to make an order of transfer of a case under sec. 145 of the Code, which a Magistrate has taken cognizance of, under its general powers of superintendence under sec. 15 of the Charter Act. When by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it is expedient for the ends of justice to transfer the case from his file to that of some other officer competent to try it, though there may not be any actual bias. *Queen-Empress v. Bhairab Chandra Chakraborty*, 2 C. W. N. 85: s. c. I. L. R. 25 Cal. 727, and *Dupeyron v. Driver*, I. L. R. 23 Cal. 495, followed. (Per TAYLOR, J.)—It is doubtful whether the High Court has the power under sec. 526 of the Code to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law. The High Court has

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such power under sec. 29 of the Letters Patent, where the expression "criminal case" appears without the distinction which apparently exists in the Code of Criminal Procedure in respect of cases tried by a Criminal Court as opposed to civil cases. Meaning of "case" and "criminal case" as used in the Code discussed. <i>LOLIT MOHAN MOITRA v. MAHARAJA SURYA KANTA ACHARYA CHOWDHRY</i> ...	749

..., s. 528—*Transfer of pending cases—Magistrate taking part during investigation by Police—Examination of accused by Magistrate preliminary to trial by way of cross-examination.* When a Magistrate was present at a search made by the Police during investigation and in all probability he came to know of some facts in connection with the case, it is expedient that the case should be tried by some other Magistrate. During Police investigation the examination of an accused by a Magistrate by way of cross-examination is improper. (*TAYLOR, J.*)—In the course of Police investigation a Magistrate is entitled to record under sec. 164, C. Cr. P., any voluntary statement made by an accused person, but he is not entitled to examine him in respect of the facts of the case. Sec. 342 of the Code only empowers a Court to examine an accused to explain evidence already recorded. *GYA SINGH v. MOHAMED SOLIMAN* ...

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..., s. 530 (g)—*Summary trial—Complaint disclosing facts constituting offence of a graver nature—Process, issue of, for minor offence, if proper—Procedure—Jurisdiction of Magistrate—Code of Criminal Procedure (Act V of 1898), secs. 268, 530 (g)—Irregularity or illegality—Transfer of a case upon order for retrial, without issuing a rule.* A Magistrate is bound to proceed and regulate his proceedings at the trial as for the offence made up of the facts complained of, if on the examination of the complainant, there is no reason to believe that the complaint is exaggerated or false and process is issued for the attendance of the accused. When a Magistrate deliberately disregards the offence actually complained of, it becomes no question of mere irregularity but his proceedings are absolutely void under the provisions of sec. 530 of the Code of Criminal Procedure. The High Court without issuing a rule directed a transfer of the case to some other Magistrate in ordering retrial. *KAILASH CHUNDER PAL v. JOYNDIPUR* ...

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**Defraud—Intention.** See PENAL CODE, s. 417 ...

**Delusion, mental.** See INSANITY ...

**Discharge of accused person—Rehearing of case by Presidency Magistrate—Presidency Magistrate—Warrant case—Discharge—Rehearing of warrant case after discharge of accused person—Criminal Procedure Code (Act V of 1898), Ch. XXI—Judgment** (*Held by the Full Bench, GHOSH, J., dissenting*)—That a Presidency Magistrate is competent to re-hear a warrant case triable under Ch. XXI of the Code of Criminal Procedure, in which he has discharged the accused person. *Queen-Empress v. Dole Gobind Dass*, 5 C. W. N. 169; *Opoorba Kumar Sett v. Probodh Kumary Dassi*, 1 C. W. N. 49, approved of. *DWARKA NATH MONDUL v. BENI MADHUB BANERJI* ...

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<i>cused and charged with having come upon</i>	
<i>a piece of land with a large number of</i>	
<i>people and committed mischief in respect</i>	
<i>of some indigo crops said to have been</i>	
<i>raised upon it by the complainant's tenants,</i>	
<i>and the accused pleaded that they held</i>	
<i>the land from some time before, and in</i>	
<i>proof put in road-cess return filed by the</i>	
<i>complainant shewing that the accused were,</i>	
<i>at the date the return was filed, in posses-</i>	
<i>sion of a larger plot of the land of which</i>	
<i>they claimed the land in dispute to be a</i>	
<i>part: Held—That the presumption as to</i>	
<i>the possession of the disputed land was in</i>	
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<i>they had held previous possession or that</i>	
<i>they held some other lands in the same</i>	
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<i>Binding down to keep the peace, order for—</i>	
<i>"Criminal force," meaning of—Order for</i>	
<i>restoration of immoveable property.]</i> When	
<i>one person instigates another to join an</i>	
<i>unlawful assembly armed with a deadly</i>	
<i>weapon and afterwards joins the unlawful</i>	
<i>assembly himself, he may be punishable</i>	
<i>under sec. 144, I. P. Code, read with sec.</i>	
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<i>with a deadly weapon. Sec. 106 of the</i>	
<i>Code of Criminal Procedure may apply to</i>	
<i>a case in which armed men are assembled</i>	
<i>with the intention of committing a breach</i>	
<i>of the peace but no breach of the peace</i>	
<i>occurs because the assembly does not go so</i>	
<i>far. The term "criminal force" used in</i>	
<i>sec. 522 of the Code of Criminal Procedure</i>	
<i>must be understood as defined in sec. 350</i>	
<i>of the Penal Code and to justify an order</i>	
<i>for the restoration of possession of im-</i>	
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<i>Code, the dispossession must have been by</i>	
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<i>if lawful.]</i> Refusal to accompany a police-	
<i>officer to the police-office situated at some</i>	
<i>distance not for any purpose of Police duty</i>	
<i>but simply to obtain the authority of ap-</i>	
<i>pointment to serve as special constables</i>	
<i>and the necessary badges and arms does</i>	
<i>not amount to a refusal to serve as special</i>	
<i>constables and it does not constitute an</i>	
<i>offence under sec. 19 of the Police Act. An</i>	
<i>arrest made by a police-officer on such a re-</i>	
<i>fusal is not lawful and any resistance offered</i>	
<i>to such an arrest does not amount to an offence</i>	
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<i>number of men assemble with the common</i>	
<i>object of assaulting or using criminal force</i>	
<i>to police-officers and of resisting any action</i>	
<i>on the part of the Police and an unjustifi-</i>	
<i>able assault takes place in the attempt</i>	
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<i>the section though he may be in entire</i>	

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ignorance of the acts of his agent or manager. (Per RAMPINI and PRATT, JJ.) —An owner of occupier of land is liable for the acts of omission and acts of commission, not only of himself but of his agent or manager; and sec. 154 of the Penal Code makes no distinction between acts of omission and acts of commission on the part of the landlord's agent. The provisions of sec. 154 of the Penal Code are intended to impose on non-resident landholders and their agents the duty of maintaining the public peace and preventing unlawful assemblies and riots on their estates and to render the former liable for any dereliction in the discharge of his duty. *Queen-Empress v. Payag Singh*, I. L. R. 12 All. 550, referred to and followed. *Queen v. Hurnath Roy*, 3 W. R. Cr. 54, *In the matter of Radha Nath Chowdhry*, 7 C. L. R. 289, *Queen v. Surroop Chunder Paul*, 12 W. R. Cr. 75, and *Tarakant Das v. Queen-Empress*, 4 C. W. N. 691, referred to and explained. (Per AMEER ALI, J.)—Sec. 154 of the Penal Code contemplates three different breaches of duty, viz., (a) omission to give notice of, (b) abstention from preventing and (c) negligence to suppress an unlawful assembly or a riot. Penal provisions are to be strictly construed, and liability to punishment for the neglect of a statutory obligation cannot be extended by inferential reasoning. The Penal Code makes a distinction between the commission of a criminal act and the neglect of a duty. There is nothing in the law which makes owners of properties liable for the criminal acts of their agents and servants except on the ground of abetment. It would be straining the law to make an absentee owner of land, who has himself no knowledge of the occurrence, liable for not giving information of the riot that has taken place if his agent takes part in it, and as a rioter, actually taking part in it, does not give notice of it to the Police. It is the agent on the spot who is primarily responsible for the duty of giving notice to the Police, and his failure makes the owner liable for his neglect; but a charge of neglect assumes that the agent is not directly concerned in the commission of the offence; if he is so concerned it ceases to be neglect; it then becomes a substantive crime. *Queen-Empress v. Payag Singh*, I. L. R. 12 All. 550, dissented from. KAZI ZEANUDDIN AHMED v. THE KING-EMPEROR ... 771

—, s. 161—Receiving illegal gratification as a public servant—Gratification received partly on one day and partly on another—Continuous offence—Conviction for separate offences, if proper—Criminal Procedure Code (Act V of 1898), sec. 421—Summary dismissal of appeal of accused, legality of, on admission of appeal of co-accused.] Where a certain sum of money is paid to a public servant as illegal gratification on one day and a certain sum on another day for the same purpose, the

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offence of receiving illegal gratification becomes a continuous offence and there ought not to be separate convictions for offences under secs. 161 and 165 of the Penal Code for the same offence. The law gives to the Appellate Court the power of dismissing summarily an appeal upon going through the judgment, if the Court is satisfied that there is no sufficient reason shown for the interference of the Appellate Court; and the fact that the Appellate Court admitted one Appellant's appeal does not affect the order summarily dismissing another Appellant's appeal. JAGAT CHANDRA SARMA v. LAL CHAND DAS ... 332

—, s. 165. See s. 161 ... 332

—, s. 174—Land Acquisition Act (I of 1894), secs. 9, 10—Code of Criminal Procedure (Act V of 1898), sec. 205—Giving false information to a public servant, whether non-furnishing of correct statements as to names and interests of persons, amounts to—Contempt of Court, whether non-attendance in Court in obedience of summons to attend Court, amounts to—Notice to persons interested in lands of intention of Government to take lands for public purposes—Joint trial.] A Deputy Collector made a complaint against the lessor and the lessee of some lands taken up under the Land Acquisition Act that they had given false information in certain written statements that they made to the Collector in response to a call from him under sec. 9 of the Land Acquisition Act (I of 1894), but did not put in either with his written complaint or at the time of his examination by the Magistrate before whom he made the complaint, the written statements upon which he desired to proceed, and the Magistrate issued processes for the attendance of the accused to answer a charge under sec. 177, I. P. Code, and sec. 10 of the Land Acquisition Act; on the day fixed for trial the lessee appeared, and appearance was made on behalf of the lessor by his mukhtear who asked the Magistrate under sec. 205 of the Code of Criminal Procedure to dispense with the personal attendance of that accused, which the Magistrate refused to accede to, and called upon him to show cause why he should not be prosecuted for contempt of Court under sec. 174, I. P. Code: *Held*—That in the absence of the written statements on which the proceedings were founded and in the absence of any reference as to the particular statement or statements on which the accusation was made, the Magistrate should not have issued processes against the accused, and that his action in the matter was without proper discretion, and that the complaint is bad and should not be allowed to proceed in its present form. That the lessor accused having made an appearance, though not a personal appearance on service of summons, and his having moved the Superior Courts against the proceedings of the Magistrate

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should not have been regarded as an offence under sec. 174 of the Penal Code, and that the Magistrate's proceedings were misconceived and that they should cease. That the proceedings in the civil case being still before the High Court in respect of the lessee, no prosecution should be taken before the Magistrate until at least the final orders of the High Court shall have been obtained. That the offence, if any, committed by each of the accused distinct and separate offence and tried separately. DURGADA F  
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—, s. 177. See s. 174 ... 131

—, s. 182. See s. 211 ... 727

—, s. 183. See WARRANT, VALIDITY  
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—, s. 184. See WARRANT, VALIDITY  
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—, s. 188—Disobedience of an order of a public servant lawfully promulgated—Order under sec. 144, Cr. P. Code, interfering with the exercise of private rights of individuals, if lawful—Magistrate, jurisdiction of, to pass such orders.] If a Magistrate apprehends a breach of the peace he can restrain temporarily the exercise by any private person of his lawful rights to prevent such breach of the peace, by making an order under sec. 144, Cr. P. Code; and disobedience to such an order amounts to an offence under sec. 184, I. P. Code. *Byamtram Shaha Roy*, 10 B. L. R. 448, followed. *TEKAIT KUNJ BEHARI NARAIN DEO v. BHIKO SINGH* ... 829

—, s. 193—Evidence Act (I of 1872), sec. 35—Intentionally giving false evidence in a judicial proceeding—Statement of a witness made to a police-officer in the course of an investigation, admissibility of—Code of Criminal Procedure (Act V of 1898), sec. 162—Statement made to a Magistrate making an enquiry—Judicial proceeding.] Statement of a witness to a police-officer under the provisions of sec. 162, Cr. P. Code, though reduced into writing is not a public or official document and the writing in question cannot be used as evidence in any proceeding to prove that the statements contained therein were in fact made, there being nothing in sec. 162, Cr. P. Code, which limits the prohibition of the use of such a document as evidence only in the matter of the charge which is actually under investigation. Such a document is not a "record" within the meaning of sec. 35 of the Indian Evidence Act and the document in question is not therefore admissible in evidence under the provisions of that section. It is irregular in a charge of intentionally giving false evidence to put the whole of a long statement bodily to a witness at once, and in such a case no conviction can properly be had except on proof that the accused person had made to

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the police-officer each and every one of the statements contained in the document. *ISAB MANDAL v. THE QUEEN-EMPRESS* ... 65

—, s. 193 See CRIMINAL PROCEDURE CODE, s. 215... 411

—, s. 193. See CRIMINAL PROCEDURE CODE, 477 ... 609, 615, 680

—, s. 206—Fraudulent removal of property to prevent its seizure in execution of a decree—Removal of crops under attachment in execution of a certificate under Public Demands Recovery Act—Certificate officer, whether a Court of Justice—Sanction, want of—Failure of justice—Irregularity—Public Demands Recovery Act (I of 1895, B. C.)—Criminal Procedure Code (Act V of 1898), sec. 537.] A certificate issued under the Public Demands Recovery Act (I of 1895, B. C.) has the force and effect of a decree of a Civil Court, as regards the remedies for enforcing the same, and money due under such certificate must be regarded as money due under a decree of a Civil Court; and a removal of crops under attachment in execution of such a certificate amounts to an offence punishable under sec. 206 of the Penal Code. Sanction for a prosecution should be given before a Magistrate can take cognizance of an offence under sec. 206, I. P. Code; but unless the want of such sanction, in fact, occasions a failure of justice, a conviction cannot be regarded as bad only on that account. *SUNDAR DOSADH v. SITAL MAHTO*... 291

—, s. 211—Code of Criminal Procedure (Act V of 1898), sec. 4 (b), 195, 476—Giving false information to Police of an offence, order for prosecution for—"Complaint," meaning of—Judicial proceeding—Jurisdiction of Magistrate—Procedure.] Where upon a police-report that a complaint is false, the complainant is called upon to show cause why he should not be prosecuted under sec. 211, I. P. Code, he appears, and the Magistrate examines him and his witnesses, and upon that evidence come to the conclusion that the charge is false, he can then proceed under sec. 476 of the Code of Criminal Procedure and direct a prosecution. *Mouli Durzi v. Naurangi Lall*, 4 C. W. N. 55, distinguished. The Magistrate does not exercise a proper discretion, who on receipt of a police-report that the complaint is false forthwith orders the complainant to be prosecuted under sec. 211, I. P. Code. The complainant should be given a reasonable time and full opportunity to prove his case before sanction is given for his prosecution. The presentation of a petition by the complainant that his complaint should be enquired into is in effect a complaint within the meaning of sec. 4, cl. (A), and the Magistrate is bound to hold a full judicial enquiry into the matter before proceeding further. *LALI GOPE v. GIRIDHARI CHAUDHURI* ... 106

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... s. 211. See CRIMINAL PROCEDURE CODE, s. 195...	254
... s. 211—False charge to Police of cognizable offence—False information to public servant with intent to use his lawful power to the injury of another—Charge partly true and partly false—Charge if maintainable—Reference by Presidency Magistrate—Criminal Procedure Code (Act V of 1898), sec. 432.] When a false charge is made to the Police of a cognizable offence, the offence committed by the person making the false charge falls within the meaning of sec. 211 of the Penal Code and not sec. 182. <i>Karim Buksh v. Queen-Empress</i> , I. L. R. 17 Cal. 574, followed. Sec. 211 of the Penal Code contemplates a charge which is indivisible in its nature; to judge whether a complaint, part of which is true and part of which is false, falls under the section, the nature of the complaint or charge made by the accused has to be considered; in other words, whether the complaint is substantially true or whether it is substantially false; no precise rule or principle can be laid down in respect of the question and each case must depend upon its own circumstances. <i>GIRJIDHARI NAIK v. THE EMPRESS</i> ...	727
... s. 224—Arrest for cognizable offences—Escape from lawful custody—"Any such offence," meaning of.] The words "for any such offence," in sec. 224 of the Penal Code, mean for any such offence with which a person is charged or of which he has been convicted. It is an offence for a person to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence. If a person is lawfully arrested the subsequent detention of that person is also lawful, even if he may not be convicted of the offence for which he was arrested. <i>Ganga Churn Singh v. Queen-Empress</i> , I. L. R. 21 Cal. 387, distinguished. <i>DRO SHAHAI LAL v. THE QUEEN-EMPRESS</i> ...	289
... s. 224. See CRIMINAL PROCEDURE CODE, s. 79 ...	447
... s. 225B—Resistance to execution of warrant—Obstruction to public servant in execution of duty—Warrant, validity of—Warrant with incorrect description—Onus of proof—Criminal Procedure Code (Act V of 1898), sec. 75.] In order to have a conviction for illegal disobedience of a warrant, it is for the prosecution to shew that the accused is the person against whom the warrant was issued or in other words, that he satisfied the description of the person against whom it was issued and not on the accused to shew that he was not the person. It is illegal to convict a person under secs. 225B and 353 of the Penal Code when the warrant attempted to be executed was addressed to the person with a wrong description to which the accused did not answer. <i>DEBI SINGH v. THE QUEEN-EMPRESS</i> ...	413

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... s. 225B—Assaulting a public officer in execution of his duties—Resisting or obstructing public officer in discharge of his duties as such—Warrant, execution of, by person not authorised—Warrant of arrest, issue of, in execution of a Civil Court decree—Notification of contents of warrant, if necessary—Lawful arrest.] To make an arrest under a warrant issued in execution of a Civil Court decree valid it may not be necessary to shew the warrant to the person to be arrested, but it is the duty of the bailiff to acquaint the person with the contents of the warrant at the time he arrests him and that he was authorised to arrest him, and if the accused then wants to see the warrant it would be the duty of the bailiff to shew it to him. When a warrant is not shewn to the person arrested nor are the contents of the warrant notified to him, before or at the time of the arrest, there is no lawful arrest. <i>IN THE MATTER OF RAJANI KANTO PAL v. THE EMPEROR</i> ...	843
... s. 290. See s. 447 ...	567
... s. 300, Excp. (i). See s. 304 ...	708
... s. 302. See INSANITY, PLA OF ...	665
... s. 302. See PENAL CODE, s. 304 ...	708
... s. 304—Murder—Culpable homicide not amounting to murder—Provocation, grave and sudden—Provocation, continuing to influence feelings.] Where the accused found a man entering his house at night at the invitation of his wife with whom that man had criminal intimacy and being enraged, caught hold of him and took him outside the house to some distance and there assaulted him so severely that he subsequently died of the injuries received; <i>Held</i> —That the circumstances under which the deceased was found in the house of the accused on the night of the crime were sufficient to cause grave and sudden provocation to the accused and his relations. That the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period after the deceased was caught in the house in the company of the wife of the accused. <i>ABALU DAS v. THE EMPRESS</i> ...	708
... s. 333. See CRIMINAL PROCEDURE CODE, s. 437 ...	72
... s. 335. See CRIMINAL PROCEDURE CODE, s. 79 ...	447
... s. 336—Rash and negligent act likely to endanger human life or personal safety of others—Swinging by hooks inserted in the flesh—License to conduct swinging on a Hindu festive occasion—Swinging by means of cloth attached to the swinging apparatus.] A person, having a license to conduct the swinging during <i>charak puja</i> , a Hindu festival, does not, by allowing persons, in his absence, to swing by hooks inserted in the flesh, instead of by being attached to the poles, by cloth, tender him-	

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- self liable for an offence under sec. 386, I. P. Code, unless it is shewn that he knew of it. *GOPINATH MATHO v. MANSARAM KOOMAR* ... 876
- , s. 341—*Erecting a fence over a way—Obstruction to public pathway—Decree of Civil Court—Maps and plans depicting way—Unlawful assembly—Wrongful restraint—Magistrate, duty of, to maintain decrees of Civil Court—Rule, enlargement of, at the hearing.*] In deciding whether a person, accused of wrongful restraint by erecting a fence over a way had, as he alleged, obtained a decree of the Civil Court with regard to that particular way, a Magistrate should, instead of obtaining evidence to modify or question a decree passed by the Civil Court declaring rights of parties, confine his attention to observing or enforcing the terms of the decree of the Civil Court. *RASH MOHAN PAL v. MOHIM CHANDRA CHAKRAVARTY* ... 215
- , s. 341. See CRIMINAL PROCEDURE CODE, s. 423 ... 482
- , s. 342. See CRIMINAL PROCEDURE CODE, s. 437 ... 72
- , s. 350. See CRIMINAL PROCEDURE CODE, s. 522 ... 250
- , s. 353. See PENAL CODE, ss. 147, 149 ... 134
- , s. 353. See s. 225B ... 413
- , s. 353. See s. 225B ... 843
- , s. 379. See s. 147 ... 31
- , s. 379—Theft—Sentence. See REFORMATORY SCHOOLS ACT, ss. 8, 16 210, 211
- , s. 390—*Dacoity—Hurt caused to persons not for the purpose of committing theft—Robbery—"For that end," meaning of—Splitting up of graver offence into smaller offences, in order to give himself jurisdiction.*] It is not open to a Magistrate to split up a graver offence into a number of smaller offences which, when combined, constitute that offence, in order to give himself jurisdiction. When hurt or fear of instant hurt is caused by five or more persons for the purpose of dispossessing persons already in possession of some premises and has no relation to the commission of theft, although theft may have been committed at the same time as a perfectly independent act, it does not amount to robbery as defined in sec. 390, I. P. Code. *OTARUDDI MANJHI v. KAFIL-UDDI MANJHI* ... 372
- , s. 391. See s. 390 ... 372
- , s. 406—*Court of Wards, servants of, prosecution of, by proprietor of estate on assuming management—Criminal breach of trust.*] The owner of an estate on assuming management thereof is competent to prosecute a servant of the Court of

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- Wards for criminal breach of trust committed during the management of the estate by the Court. *TARAK NATH NUNDY v. GOBINDA CHANDRA MITRA* ... 248
- , s. 417—*Cheating—Including an article in a bill not supplied—Payment of the bill in part—Intention to defraud.*] The fact that a trader in a statement of his account included amongst other articles delivered, an article, which the complainant alleged she had returned, does not amount to cheating unless it is proved that he had intentionally done so with an intention to defraud and had obtained a payment of the whole bill or of the bill in part including the price of that article. *BAIJ NATH RAM MARWARI v. BURGESS* ... 255
- , s. 422—*Dishonestly or fraudulently preventing debt being available for creditors—Application to withdraw money paid into Court—Breach of civil contract—Security for payment of debt not endangered—Fraudulent or dishonest intention.*] Petitioners' estate was under mortgage and in the management of certain persons under certain conditions as to payment of moneys realised by them. In execution of a decree obtained by the managers in a suit brought by them in the name of the Petitioners, a certain under-tenure was sold for Rs. Rs. 3,000. The judgment-debtor arranged with the Pretiousers that on payment of Rs. 1,000, the sale should be set aside and he accordingly paid that sum into Court, and an application was made by the Petitioners to draw out the money upon which no order was made. They were thereupon convicted, at the instance of the managers, of an attempt to commit an offence under sec. 422, I. P. C.: *Held*—That the application to obtain the money paid into Court might have been a breach of their contract with the mortgagors but such conduct cannot necessarily be regarded as dishonest or fraudulent so as to render the Petitioners liable to punishment, their attempt to get the money being "more to put an end to the management than to prevent the money from being available to the payment of their debt under the mortgage. *Nob'n Chunder Mudduck*, 22 W. R. Cr. 46, referred to. *HARA KUMARI CHAUDHURANI v. MR. SAVI* ... 174
- , s. 447—*Public nuisance—Criminal trespass—Conviction on a charge not called upon to meet.*] When the accused was called upon to answer a charge under sec. 447, I. P. C., and convicted under that section as also under sec. 290, I. P. C., and on appeal the Sessions Judge was of opinion that the conviction could not be maintained under sec. 447, but that sec. 290 was wide enough to cover the act: *Held*—That as the accused was not called upon to meet the charge under sec. 290, I. P. C., and had no opportunity to give evidence in rebuttal thereof, the conviction could not stand. *IN THE MATTER OF CHINIBAR PAL* ... 567



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—, s. 486. See CRIMINAL PROCEDURE CODE, s. 477	609, 615	or knowing or having reason to believe that such imputation will harm the reputation of such person Under sec. 282 of the Criminal Procedure Code the Appellate Court has power to order a new trial of a case in making an order on appeal. <i>Quare</i> —Whether an Appellate Court has power under sec. 423 (b) to order a new trial. GOVIND PRASAD PANDAY v. THE EMPRESS	819
—, s. 487. See PENAL CODE, s. 471	897	—, s. 511. See s. 422	174
—, s. 471. See CRIMINAL PROCEDURE CODE, s. 477	609, 615	<b>Perjury.</b> See PENAL CODE, s. 193 AND CRIMINAL PROCEDURE CODE, s. 477	609
—, s. 41. See PENAL CODE, s. 800	819	<b>Plaint,</b> statement made in—Defamation. See PENAL CODE, s. 500	293
—, s. 471— <i>Forgery</i> —Using a forged document knowing it to be forged—"Fraudulently" and "dishonestly," meaning of—"False document"—Suit upon a bond for enforcement of payment—Absence of intention to cause wrongful loss if any defence—Intention to deceive.] Intention to cause wrongful loss to another and a deception, actual or intended, are not the necessary ingredients of the intent to defraud. There is a real distinction between the meaning of the terms "fraudulently" and "dishonestly" as used in the Penal Code; the former denotes an intention to deceive. The production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced, though may not be dishonest within the meaning of sec. 24 of the Penal Code, may yet be fraudulent within the meaning of sec. 471 of the Code. <i>Queen-Empress v. Abbas Ali</i> , 1 C. W. N. 255; s. c. I. L. R. 25 Cal. 512, <i>Lalit Mohan Sarkar v. Queen-Empress</i> , I. L. R. 22 Cal. 313, <i>In re Dhunoo Kazei</i> , I. L. R. 9 Cal. 53, referred to. <i>Queen-Empress v. Sheo Doyal</i> , I. L. R. 7 All. 459, dissented from. <i>KEDAR NATH CHATTERJEE v. THE KING-EMPEROR</i>	897	<b>Pleader,</b> misconduct of, See LEGAL PRACTITIONERS ACT, ss. 13, 14	45, 48
—, s. 499. See s. 500	819	<b>Pleadings,</b> statements of parties in, if privileged. See PENAL CODE, s. 500	293
—, s. 500— <i>Defamation</i> —Statement made in a plaint—Pleadings, statement of parties in, if privileged—Parties and witnesses, distinction between statements made by.] Statements made by parties to the suit in the pleadings are not privileged and a charge for defamation is maintainable in respect of them. <i>Angoda Ram Shaha v. Nemai Chand Shaha</i> , I. L. R. 23 Cal. 867, followed. <i>Nathji Muleshwar v. Lalbhai Ravidut</i> , I. L. R. 14 Bom. 97, dissented from. <i>KALI NATH GUPTA v. GOBINDA CHANDRA BASU</i>	293	<b>Police Act (V of 1861),</b> secs. 17, 19. See PENAL CODE, ss. 147, 149, 353	134
—, s. 500— <i>Defamation</i> —Dishonestly using a forged document, charge for—Conviction for defamation when no charge framed for such an offence—Irregularity—Prejudice—Criminal Procedure Code (Act V of 1898), secs. 232, 423 (b), 423 (2)—New trial, power of Appellate Court to order—Stay of further proceedings.] To constitute an offence of defamation it is not necessary that there should be evidence to show that the complainant has been injuriously affected by such alleged defamation; it is sufficient that there should be an intent that the person who makes or publishes any imputation should do so intending to harm		<b>Possession,</b> joint—Dispute about land. See CRIMINAL PROCEDURE CODE, s. 145	105
		—, Summary finding of, by Magistrate in proceeding under sec. 145, if legal—Code of Criminal Procedure (Act V of 1898), secs. 145, 438—Summary finding of possession by Magistrate in proceeding under sec. 145—Written statement in such proceeding, proof of—Warrant, issue of, for attendance of parties, legality of—Sessions Judge, power of, on application for redress of irregularity under sec. 145, to report to High Court under sec. 438, C. Cr. P., for orders.] In a case under sec. 145 of the Code of Criminal Procedure a Magistrate cannot on the failure of one party to file a written statement, summarily pass an order declaring possession with the party who has filed a written statement without taking evidence in proof of such statement. He has no jurisdiction to issue a warrant to compel the attendance of a party in such proceeding. On application to the Sessions Judge for redress against such illegality he should report the matter under sec. 438 of the Code for orders of the High Court, if he is of opinion that the order is illegal and without jurisdiction. <i>KEFATULLAH v. FERUZUDDIN MIAH</i>	71
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# THE CALCUTTA WEEKLY NOTES.

## REPORTS.

### PRIVY COUNCIL.

[ON APPEAL FROM OUDH.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD LINDLEY.

SIR RICHARD COUCH.

SIR HENRY DE VILLIERS,  
1900.

. 21, July.

HODGES & ANR.,  
v.

THE DELHI AND  
LONDON BANK,  
LIMITED.

*Surety—Time given to principal debtor—*  
*Quasi purdanashin, position of—Purdanashin*  
*—Plea by executant of a document that he*  
*did not read or understand its contents—*  
*Contract Act (IX of 1872), sec. 135—Mis-*  
*joinder of Appellants.*

*It is irregular for persons with different*  
*defences to a suit and with different reasons*  
*for appeal to join in a single appeal.*

*A surety can contract himself out of the*  
*rule which exonerates him from liability*  
*if time be given by the creditor to the*  
*principal debtor.*

*Where a surety alleged that he signed the*  
*bond without reading it and that he was not*  
*given to understand that he was contracting*  
*himself out of the ordinary rule :*

*Held—That people who induce others to*  
*advance money on the faith of their under-*  
*takings cannot escape from their plain*  
*effect on such plea. It requires a clear case*  
*of misleading to succeed on such a plea.*

*A quasi purdanashin woman, i.e., a*  
*woman who, not being of the purdanashin*  
*class, is yet close to them in kinship and*

*habits and secluded from ordinary social*  
*intercourse, is not entitled to the same*  
*amount of protection which the law gives*  
*to purdanashins. Outside the latter class*  
*it must depend in each case on the charac-*  
*ter and position of the individual woman*  
*whether those who deal with her are or are*  
*not bound to take special precautions that*  
*her action shall be intelligent and volun-*  
*tary and to prove that it was so in case of*  
*dispute.*

The facts of the case were as follows :—

The suit was brought on a loan transaction by the Respondent Bank against five Defendants of whom two, Colonel and Mrs. Oldham, made no defence, and E. W. Hodges was discharged from the suit at an early stage of the proceedings on a preliminary ground.

The remaining Defendants were the Appellants, one of their main objections to the suit being that they were released as sureties by the fact that the Bank had given time to the principal debtor. The first Court, the Civil Judge of Lucknow (Mr. Mahomed Rafique) considered that they were released, the Court of the Judicial Commissioner which decided in Respondents' favour held that the sureties had not been released.

Robert Hodges was tutor to the Raja of Kapurthala and afterwards magistrate of that place. On 5th December 1838 he married a native lady of Kashmir, named Piyari Phande Khanum, by whom

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he had five children, among them being the Appellant Hodges and the Defendant E. W. Hodges who had been discharged from the suit and Matilda Helen Oldham, wife of Major Arthur Oldham. The said Kashmiri lady after her marriage took the name of Katherine Hodges. She remained in dress and religion a Mussalmani. Robert Hodges was killed in the Mutiny at Delhi. He left a Will made in 1845. On his death there were five children of whom the eldest son died in 1865. The eldest daughter Henrietta married in 1859 Raja Randhir Singh of Kapurthala and has no concern in the present suit. The second daughter married the 2nd Defendant Col. Arthur Oldham in 1865 and her mother resided with her from then (October 1865) until her death.

Col. Oldham was in 1865 in debt to the extent of some Rs. 10,000. In January 1886 he was much pressed for money and saw Mr. Langdon, the Delhi Bank manager of the Bank's branch at Lucknow, proposing that an advance should be made to him of Rs. 14,000. Correspondence followed and Major Oldham offered as securities his wife's mother and Captain Craster of his regiment (the 2nd Appellant). In answer the Bank wrote to say that "if Mrs. Hodges would give the Bank a lien on her property to cover the amount there would be no difficulty."

On 29th January 1886 three documents were executed for securing a loan by the Bank to Col. Oldham. The first was an indenture between Col. Oldham of the first part, Mrs. Katherine Hodges and Captain Craster, who was in the same regiment (the 12th Native Infantry) as Col. Oldham of the second part, and the Bank of the third part, by which, after

reciting that the Bank had advanced Rs. 4,500 to Oldham, it was witnessed that the three parties jointly and severally covenanted with the Bank that Oldham should pay the principal and interest and the premiums on a life policy by monthly instalments of Rs. 300 beginning on 10th March next, the whole amount to be recoverable on failure to pay any instalment. The last clause of the deed on which principally the question in this litigation arose is as follows:—

"And it is hereby also agreed and declared that although as between the said Arthur Oldham and the said K. Hodges and J. C. B. Craster the said K. Hodges and J. C. B. Craster are to be considered as sureties only for the said Arthur Oldham, yet as between the said K. Hodges, J. C. B. Craster and the said Bank, the said K. Hodges and J. C. B. Craster, are to be considered as principal debtors to the said Bank so that the said K. Hodges and J. C. B. Craster, their heirs, executors, administrators, or either of them shall not be discharged or exonerated by any dealings between the said Arthur Oldham, his heirs, executors or administrators and the said Bank, whereby the said K. Hodges and J. C. B. Craster as sureties only for the said Arthur Oldham would have been so discharged or exonerated."

The second of the three documents was a letter written by Mrs. Hodges to the Bank. It stated that she handed to the Bank certain certificates for shares in other banks with a power-of-attorney to enable the Bank to sell them. The third document was the power-of-attorney mentioned in the letter.

Mrs. Hodges died on 8th June 1886.



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The Appellant, Robert Hodges, was her administrator. In September 1886 Col. Oldham failed to pay the instalment due to the Bank. He applied for delay but was informed that the consent of the sureties must be obtained. Craster consented but as there was then no representative to Mrs. Hodges' estate no consent could be given on her part. On the 26th July Mrs. Oldham, wife of Col. Oldham, executed a bond charging her interest under her father's Will in consideration of the forbearance of the Bank from suing Oldham Hodges and Craster until 1st May 1898.

In the present suit instituted by the Bank in 2nd May 1898 to obtain payment from the parties personally liable and from the estate of Mrs. Hodges the important issues raised on the pleadings of the parties were :—

(1) That Mrs. Hodges, a *quasi purdahshin* lady, was quite unable to understand the three documents in question about which she had not independent advice and which were not explained to her and that the Bank had given time to the principal creditor whereby the sureties were discharged.

*Sir W. Rattigan, Q. C., and Mr. Degruyther* for the Appellant R. N. Hodges.

*Mr. A. J. Ashton* for Captain Craster.

*Mr. Arthur Cohen, Q. C., and Mr. Mayne* for the Bank.

THEIR LORDSHIPS' JUDGMENT was delivered by

**LORD HOEHOUSE.**—The Appellants in this case were Defendants in the suit brought by the Respondent Bank. They had different defences and their reasons

in support of the appeal are different. For Defendants so situated to join in a single appeal is an irregular proceeding and might easily result in inconvenient consequences. But they have been allowed to lodge separate cases and their Lordships have heard them by separate counsel; and as matters turn out the misjoinder in appeal will not cause any embarrassment.

On 29th January 1886 three documents were executed for the purpose of securing a loan made by the Bank to Colonel, then Major, Oldham of the 12th Native Infantry, then quartered at Lucknow. The first is an indenture made between Colonel Oldham of the 1st part, Katherine Hodges, widow, of Loodhiana and the Defendant Captain Craster then a Lieutenant in the same regiment of infantry of the 2nd part, and the Bank of the 3rd part. After reciting that Rs. 4,500 had at the request of the other three parties been advanced by the Bank to Oldham upon an agreement for repayment as thereafter provided, it is witnessed that the three parties jointly and severally covenant with the Bank that Oldham shall pay the principal and interest and the premiums on a life policy by monthly instalments of Rs. 300 beginning on the 10th March next; the whole amount to be recoverable on failure to pay any instalment. The last clause of the deed runs as follows :—

"And it is hereby also agreed and declared, that although as between the said Arthur Oldham and the said K. Hodges and J. C. B. Craster, the said K. Hodges and J. C. B. Craster are to be considered as sureties only for the said Arthur Oldham, yet as between the said K. Hodges, J. C. B. Craster, and the said Bank, the said K. Hodges, and J. C. B. Craster are to be considered as principal debtors to the said Bank, so

## HODGES v. THE DELHI AND LONDON BANK, LIMITED.

that the said K. Hodges and J. C. B. Craster, their heirs, executors or administrators, or either of them shall not be discharged or exonerated by any dealings between the said Arthur Oldham, his heirs, executors or administrators and the said Bank, whereby the said K. Hodges and J. C. B. Craster as sureties only for the said Arthur Oldham would have been so discharged or exonerated."

The second of the three documents is a letter written by Mrs. Hodges to the Bank. It states that she hands to the Bank certain certificates for shares in other banks with a power-of-attorney to enable the Bank to sell them. In the event of her loan account with the Bank (joint and several with Oldham and Craster) becoming out of order by infringement of any of the conditions of the bond securing it, the Bank may sell for the credit of the Loan Account. The third document is the power-of-attorney mentioned in the letter.

On 8th June 1886 Mrs. Hodges died, and the Appellant Robert Hodges is her administrator. In September 1886 Colonel Oldham failed to pay the instalment due to the Bank. He applied for delay, but was informed by the Bank that it could not be granted without the consent of his sureties. Craster consented to a delay of four months, but no consent could be given on the part of Mrs. Hodges' estate to which no representative had then been appointed.

After this much time was consumed in applications by the Bank for payment and proposals on the part of Oldham for delay. On the 26th July 1888 Mrs. Oldham, wife of the Colonel, executed a bond whereby she charged her interest under her father's Will in consideration of the forbearance of the Bank from suing Oldham, Hodges, and Craster till

the 1st May 1889. This suit was brought on 2nd May 1889 to obtain payment from the parties personally liable and from the estate of Mrs. Hodges.

The defences raised by Robert Hodges which are now material are these: First he says that Mrs. Hodges was a *quasi purdanashin* lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question; which were not explained to her, and on which she had no independent advice. Secondly he says that her execution of the instruments was obtained by undue influence and misrepresentation on the part of Colonel and Mrs. Oldham. Thirdly that the Bank had given time to the principal debtor and had thereby discharged the surety.

The fourth and fifth issues stated by the first Court were as follows:—

"4. Was Katherine Hodges a *quasi purdanashin* lady and uneducated?"

"5. Did Katherine Hodges execute and understand the documents alleged to have been executed by her?"

The first Court answered the fourth issue in the negative (Rec. p. 267). On the fifth issue the learned Judge thought that Mrs. Oldham explained the deeds to Mrs. Hodges, and he says it is apparent that Mrs. Hodges was not a person to sign deeds without first knowing what they contained. He therefore answered the fifth issue in the affirmative. But this latter finding must be taken as qualified by a subsequent part of his judgment.

It will be convenient here to state the position and character of Mrs. Hodges. The main features are summed up shortly in the judgment delivered by one of

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the learned Judges in the Judicial Commissioner's Court :—

"Mrs. Hodges was by birth a Kashmiri, sister of a well-known Kashmiri gentleman, a political pensioner. Mr. Hodges was employed in the Kapurthala estate and died during the Mutiny. Mrs. Hodges continued to live in Ludhiana till October 1885, staying during the hot weather with the Reverend J. Woodside at Landour. In October 1885 she began to live with her son-in-law Major Oldham at Lucknow. She was a woman of superior mental capacity. She could not understand English, but could read and write Urdu in the Roman character. Her habits were those of a native in this country. She did not appear before strangers, but had a limited circle of friends either natives of the country, or Europeans connected with natives of the country before whom she appeared. According to Mr. Woodside, though Mrs. Hodges had great ability she was incapable of doing business such as getting interest on her Government Promissory Notes. According to Colonel and Mrs. Oldham she managed all her affairs. The Respondent Hodges has admitted that with the exception of certain remittances to England, Mrs. Hodges transacted all other business herself (Exhibit 25). There can be no doubt that for 27 years she managed her affairs with prudence and success, possibly with some assistance from friends."

A few particulars may usefully be added. Her marriage with Mr. Hodges is said to have taken place in the year 1838 when she must have been hardly fifteen years old. It was solemnised by the Reverend Mr. Rogers according to the rites of the Presbyterian Church. She then took the Christian name of Katherine and retained it during her life instead of her birthname of Piyari Phundo Khanum. Her children, five in number, were all baptised into the Christian Church. Her husband was killed at Delhi in 1857. It does not appear that she ever ceased to be Mahomedan in religion, and she clearly was of that religion both before her marriage and during her widowhood. But the statement that her

habits were those of a native Indian must be taken subject to the qualifications necessarily resulting from the events of her life, and to the fact that during widowhood she resided much with Mr. Woodside, a Christian missionary, and appeared uncovered before his male servants as well as her own.

In this part of the case there is no discrepancy in the evidence except on some small immaterial details, and none at all in the findings of the two Courts. It is abundantly clear that Mrs. Hodges was not a *pardanashin*. The term *quasi-pardanashin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *pardanashin* class, is yet so close to them in kinship and habits and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *pardanashins* must be extended to her. The contention is a novel one and their Lordships are not favourably impressed by it. As to a certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. Mrs. Hodges was an independent woman of more than ordinary capacity for, and experience in, dealing with property. It would be very unjust to hold that the Bank was bound to treat her on any other footing.

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As regards the allegation that the security given by Mrs. Hodges was procured by undue influence and misrepresentation on the part of the Oldhams there is absolutely no evidence beyond the facts that she was residing with them, that Mrs. Oldham was her favourite daughter, and was in the habit of explaining English expressions to her as she did on the occasion in question. No formal issue was stated on this point, but it has been much pressed, though not so much at this Bar as in the Courts below. The Judicial Commissioner examines the matter very carefully and is at pains to show not only that Mrs. Hodges was freely consenting to the transaction, but that having regard to the family circumstances it was not at all an unreasonable thing for her to assist Colonel Oldham as she did.

On this important part of the case their Lordships have no difficulty in expressing agreement with both the lower Courts. In what comes afterwards it is difficult to follow them. The District Judge goes on to try the eighth issue. Did Katherine Hodges execute the bond as a principal or as a surety? Now when it had once been found that she was a competent woman of business and understood the deed and executed it willingly, nothing remained for the purpose of ascertaining her position except to construe the deed unless there had been some special case set up making a distinction between one part of the deed and another, of which there is no trace in the pleadings the issues or the judgments. The deed is not open to any serious doubt. Mrs. Hodges covenants that Oldham shall pay. That makes her

a surety, liable to pay the whole immediately on Oldham's default. She is a surety with all the rights of a surety to be indemnified by him and to have contribution from her co-surety. But as regards the Bank she was to be considered as a principal debtor, not so as to be liable while Oldham was meeting the instalments, but so as not to be discharged by dealings between the Bank and Oldham which were otherwise calculated to discharge a surety. The District Judge however goes to the extrinsic evidence, and he decides that Mrs. Hodges was a surety pure and simple. His only grounds are, partly some loose general statements, made most of them subsequent to the deed, by Colonel Oldham and Mr. Langdon, the Bank manager, that she was surety, which is quite true; and partly because from the evidence of Mr. Woodside it is apparent that she never would have agreed to stand as a principal (Rec. p. 272).

The learned Judge can hardly have been serious in treating Mr. Woodside's opinion as evidence. But great stress has been laid at this Bar and was evidently laid in the Courts below, on the hardship which the last clause of the deed inflicts upon the sureties, and on the consequent probability that they would not have borne their part in the transaction if its exact effect had been explained to them. That its exact legal effect was not explained is probable enough, seeing that counsel at this Bar found it difficult to say what effect it would have except the effect of avoiding the rule by which the sureties are now seeking to protect themselves. That rule, though established in English law, and imported into the Indian

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Contract Act, sec. 135, without express mention of all the qualifications which attach to it in England, has often operated as a surprise and hardship on creditors. It has long since become a common thing, at least in England, for prudent lenders of money to prevent its application by provisions like that which is found in the document under consideration. Whether that practice has been so common in India is not apparent. But it has been the practice of the Plaintiff Bank, and this deed was copied from a printed form. Neither of the Courts below intimates that there is anything unusual in the provision, nor that in this particular case its insertion was in any way improper or calculated to deceive.

It seems to their Lordships not only not probable but highly improbable that a lady who was knowingly and willingly making herself liable for the whole debt in the, only too likely, event of Colonel Oldham's default, should draw back from that engagement on being informed that if it so chanced that the Bank gave indulgence to Colonel Oldham of a kind which is usually calculated to benefit all the debtors alike, her liability to the Bank would still continue. The addition to her responsibility was a minute one. Having swallowed the camel she would hardly strain at this gnat.

Nevertheless the District Judge having found that Mrs. Hodges executed the deed as surety, as she undoubtedly did, proceeds to treat it as if there were nothing else in it and holds that she was discharged when time was given to Colonel Oldham. He does not bestow any examination on the question, or even put the question, whether as regards

explanations given to Mrs. Hodges, or as regards her understanding, there is any different evidence applicable to the final clause of the deed from that which applies to the deed as a whole and which convinced him that she understood it.

On this question of suretyship the Judicial Commissioner's Court arrives at the same conclusion in a different and more legitimate way, i.e., on the construction of the deed. The judgment lays it down that inasmuch as the prior part of the deed created Mrs. Hodges and Captain Craster sureties, the latter part cannot make them principal debtors. Their Lordships cannot understand this argument nor was it supported at this Bar. They have above given their view of the meaning of the deed.

The Judicial Commissioners however did not support the District Judge, because they thought that the Bank did not contract with Colonel Oldham to give him time. It seems however to their Lordships that having taken Mrs. Oldham's security, as the result of a correspondence with her husband, in consideration of forbearance from suing the three debtors, the Bank effectually precluded itself from suing between July 1888 and May 1889. If they could agree with either Court on the effect of the deed they would hold that Mrs. Hodges was discharged; but as they think that the construction of the High Court is wrong and that the District Judge is wrong in disregarding the final clause of the deed, they must affirm the liability of her estate to the Bank.

Captain Craster's case is different and much more simple. His personal position is in no way peculiar. He was a man

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living in the world, 32 years of age, and had been working with his regiment for about three years. He does not allege any improper influence on the part of his superior officer Colonel Oldham who procured his execution of the deed. His case is that Langdon, the Bank manager, misled him as to the nature of the deed. This is his account of what happened with Langdon.

"I saw Mr. Langdon in his office and said 'Colonel Oldham tells me that he is desirous of obtaining a loan from your Bank and I have come down to see you regarding the matter.' I said, 'do you consider that if I stand security to your Bank for so large a sum I shall be incurring any unnecessary risk?' Mr. Langdon replied 'No.' He said Mrs. Katherine Hodges will be security with you. She is lodging Bank shares as extra security. Colonel Oldham's life will be insured for a sum of Rs. 14,000, and Colonel Oldham will repay the loan at the rate of Rs. 300 per mensem. I said, well, you must recollect I have no other means besides my pay and should anything happen to prevent Colonel Oldham paying up I can't do so. Mr. Langdon said in the face of the security of Mrs. Hodges, and the shares that she has lodged and also Colonel Oldham's life being insured, I do not see how you can run any great risk since Colonel Oldham is paying Rs. 300 a month, and in the event of his death we get the Rs. 14,000 Life Insurance. I said, very well, you accept me as a co-surety for the amount. He said, yes, a deed will be drawn up by which you will become surety to the Bank."

Langdon says that this account is correct in the main, but he will not speak to every detail (p. 257); afterwards adding that he is convinced that he told Captain Craster that he would be a principal debtor; only that the Bank would not call upon him unless Oldham failed (p. 258).

The deed was brought to Craster for his signature by Oldham on the Rifle Range at Lucknow. He executed it without making any attempt to read it,

relying, as he says, on Oldham, who told him that it was the Bond drawn up in accordance with his agreement made with Langdon. As to the tenor of the deed he says :—

"I understood the liability of a principal to be greater than that of surety. I object to being called a principal debtor. Had I read the passage in Exhibit A 1, 'are to be considered as principal debtors to the said Bank,' I would never have signed Exhibit A 1. The said passage is quite plain to me. I have borrowed money once of the Bank. I had to sign and get a surety also. I can't remember if that transaction was prior to the one in suit. The look of the paper I signed for that transaction was something like Exhibit A 1. Had a stamp above and writing below. I did not read the paper for that transaction. I repaid the money."

Colonel Oldham says that he told Craster what Langdon had told him; that all would be jointly and severally liable. "The Bank may come down on you directly without reference to me" (p. 254). And again (p. 255) "I took the Bond to him myself. I did not read it to him. I explained it to him fully that he was responsible irrespective of me. It was fully explained to him that he would jointly and severally be liable."

In fact both Langdon and Oldham, if they correctly remember what they said, appear to have represented the liability of the sureties not as something less but as something greater than it "actually was; viz., as an immediate liability to the Bank instead of one dependent on Oldham's default.

Captain Craster also relies on Langdon's refusal to give time upon Oldham's first application without consent of the sureties. That however cannot affect the legal rights of the parties; and indeed at this Bar it is only used in a legitimate way, as showing Langdon's real belief

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that Craster was a surety pure and simple, and so lending probability to Craster's statement that Langdon had misled him into believing the same thing. But this reference to sureties may have been merely a point of courtesy or of unnecessary caution, or perhaps only a civil excuse to Colonel Oldham for not giving the indulgence he asked. It is no more evidence that Langdon really misrepresented the effect of the deed to Captain Craster, than his acting at a later time without reference to the sureties would be evidence the other way. It ought to be treated as wholly insignificant.

Their Lordships have already mentioned their reasons for thinking it highly improbable that those who incurred the substantial liability of the whole debt would have scrupled at this particular clause. It has become important now, and Captain Craster may think that he would have treated it as of vital importance then, if all the consequences had been explained to him. But it has been before stated that he was a man who ought to have been, and probably was, able to look after his own affairs. He admits that the effect of the deed is plain to his understanding; only he did not take the trouble to read it. It would be a very dangerous thing to allow people who have induced others to advance money on the faith of their undertakings, to escape from the plain effect of those undertakings on the plea that they did not understand them. It requires a clear case of misleading to succeed on such a plea. The District Judge seems to have acted on Captain Craster's statement alone. He does not mention the counter statements of Oldham and Langdon.

Taking Craster's statement it hardly amounts to more than that Langdon underrated the risk he was running, and said that he was to be surety (which was the fact) without any particular mention of the last clause in the deed; which very likely was not mentioned. That would not suffice to show that Langdon misled Craster. But putting all the evidence together their Lordships are satisfied that Craster was given to understand, perhaps even too broadly, that in his liability to the Bank he stood upon an equal footing with Colonel Oldham and Mrs. Hodges.

The District Judge granted a decree against the Oldhams and dismissed the suit as against Hodges and Craster with costs. The Court of the Judicial Commissioner gave a decree against all the Defendants. This their Lordships hold to be right though they differ as regards the grounds on which it should rest. The decree, however, is against all the Defendants personally to pay the whole sum found due or accruing due. That does not recognise the representative position of Robert Hodges, who is only brought here as administrator of his mother's estate. In delivering judgment the learned Judicial Commissioner states that Mrs. Hodges was in the possession of her husband's estate and remained the ostensible owner of the balance with consent of her sons, and that she was treated as the owner of the entire property by the Defendant Hodges in his application for probate. He states a formal finding on the sixth issue thus: "I find that the Defendant Hodges is liable to the extent of the entire estate in the possession of Mrs. Hodges." It does not appear that this Record contains the requisite materials for trying such a

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question, which is more appropriate for a separate inquiry; and it is not disputed by the Plaintiff's counsel that, as Hodges has not admitted assets, it would be more regular to ascertain the measure of his liability by inquiries in the execution of the decree. Their Lordships think that it would be right to add to the decree as follows:—"But as regards the Defendant Robert Nathaniel Hodges this decree is, except as regards the costs hereby ordered to be paid, made against him in his representative capacity. Let all proper inquiries be made and accounts taken for the purpose of ascertaining the amount of the estate of Katherine Hodges and the liability of the Bank shares pledged by her and of her administrator Robert Nathaniel Hodges to make good the debt due to the Plaintiff Bank." Their Lordships will humbly advise Her Majesty to dismiss the appeal and with the qualification just mentioned to affirm the decree. As regards the costs of the appeal, the case of Captain Craster has wholly failed, and the case of Robert Hodges has failed on the most material points. Their Lordships think that the modification now made ought not to affect the costs; especially considering that no attempt was made in the Court below to review the judgment on this point. The Appellants must pay the costs.

Solicitors: *Messrs. Young, Jackson, Beard & King* for the Appellant.

Solicitors: *Messrs. Lyne & Holman* for the Bank.

*Appeal dismissed.*

C. W. A.

**PRIVY COUNCIL.**

[ON APPEAL FROM THE BOMBAY  
HIGH COURT.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD LINDLEY.

SIR RICHARD COUCH.

SIR HENRY DE VILLIERS.

1900.

21, July.

MALKARJUN BIN

SHIDRAMAPPA

PASARE

v.

NARHARI BIN

SHIVAPPA and

another.

*Civil Procedure Code (Act XIV of 1882), sec. 311—Limitation Act (XV of 1877), Sch. II, Arts. 12 (a), 118—Execution proceedings against estate of deceased judgment-debtor without notice to legal representative or making him party, irregularity—Sale in such execution if a nullity or only voidable—Sale, setting aside of, for irregularity—Purchaser at an execution sale, if bound to enquire into its defect, or legality—Want of jurisdiction and error of judgment—Suit for redemption of mortgage in which relief is consequential on annulment of sale—Limitation—Pleadings—Parties—Frame of suit.*

*Where a decree had been made against the judgment-debtor and after his death application for execution was made against "the estate" of the deceased and against a person as heir, who was in fact not the heir, and without notices to the proper heirs the property was sold:*

*Held—That such a sale can "only" be set aside in the regular way by proceedings under sec. 311 of the Code of Civil Procedure or by a regular suit within a year of the confirmation of the sale as provided under Art. 12 (a), Sch. II of the Limitation Act of 1877.*

**BASWANTAPA v. RANU** (1) *distinguished.*

*The fact that the Court proceeded with the execution upon notice to a person not*

(1) I. L. R. 8 Bom. 88 (1884).



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*the legal representative is an error of judgment and does not amount to adjudication without jurisdiction so as to render the sale a nullity. Such sale can only be set aside as above stated.*

*A purchaser at an execution sale, who is a stranger to the suit, is not expected to enquire into its accuracy or to judge of its legality and is justified in believing that the Court has done all that which the law requires.*

*At the above-mentioned sale the property of the judgment-debtor was purchased by a previous mortgagee thereof and a suit for redemption and accounts was brought by the real heirs ignoring or treating the sale as a nullity*

*Held—That they could not succeed in their suit for redemption unless they first brought a suit or remodelled the one they had already brought, for setting aside the sale making the original decree-holder a party thereto.*

*A party seeking relief inconsistent with a previous sale must pray to set it aside.*

*One year's limitation prescribed by Art. 12 (a) of the Act of 1877 is not confined only to suits, which seek no relief other than a declaration that a sale ought to be set aside but apply also to suits where other relief is sought which can only be granted on annulment of the sale.*

*The principle in JAGADAMBA CHOWDRANI v. DAKHINA MOHUN (2) applies to this case.*

*The doctrine of the Bombay High Court in BHAGVANT GOVIND v. KONDI (3) that where the necessity for impugning the sale is subservient to a suit for redeeming the mortgage, a different period of limitation is to prevail, is unsupportable.*

Appeal from a decision of the Full Bench of the Bombay High Court composed of Jardine, Candy and Ranade, JJ., on reference by Farran, C. J., and Parsons, J.\*

Suit for redemption. The Plaintiffs (represented by the Respondents in the present appeal) merely stated that they were the daughters and heirs, under the Will, of one Nagappa who had on the 28th March 1877 mortgaged the property in question to the Defendant (the present Appellant) and they prayed for accounts and redemption of the mortgage.

The Defendant by his written statement stated that, subsequent to his mortgage, on the 27th June 1877, one Hanmant Vithal had obtained a decree against Nagappa, in execution of which Nagappa's interest in the property was put up for sale, that it was purchased by the Defendant on the 9th June 1880; and that on the 11th October 1880 possession was given to him and had continued with him ever since. He went on to contend that the claim for redemption cannot be maintained unless a suit is brought to set aside the sale, that the legality of the sale could not be impeached in the present suit, one reason being that Vithal, the decree-holder, was no party to the suit, but that if the sale be impugned he had a good answer to it. No mention of this sale was made in the plaint, Plaintiffs persisted in their suit according to its original frame, and eleven issues were framed none of which was adapted to examine the propriety of the execution proceedings.

The facts with regard to the sale were

(2) L. R. 13 I. A. 54 (1886).

(3) L. R. 14 Bom. 279 (1889).

\* Reported as *Brava v. Sidramappa*, L. L. R. 21 Bom. 424 (1895).—Ed.

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as follows:—Vithal's decree was against Nagappa as principal debtor and Wyankappa as surety, the latter being the son-in-law of Nagappa and the husband of one of the Plaintiffs. On Nagappa's death, after decree, Vithal applied for execution of the decree against "the estate of the deceased Nagappa" and the names of the parties against whom execution was sought were given as "Defendant Nagappa, deceased, by his heir and nephew Ramlinga" and Wyankappa. A year having elapsed since the decree, notice was issued under sec. 284, C. P. C., and served upon Ramlinga and Wyankappa and not upon the Plaintiffs. Ramlinga appeared and informed the Court, as the fact was, that he was separated from his deceased uncle Nagappa and was not his heir; that the Plaintiffs in the present suit were Nagappa's heirs and that he was not in possession of the estate. He was informed by the Court that the application was not against his property but against the estate of the deceased Nagappa and that if his property should be attached, he would have his remedy after attachment.

The property was then attached and was followed by a sale proclamation in which the Defendant was described as "Nagappa, deceased, after decree—heir Ramlinga" and the interest to be sold as that of "Nagappa, deceased, his heir Ramlinga." At the execution sale on the 9th June 1880, the mortgagee Sidramappa (the Defendant) purchased the property and a certificate of sale was granted to him when the sale was confirmed. He had given notice of his mortgage and the sale was made subject to it. The certificate of sale described the interest

sold as that of "the deceased Nagappa." On the 11th October 1880, the Defendant was put into formal possession, he being already in possession as a mortgagee.

*Mr. Phillips* for the Appellant.

The Respondents were not represented.

'Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—The Respondents to this appeal represent the Plaintiffs below who instituted their suit on the 24th January 1889. The Defendant below is now represented by the Appellant. The Plaintiffs stated that on 28th March 1877 one Nagappa whose heirs they are, mortgaged land to the Defendant to secure the sum of Rs. 3,000; and they prayed for accounts and redemption of the mortgage.

The only defence which need now be considered was that in a suit instituted against Nagappa by a creditor of his named Vithal, a decree was obtained in execution of which Nagappa's interest in the property was put up for sale; that it was purchased by the Defendant on 9th June 1880; and that on 11th October 1880 possession was given to the Defendant and had continued with him ever since. The plaint was wholly silent about this sale. The written statement went on to suggest that the Plaintiffs might possibly contend that the sale was illegal because it took place without the Plaintiffs being joined in the certificate as heirs. The Defendant said that he waited to hear whether the Plaintiffs would make any such case, but that if they did he had an answer to it; and he pleaded by anticipation that the legality of the sale could not be impeached in

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the present suit, one reason being that Vithal the decree-holder was no party to the suit. Finally the Defendant put in a distinct plea that the claim for redemption cannot be maintained unless a suit is brought to set aside the sale.

The Plaintiffs persisted in their suit according to its original frame. Eleven issues were settled by the first Court. The first issue was whether the mortgage debt merged in the subsequent purchase. In point of form that issue was not adapted to the facts of the case; nor, as it was treated by the first Court, was it adapted in point of substance. There was no issue adapted to examine the propriety of the execution proceedings.

The first Court dismissed the suit on the ground, as the learned Judge expressed it, that the mortgage merged in the purchase. The Plaintiffs appealed. They complained that proper issues had not been stated, and that they had been prevented from tendering evidence on points connected with the regularity of the execution proceedings. The Defendant made objections to the same effect. But no further issues were stated, and no further evidence was given.

The Judge of the second Court, the first appeal Court, who is styled the joint first class Subordinate Judge, A. P. at Sholapur, affirmed the decree below. As there has been no remand of the case on account of defects in the issues or evidence, his findings of fact are in this stage conclusive; and from them and the documents referred to in them the case appears to stand as follows. Vithal's decree was against Nagappa as principal debtor and Wyankappa as surety. The latter was Nagappa's son-in-law being the

husband of Tukava one of the original Plaintiffs in this suit. The date of the decree was 27th June 1877. It is an important document but there is no copy of it in the record. It is spoken of as a simple decree for payment of money; but from terms of the application for execution, which was made on 22nd November 1878 (Rec. p. 21) it appears that the decree also related to some property which was mortgaged, and that on a previous application made in the year 1878 a trifling sum, Rs. 3, As. 4, had been realised by sale of that property. The application is in a tabular form as required by the then Code of Procedure, the terms of which are those of sec. 235 of the existing Code of 1882. The name of the person against whom the execution is sought is given as "the estate of the deceased Nagappa." The names of the parties are given as, first Nagappa deceased by his heir Ramlingappa, and secondly Wyankappa. The relief sought is sale of the immoveable property of the deceased Defendant for the realisation of Rs. 65 and a fraction, being the balance remaining due under the decree.

Notices were served upon Ramlingappa and Wyankappa. The former was the nephew of Nagappa but was not his heir, the family having been divided as the Court has now found. On the 23rd December 1878 Ramlingappa appeared to show cause. What then took place appears from an entry of that date. Ramlingappa stated "As Nagappa separated from my father even during [my father's] lifetime I am not Nagappa's heir. His heirs are his daughters" (and he named them, meaning to name the Plaintiffs). "I have not with me any 'estate' of

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the deceased nor did I receive it. Therefore this decree should not be executed against me."

The Court's judgment was as follows: "The Plaintiffs' application for execution is not against other property: it is against the 'estate' of the deceased. If [any] property belonging to you is included in that [estate], you should take legal steps after the attachment is levied." (See Rec. pp. 25, 26).

After that the execution proceedings went on; with the result that the mortgaged property was put up on the 9th June 1880 to be sold subject to the charge then stated to be Rs. 3,680, and was bought by the Defendant. It would appear that the property was considered to be worth nothing substantial beyond the mortgage debt; the highest biddings for all the lots only amounting to Rs. 9-12.

The second Court dismissed the Plaintiffs' appeal. The learned Judge proceeded on the ground that Ramlingappa was a legal representative of Nagappa within the meaning of the Code because he was a relative of the deceased and was possessed of some of his property. He also relied on the presence of Wyankappa as a party to the execution proceedings, arguing that knowledge of them was thus brought home to the Plaintiffs, and that they could not be allowed to lie by for years and then after the property had increased in value to treat the sale as invalid. If, he said, they objected to the proceedings as irregular they ought to have sued within the year allowed by the law of limitation.

The Plaintiffs appealed to the High Court, when there appeared a great

variety of judicial opinion. The appeal was first heard before Sir Charles Farran, C. J., and Parsons, J. The former of those learned Judges pointed out the insufficiency of the reasons assigned by the Courts below for their decrees. He held that notice should have been served on Nagappa's heirs, and that in default of such notice the sale was informal and irregular, and might be set aside on an application made in good time (Rec. p. 172). Then he addressed himself to the question whether the sale however irregular was a nullity; and he held that it was not, that it must be set aside before the Plaintiffs could recover the property, and that they had never sued to set it aside (pp. 172, 174). Parsons, J., on the other hand held that the sale was an entire nullity and that the Plaintiffs were entitled to proceed as if it had never taken place (p. 176).

Upon this conflict of opinion the cause was referred to three other Judges of the High Court. Ranade, J., agreed with Parsons, J., that the Court had no jurisdiction at all to make the sale which was consequently a nullity (p. 184). Candy, J., without deciding the point, assumed for the purpose of his judgment that the sale passed the property subject to challenge in a regular suit, but he held the present suit to be a suit for that purpose. He further held that the suit was brought in good time; apparently on the ground that the right to set aside the sale is subservient to the right to redeem, and that the necessity of impugning the sale arises from the Defendant resisting the suit to redeem (p. 180). Jardine, J., gives his reasons at length for holding that the

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Court had jurisdiction to order the sale and that the sale was not a nullity. \* But then he expresses agreement with Candy, J., as to the nature of the present suit and its competency (p. 182).

The decree of the High Court does nothing but direct accounts to determine what amount the Plaintiffs must pay for redemption. It does not set aside the sale. It must therefore rest on the principle that the sale is an absolute nullity, though in fact only one of the Judges on the first hearing and one on the second hearing was of that opinion.

This is indeed the cardinal point of the case, and it is one of great importance to all those who take property under the apparent security afforded by a judicial sale, which in India is conducted not by the creditor who seeks payment, but by the Court itself. It is very unfortunate that the views which have prevailed in the High Court have not been supported by any argument at this Bar. Their Lordships have done what they can to understand and appreciate the views of the two learned Judges who think that the sale was a nullity, and to examine the authorities cited for that opinion, but they feel the disadvantage of being without a Respondent.

It is not disputed that if the Court took proceedings wholly without jurisdiction the Plaintiffs would remain unaffected by them, and two of the learned Judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa; and his estate was liable to make good the balance. To enforce this liability

was within the jurisdiction of the Court. If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact the application made was against "the estate of Nagappa," and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such an application and either to reject it as defective or to order some further proceeding. If Ramlingappa had actually been successor in title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken. All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards?

The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a bad mistake it is true; but a Court has jurisdiction

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to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do.

As for authority, many cases are cited, but their Lordships cannot find any decision which supports the one now under discussion. That which is relied on by Candy, J., is *Basvantapa v. Ranu* (1). In that case the creditor of a man who was dead sued his mother in the character of heir, whereas the real heir of the debtor was his widow. In August 1878 the creditor obtained a decree *ex parte* upon which execution took place and the debtor's property was transferred to the Defendant in November

1880. In 1881 a son adopted by the widow of the debtor sued by her as his guardian to recover the land. The plea of bar by time under Art. 12 of the Limitation Act was set up; and it was held that the article did not apply because the sale was a nullity and there was no need to set it aside. In that case neither the debtor nor his estate were ever made subject to the decree of the Court, the liability never was established, and the process of execution had nothing to rest upon. The Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against his estate.

Other decisions are cited in which proper notices have not been served after decree; but on examining them they all appear to be cases in which proceedings have been taken, either under sec. 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise; and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they are used, are only misleading when separated from their context and applied to a case in which the distinction between irregularity and nullity is the cardinal point.

It is then necessary for the Plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity,

(1) I. L. R. 9 Bom. 86 (1884).

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sufficient by itself to entitle the Plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the Plaintiffs could unite a suit to set aside with one to redeem, and that the Defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be discussed, because their Lordships think it to be beyond reasonable dispute that this is not a suit to set aside the sale.

The Plaintiffs have deliberately refused to make it such a suit in the face of the Defendant's challenge. It can only be called a suit to set aside a sale in the sense in which any other suit might be so called if it prayed relief inconsistent with the validity of the sale. Candy, J., considers that the only thing wanting is a formal prayer to set the sale aside, and he says that if the plea had been raised that there was no such prayer leave would have been given to amend. (Rec. p. 179). In fact the plea was raised at a time when the Plaintiffs could amend at their option, but they did not do it. To give leave to amend at the hearing may have been in the discretion of the Court, but it would be very far from a matter of course to do so. It would be giving leave to institute a new suit with the date of an earlier one. The decree-holder would be affected by it. He would be a proper party and (unless there is some recognised practice in India to the contrary as to which Mr. Phillips could not inform the Board) a necessary one. The issues would be different. It cannot be denied that the conduct of interested parties at the time of sale may

be a bar to them when they come to set it aside. The Defendant said openly that if the Plaintiffs made a case for setting aside the sale he had got an answer to it. If the Plaintiffs then made such a case he must have been allowed to make his answer, and the issues raised by him or by the judgment-creditor must have been tried. When defeated in the first Court the Plaintiffs complained (Rec. p. 153) that proper issues had not been framed for trying points connected with the sale: which was true though it was their own fault: but they did not ask to remodel their suit. When defeated in the second Court they complained (Rec. p. 165) that the Court had drawn presumptions as to their knowledge of the sale without issues or evidence; which was true; but they did not ask to remodel their suit. In fact their case has been conducted throughout on the principle that the question of nullity was the sole question, and that they could not succeed on any other ground. To allow them now to shift their ground and to make a new case, and that too without allowing the Defendant an opportunity of making the defence which he says he has in reserve, is wrong in principle and is calculated to work practical injustice.

In the case of *Jagadamba Chowdrani v. Dakhina Mohun* (2) the Plaintiffs were reversionary heirs of a deceased Hindu, subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the Plaintiffs. The law of limitation applicable to the case (the

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Act of 1871) provided that a suit to set aside an adoption must be brought within 12 (*sic.* 6) years after the date of the adoption. The Plaintiffs sued, not to set aside the adoptions, but to recover the estate; and they argued that their title was good until an adoption was set up; that those who set it up must prove its validity; which accordingly might be controverted by the Plaintiffs. There was difficulty in the case because the expression "set aside an adoption" is inaccurate; an adoption cannot be set aside, though its validity may be impeached; and in fact the language was altered in 1877 before the appeal was heard. This Board found however that the expression had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On that ground they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were barred. It is obvious that the expression "set aside a sale" is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside. That brings us to the last point in this rather tangled controversy: *viz.*, what is the period allowed for setting a sale aside?

Their Lordships have discussed the nature of this suit in detail because the two learned Judges who affirm or assume

the reality of the sale make the case turn upon it. But if the conclusion could be reached that the suit is one to set aside the sale, the result would be equally fatal to the Plaintiffs. Art. 12 (a) of the Limitation Act of 1877 provides that a suit to set aside a sale in execution of a decree must be brought within one year after the sale is confirmed. That seems precisely applicable to the present case. It is said by Candy, J. (with whom Jardine, J., agrees) that it has not been contended that the Plaintiffs were bound to sue within the year: and he refers to a text-book for cases to show that the article does not apply to a suit for a declaration that the sale is inoperative as against the Plaintiff. Here the sale is, as their Lordships hold, and as the learned Judge himself assumes, operative as against the Plaintiffs though liable to be set aside for due cause.

The only case cited by the learned Judge himself is *Bhagvant Govind v. Kundi* (3). In that case there was no judicial sale. Property was mortgaged by a Hindu, and after his death his widows, who seem also to have been guardians of his infant heir, sold the property to a trustee for the mortgagee. The heir sued to redeem, but not till after the expiry of the three years after his majority which by Art. 44 of the Limitation Act are the limit of time for setting aside a sale by a guardian. In overruling the plea of limitation the Court made the following observations: "The necessity of impugning the sale of 1863, to the second Defendant arises from the second Defendant's resisting the Plaintiffs' suit to redeem the mortgage and is therefore



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subservient to that suit." That is the only reason assigned for overruling the plea.

Candy, J., says that these observations apply exactly to the facts of the present case. Possibly they do, but their Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for 60 years. The two learned Judges intimate that there is a limit of 12 years, but how that limit is arrived at does not appear. They treat the sale as valid until vacated, but apparently they allow it just so much validity as suffices to turn the possession of the mortgagee into the adverse possession of an absolute owner, and no more. But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law; and it seems to their Lordships that the case must fall either within sec. 311 of the Code or within Art. 12 (a) of the Limitation Act of 1877, or within both; any way there exists a bar by one year's delay.

The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however seems to be the effect of the doctrine of subservience laid down by the Bombay High Court.

In the adoption case just cited from 13 Ind. App. this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of 12 years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for 12 years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe Art. 12 (a) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.

The High Court ought to have dismissed the Plaintiffs' appeal with costs, in accordance with the opinion of the learned Chief Justice. Their Lordships will now humbly advise Her Majesty to make that order, reversing the decree appealed from. The Respondents must pay the costs of this appeal.

Solicitors: *Messrs. Edwards, Heron & Co.* for the Appellants.

*Appeal allowed with costs.*

C. W. A.

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## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 115 of 1898.

	}	RAI JATINDRA NATH
		CHAUDHURI and others,
BANERJEE, J.		Defendants Nos. 1 & 2,
STEVENS, J.		Appellants,
1900.		v.
8, March.		AMRITA LAL BAGCHI and others, Plaintiffs, Respondents.

*Hindu Law—Adoption—Hindu widow—Successive adoption—Adoption of a second son after death of first, whether divests the mother's estate—Right of reversionary heir—Pleadings—Reliefs of a nature different from the case made out in the plaint.*

*A Hindu widow adopting a son under the authority of her deceased husband upon the death of a son begotten or adopted whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her and such son takes the estate immediately on his adoption.*

MUSSETT. BHOORUN MOYEE DEBIA *v.* RAM KISHOREACHARY CHOWDHURY (1), VELLANKI VENKATA KRISHNA RAO *v.* VENKATA RAMA LAKSHMI (2), RAMASAMI AIYAN *v.* VENKATA RAMAIYAN (3), BYKANT MONEE ROY *v.* KISTO SOONDEREE ROY (4), GOBINDO NATH ROY *v.* RAM KANAY CHOWDHURY (5), PUDDO KUMARI DEBI *v.* JUGGUT KISHORE ACHARJEE (6), PADMA KUMARI DEBI *v.* THE COURT OF WARDS (7), TAGORE *v.* TAGORE (8), JAMNABAI *v.* RAY CHAND NAHAL

(1) 10 M. I. A. 279 (1865).

(2) I. L. R. 1 Mad. 174 (1876).

(3) I. L. R. 2 Mad. 91 (1879).

(4) 7 W. R. 392 (1867).

(5) 24 W. R. 183 (1875).

(6) I. L. R. 5 Cal. 615 (1879).

(7) I. L. R. 8 Cal. 302 (1881).

(8) 18 W. R. 359 (1872).

CHAND (9) and RAVJI VINAYAKROA JAGANNATH SHANKARSETT *v.* LAKSHMIBAI (10) considered.

*No declaration ought to be granted where the case upon which the declaration is sought to be obtained is not only not the case made in the plaint but is one that is wholly inconsistent with it.*

ESHEN CHUNDER SINGH *v.* SHAMA CHURN BHUTTO (11) referred to.

This was an appeal preferred on the 6th of April 1898, against the decree of the Second Subordinate Judge of Zillah 24-Pergunnahs, dated the 11th January 1898.

This appeal arose out of a suit brought by Amrita Lal Bagchi and others, Plaintiffs-Respondents, to recover possession of certain immoveable property known as Nune Bheri, which consisted of 915 bighas and odd land comprised in taluk Dhapa Manpur, on the allegation that it belonged to one Pran Kissen Bagchi, who died in 1852, leaving his widow, Lobongomoni Debi, as his sole heiress; that upon the death of Lobongomoni on the 21st Magh 1302 (corresponding to February 1896) the Plaintiffs, as the nearest agnates and heirs of Pran Kissen Bagchi, became entitled to the property as reversionary heirs; that Jatindra Nath Chaudhuri and Harendra Nath Chaudhuri, Defendants Nos. 1 and 2, have been holding possession of the same by setting up a lease purporting to have been granted by Lobongomoni Debi on the 30th Sraban 1264; and that the said lease was inoperative after the death of Lobongomoni Debi, there having been no legal necessity for the granting of

(9) I. L. R. 7 Bom. 225 (1883).

(10) I. L. R. 11 Bom. 381 (1887).

(11) 11 M. I. A. 7 (1866).

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the same, and the Plaintiffs were consequently entitled to possession. A lady, named Sukhodamoni Debi, was made one of the Defendants in the suit on the ground that she had been setting up a right to the property as the widow of one Kali Nath Roy upon the false allegation that Kali Nath had been adopted by Lobongomoni under an authority from her husband.

The defence of the Defendants Nos. 1 and 2 was that the Plaintiffs were not entitled to recover possession as the reversionary heirs of Pran Kissen Bagchi, as Lobongomoni Debi, with the authority of her husband, adopted Kali Nath Bagchi as her son and the estate of Pran Kissen Bagchi vested in Kali Nath, and upon Kali Nath's death, was inherited by his heir Sukhodamoni, that the *mourasi* lease under which the Defendants held was a valid lease and binding on the reversionary heirs of Pran Kissen Bagchi and of Kali Nath as having been granted under legal necessity; and that the claim of the Plaintiffs was barred by limitation.

The Defendant No. 3, Sukhodamoni Debi, filed two contradictory statements, in the earlier of which she supported the Defendants Nos. 1 and 2, but in the later one she supported the Plaintiffs. The Subordinate Judge found that Pran Kissen Bagchi gave permission to his widow to adopt two sons in succession; that the widow Lobongomoni first adopted a boy, named Baikanto, and on Baikanto's dying unmarried, she adopted Kali Nath and had him married to Sukhoda and that Kali Nath died at the age of sixteen leaving his adoptive mother and his widow him

surviving. The Subordinate Judge further found that the lease of the Defendants Nos. 1 and 2 was not shewn to have been granted under legal necessity and upon these findings the Subordinate Judge dismissed the Plaintiffs' suit for possession but gave them a declaratory decree, declaring that the lease to the Defendants Nos. 1 and 2 was granted without legal necessity and was not binding upon the reversionary heirs of Pran Kissen Bagchi and Kali Nath Bagchi.

Against that decree the Defendants Nos. 1 and 2 preferred this appeal and it was contended on their behalf that the Court below was wrong in granting the Plaintiffs a declaratory decree upon a case not made in the plaint and in fact inconsistent with the case made in it and that the Plaintiffs' claim for a declaratory decree was barred by limitation under Art. 125 of the second schedule of the Limitation Act.

The Plaintiffs preferred a cross-appeal which was abandoned at the hearing. It was contended, however, on their behalf that upon the facts found by the Court below, the estate left by Pran Kissen Bagchi having passed to the first adopted son and on his death to his adoptive mother Lobongomoni Debi by inheritance, the second adoption could not divest Lobongomoni of her rights, and as Kali Nath, the second adopted son, died in the lifetime of Lobongomoni, the estate remained in Lobongomoni and the Plaintiffs as reversionary heirs after the death of Lobongomoni were rightly entitled to the declaration that was granted in their favour.

*Sir Griffith Evans, Dr. Rash Behari*

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*Ghose, Babus Jagat Chunder Banerjee, Sarat Chunder Roy Chaudhuri, Charu Chunder Ghose and Indoo Bhusun Mozumdar* for the Appellants.

*Dr. Asutosh Mukerjee, Babus Ashutosh Dhur, Saroda Churn Mitter, Boido Nath Dutt, Mohendra Nath Roy and Jogenra Nath Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :

This appeal arises out of a suit brought by the Plaintiffs-Respondents to recover possession of certain immoveable property, on the allegation, that it belonged to one Pran Krishna Bagchi who died in 1852 leaving his widow Lobongomoni Debi as his sole heiress ; that upon the death of Lobongomoni on the 21st Magh 1302, corresponding to some day in February 1896, the Plaintiffs as the nearest agnates of Pran Krishna Bagchi became entitled to the property as reversionary heirs ; that the Defendants Nos. 1 and 2 have been holding possession of the same by setting up a lease purporting to have been granted by Lobongomoni Debi on the 30th Sraban 1264, and that the said lease is inoperative after the death of Lobongomoni Debi, there having been no legal necessity for the granting of the same, and the Plaintiffs are consequently entitled to possession. A lady, named Sukhodamoni Debi, is made one of the Defendants in the suit on the ground that she had been setting up a right to the property as the widow of one Kali Nath Roy upon the false allegation that Kali Nath had been adopted by Lobongomoni under an authority from her husband.

The defence of the Defendants Nos.

1 and 2 was that the Plaintiffs were not entitled to recover possession as the reversionary heirs of Pran Krishna Bagchi, as Lobongomoni Debi under the authority of her husband adopted Kali Nath Bagchi as her son, and the estate of Pran Krishna Bagchi vested in Kali Nath, and upon Kali Nath's death has been inherited by his heir Sukhodamoni ; that the *mourasi* lease under which the Defendants held was a valid lease and binding on the reversionary heirs of Pran Krishna Bagchi and of Kali Nath as having been granted under legal necessity ; and that the claim of the Plaintiffs was barred by limitation.

The Defendant No. 5, Sukhodamoni Debi, filed two contradictory statements, in the earlier of which she supported the Defendants Nos. 1 and 2, but in the later one she supported the Plaintiffs.

The Court below has found that Pran Krishna Bagchi gave permission to his widow to adopt two sons in succession, that the widow Lobongomoni first adopted a boy named Baikanto, and on Baikanto's dying unmarried, she adopted Kali Nath and had him married to Sukhoda ; and that Kali Nath died at the age of sixteen leaving his adoptive mother and his widow him surviving. The Court below has further found that the lease to the Defendants Nos. 1 and 2 was not shown to have been granted under legal necessity. And upon these findings the Subordinate Judge has dismissed the Plaintiffs' suit for possession, but has given them a declaratory decree, declaring that the lease to the Defendants Nos. 1 and 2 was granted without legal necessity and is not binding upon

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the reversionary heirs of Pran Krishna Bagchi and Kali Nath Bagchi.

Against this decree the Defendants Nos. 1 and 2 have preferred this appeal; and it is contended on their behalf that the Court below is wrong in granting the Plaintiffs a declaratory decree upon a case not made in the plaint and in fact inconsistent with the case made in it.

The Plaintiffs have preferred a cross-appeal, but it was abandoned at the hearing. It was contended however on their behalf that upon the facts found by the Court below, the estate left by Pran Krishna Bagchi having passed to the first adopted son and on his death to his adoptive mother Lobongomoni by inheritance, the second adoption could not divest Lobongomoni of her rights; and as Kali Nath, the second adopted son, died in the lifetime of Lobongomoni the estate remained in Lobongomoni, and the Plaintiffs as reversionary heirs after the death of Lobongomoni were rightly entitled to the declaration that has been granted in their favour, I should add that a further contention was raised on behalf of the Appellants, that the Plaintiffs' claim for a declaratory decree was barred by limitation under Art. 125 of the second schedule of the Limitation Act.

The questions then that arise for determination in this appeal are, *first*, whether upon the adoption of Kali Nath by Lobongomoni the estate which she had inherited from her first adopted son passed to Kali Nath; *second*, whether, if Kali Nath was the last full owner, the Plaintiffs, having denied Kali Nath's right and sued as the reversionary heirs of Pran Krishna Bagchi, could in this suit obtain the declaration that has been

granted in their favour as reversionary heirs of Kali Nath; and, *third*, whether the suit if it can be regarded as a suit for such a declaration, is not barred by limitation.

Upon the first question, this is how the authorities stand. There is no text of Hindu law bearing directly upon the point, nor is there any decision of the Privy Council or of this Court directly in point. There is however a dictum of the Privy Council in the case of *Mussett. Bhoobun Moyee Debia v. Ram Kishore Achary Chowdhury* (1), in which their Lordships say: "If Bhowanee Kishore had died unmarried his mother Chandrabullee Debia would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule." That shows that in the opinion of their Lordships where a widow authorised to adopt a son to her deceased husband upon the death of a son begotten or adopted, makes the adoption when the first son dies unmarried, she, by making the adoption divests her own estate in favour of the son taken in adoption. This dictum was reaffirmed by their Lordships of the Judicial Committee in the case of *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (2), in which the following observation occurs: "If then there had been a written authority to the widow to adopt, the fact of the descent being thus cast would have made no difference unless the case fell within the authority

(1) 10 M. I. A. 279 (1865).

(2) I. L. R. 1 Mad. 174 (1876).

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of that of *Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhury* (1), in which it was decided that, the son having died leaving a widow in whom the inheritance had vested, the mother could not defeat the estate which had so become vested by making an adoption, though in pursuance of a written authority from her husband. That authority does not govern the present case, in which the adoption is made in derogation of the adoptive mother's estate, and indeed expressly recognizes the distinction." It is true that in a still later case, that of *Ramasami Aiyar v. Venkata Ramaiyan* (3) their Lordships observed: "Some of the circumstances of the case are peculiar. The first adopted son became his father's heir; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety on which their Lordships give no opinion." But this refraining on the part of their Lordships from giving any opinion upon the question cannot materially weaken the weight that attaches to the dictum laid down by their Lordships in the two earlier cases. Then there are three cases in this Court in which the point was considered, namely, *Bykant Monee Roy v. Kisto Soonderee Roy* (4), *Gobindo Nath Roy v. Ram Kanay Chowdhury* (5), and *Puddo Kumari Debi v. Juggut Kishore Acharjee* (6),

and the opinion expressed in all those three cases in favour of the view that in a case like the present the second adopted son does not divest the adoptive mother of the estate inherited by her from her first adopted son, but that he succeeds to the estate as the brother of the first adopted son upon the death of the adoptive mother. But in the first two cases the question did not directly arise. The adoptive mother being dead when the suit in the first-mentioned case was brought, it was immaterial to consider whether the second adopted son took the estate immediately upon his adoption, or on the death of the adoptive mother, and in the second case, namely, that of *Gobindo Nath Roy* (5), the question that arose was whether the adopted son could, during the lifetime of the adoptive mother, set aside an alienation by her made in favour of a third party and as for the third case, that of *Puddo Kumari Debi v. Juggut Kishore Acharjee* (6), the decision of this Court was set aside by the Privy Council upon another ground, see *Padma Kumari Debi v. The Court of Wards* (7).

The question has been considered by recent writers on Hindu law, of whom West and Buhler in their *Digest of Hindu Law*, 3rd Edition, p. 983-85, seem to take the view that if the first adopted son dies unmarried and before certain initiatory ceremonies are performed the second adopted son may take the estate immediately on his adoption. Mr. Mayne in his *Hindu law and usage*, paragraph 174, takes the opposite view, observing: "Now a mother ranks before a brother as heir

(1) 10 M. I. A. 279 (1865).

(3) I. L. R. 2 Mad. 91 (1879).

(4) 7 W. R. 392 (1867).

(5) 24 W. R. 188 (1875).

(6) I. L. R. 5 Cal. 615 (1879).

(5) 24 W. R. 188 (1875).

(6) I. L. R. 5 Cal. 615 (1879).

(7) I. L. R. 8 Cal. 303 (1881).

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to her own son. Why then should he destroy her estate? If the adoption could be treated as relating back to the life of the deceased, then it would have given him an undivided brother, who would take by survivorship in preference to the mother. But it would seem that no such 'fiction' is now admitted." And Babu Golap Chandra Sarkar in his Tagore Law lectures on the Hindu Law of Adoption (p. 411), after quoting the passage from the judgment of the Privy Council in the case of *Ramasami Aiyar v. Venkata Ramaiah* (3), which we have referred to above, remarks: "This observation therefore cancels the effect of what was observed in the previous cases with respect to the divesting of the adoptive mother's estate. According to the principles of the Bengal School the adopted son cannot lay any claim to the estate which the adoptive mother inherited from her deceased son during her life, because the adopted son as brother by adoption is not entitled under any circumstances to take the same in preference to the mother. Accordingly the Calcutta High Court appear to have expressed the opinion that the adopted son is entitled to take the estate after the death of the adoptive mother." This is how the authorities stand: and, attaching, as we must do, greater weight to the dictum of the Privy Council than to any dictum of our own Court, and greater weight to the opinion twice positively expressed by the Privy Council than to the last observations of the same tribunal in which their Lordships only refrain from expressing any opinion on the point, we think that the weight of authority is in favour

of the view that a Hindu widow adopting a son under the authority of her deceased husband upon the death of a son begotten or adopted whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her.

Let us next consider how the question stands upon principle. It is no doubt difficult to work out the divesting of the adoptive mother and the vesting of the estate in the second adopted son according to the ordinary rules of inheritance; but the rights created by adoption, as has been observed by the Privy Council in the case of *Tagore v. Tagore* (8), operate in some respects by way of exception to the general rule. Moreover, in a case like this, in addition to the rules of inheritance, another principle may well be taken to come into operation, the principle, namely, that when a person, who is a free agent voluntarily does any act that person must be taken to intend the natural consequence of the act. Now a Hindu widow authorised by her husband to adopt a son is free to exercise the authority or not as she chooses. There is no one who can compel her to exercise the power. But if she does exercise it and adopts a son to her deceased husband, it is only in accordance with the ordinary Hindu notion of adoption that the son so adopted should take the estate that the adoptive father left. And the widow, by adopting a son to her husband, must be taken to intend the vesting of the estate that originally belonged to her deceased husband, in such adopted son. Of course, if, by reason of a previously adopted son having left

(3) 1 L. R. 2 Mad. 91 (1879).

(8) 18 W. R. 352 (1872).

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some other heir than herself, the estate is vested in such other heir, no act of hers can divest that heir and vest the estate in the adopted son. But where, by reason of the first adopted son having died unmarried, the estate has come back to her, it is only a natural consequence of the subsequent adoption by her that the estate should pass to the second adopted son; and this is what their Lordships meant by the dictum laid down by them in the case of *Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhury* (1) above referred to. If we view the matter in this light, no difficulty can arise. The question raised by Mr. Mayne, "why then should he destroy her estate?" will not then arise; for upon this view it is not the second adopted son who destroys the estate of the adoptive mother, but it is the mother herself who, by exercising the power of adoption, of her own free will and accord, divests herself of her estate and allows it to pass to the adopted son. This view will also answer the argument of the learned Hindu lawyer, Babu Golap Chandra Sarkar, who too seems to think that relative rights of the mother and the adopted son are to be determined only by the application of the ordinary rules of inheritance. We may here observe, however, that though maintaining the opposite view the last named writer feels the hardship of it; for he observes (see his Tagore Law lectures on the Law of Adoption, page 411):—

"Whatever may be the principle, it has been held by the Bombay High Court that a Hindu widow who adopts a son after the death of her natural son, divests herself of her estate. This view appears

to be the most equitable one, for otherwise the adopted son would not be entitled even to maintenance, as of right, out of the estate of the adoptive mother, and if he dies during her life leaving a widow and a daughter they would be unprovided for. As regards the adoptive mother she may reserve any interest she likes by an ante-adoption arrangement with the consent of the natural father." We may add that the Bombay High Court in the cases of *Jamnabai v. Ray Chand Nahal Chand* (9) and *Ravji Vinayakraw Jaggannath Shankarsett v. Lakshmi Bai* (10) have taken the view that we now take upon reason as well as upon authority. Therefore we think that the correct view would be to hold that when a Hindu widow adopts a second son upon the first son dying unmarried, the second adopted son takes the estate immediately on his adoption.

Coming now to the second question, we think it clear that the declaration granted in favour of the Plaintiffs is one that ought not to have been granted. The case upon which that declaration has been granted is not only not the case made in the plaint, but is one that is wholly inconsistent with it; and to allow the Plaintiffs to succeed in this suit in obtaining the declaration embodied in the decree of the Court below would be to contravene the rule of law laid down by the Privy Council in the case of *Eshen Chunder Singh v. Shama Churn Bhutto* (11). We may add that the objection to the Plaintiffs being allowed to succeed in obtaining the declaration in question in this case is not merely a technical objec-

(9) I. L. R. 7 Bom. 225 (1883).

(10) I. L. R. 11 Bom. 881 (1887).

(11) 11 M. L. A. 7 (1866).

(1) 10 M. L. A. 279 (1865).



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tion but is one of substance ; for, if the Plaintiffs had made an alternative case in their plaint that they were entitled to the declaration that has been granted to them as the reversionary heirs of Kali Nath, in that case it would have been open to the Defendants Nos. 1 and 2 to plead ratification of the lease by Kali Nath, a plea which the framers of the suit might well be taken to have precluded them from urging. The second point, also, must, therefore, be decided in favour of the Appellants.

In this view of the case it does not become necessary for us to pronounce any opinion upon the third point, namely, the question of limitation. If it were necessary to determine that point we should have felt considerable difficulty in holding that the case was governed by Art. 125 of the Limitation Act, the language of which does not cover a case like the present.

The result then is that the decree of the Court below so far as it grants the Plaintiffs a declaration that Lobongomoni Debi had no legal necessity for granting a permanent lease in respect of the property in suit, and that the *patta* granted by Lobongomoni Debi is not binding upon the heirs of Pran Krishna Bagchi and Kali Nath Bagchi, must be set aside and the Plaintiffs' suit must be dismissed altogether.

The Appellants are entitled to their costs in this appeal, which will include the costs of the preparation of the Appellants' supplemental paper-book. We assess the hearing fee at fifteen gold mohurs.

The cross-appeal having been abandoned, it is dismissed without costs.

S. C. S.

*Decree modified.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 568 OF 1871.

KUMAR SUTTYA SUTTYA

SALE, J.

CHONAL.\*

1897.

v.

21, April.

RANI GOLAP MONI

DEBI.

*Practice—Receiver—Application for leave to sue a Receiver.*

*The Receiver is not a necessary party to a suit for possession of immoveable property.*

This was an application by one Srinath Biswas and others for leave to sue the Receiver. The petition stated that the Petitioners were the absolute owners and had been in possession as *howladars* of a piece of land known as *kismut* Samantogati in the District of Khulna; that some time ago that land had diluviated and formed as accretion to a piece of *chur* land known as Churdakatia belonging to the Government, that under a settlement from the Government the Receiver appointed in the above suit had been holding the said reformed land and was in possession of the same. The Petitioners then stated that they were desirous of bringing a suit in the Court of the Sub-Judge at Khulna against the parties who were in possession of the said land as also against the Receiver for recovery

\* This was followed in the case of *Sm. Sarala Dassi v. Bhuban Mohan Neogi* (Suits Nos. 175 and 206 of 1899) before SALE, J., on the 18th August 1897, when his Lordship in dismissing an application for leave to sue the Receiver, observed—"If there is any question between the parties entitled to property in the hands of a Receiver, a decree in a suit between the parties can always be carried out against such property or any share therein without making the Receiver a party to the suit.—REPORTER."

**KUMAR SUTTYA SUTTYA GHOSAL v. RANI GOLAP MONI DEBI.**

of possession of the land as reformation on its own original site and they prayed for leave to bring a suit against the Receiver appointed in the above suit.

THE COURT was of opinion that the Receiver appointed in this suit was not a necessary party to the suit to be instituted in the Court of the Subordinate Judge at Khulna.

*Mr. S. R. Das* for the Petitioners asked that the expression of the Court's opinion any be embodied in the order dismissing the application so that the plaint might not be rejected by the lower Court.

THE COURT.—Very well.

*Babu Raj Mohan, Das*, Attorney for the Applicants.

S. R. D.                      *Application refused.*

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NO. 431 OF 1900.

PRINSEP, J.                      THE QUEEN-EMPRESS  
HANDLEY, J.

1900.                      POORAN AGARWALLA,  
13, June.                      Accused.

*Code of Criminal Procedure (Act V of 1898), sec. 109—Security for good behaviour—"Ostensible means of subsistence," proof of—"Doing no work," if sufficient—"Previous conviction" how far relevant—Procedure.*

*The fact that a man does no work or that he was once before convicted for bad livelihood does not justify a Magistrate, without being satisfied from evidence that since his release the accused has no ostensible means of livelihood, to order him to furnish security for good behaviour.*

This was a rule issued on the 25th of May 1900, against the order of the Presidency Magistrate of Calcutta, Northern Division, dated 25th of April 1900.

The facts of the case material to this report were as follows :—

A police inspector charged the Defendant with bad livelihood as he did no work. He had been sent up the year previous on a similar charge and was sent to jail for 6 months.

The Magistrate of the Northern Division of the town of Calcutta ordered the accused to furnish security for good behaviour under sec. 109, Cr. P. Code, on the ground of his admitting one previous conviction for bad livelihood and that he did no work.

No one appeared to show cause against the rule.

THE JUDGMENT OF THE COURT was as follows :—

Pooran Agarwalla was placed before the Presidency Magistrate by the police being stated to be "a reputed thief, having no ostensible means of subsistence, found on 21st April to be concealing his presence at Chitpur." A police-officer was examined who stated that "the accused did no work," adding that "he was sent up last year for a similar offence." The record also shows that "the Defendant admits that he does no work, admits one previous conviction for bad livelihood." On this the Presidency Magistrate passed the following order: "I direct him to give security for good behaviour in the sum of Rs. 100 for six months or to undergo six months' rigorous imprisonment under sec. 109, C. P. C."

In our opinion the evidence before the Magistrate did not justify the order. The charge stated many facts which if established would form substantial grounds for requiring the accused to give security

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for good behaviour but beyond a statement of the police-officer that the accused "does not work" and his admission of this there was nothing before the Magistrate except that some time ago the accused had been required to furnish security. But that a man "does no work" does not necessarily mean what the law requires that he has "no ostensible means of subsistence." No enquiry was directed to this, and unless this is proved the order is bad. If the charge was as stated, there should have been other evidence forthcoming. Whether this was so or not does not appear but if it was not tendered we think that the fact should have been noted by the Magistrate. The order seems to us to have been too readily passed because the accused "has already once been convicted of bad livelihood. But that was not sufficient unless it were shown that since his release the accused had no honest means of subsistence.

The order under sec. 109 must be set aside.

*Rule made absolute.***[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NO. 321 OF 1900.

PRINSEP, J.	KITABDI and others,
HANDLEY, J.	Petitioners,
1900.	. v.
6, June.	THE QUEEN-EMPRESS, .
	Opposite Party.

*Criminal Procedure Code (Act V of 1898), sec. 110.—Magistrate, jurisdiction of to require security for good behaviour—Residence outside such jurisdiction.*

*A Magistrate has no jurisdiction to require security for good behaviour under sec. 110, Cr. P. Code, from persons who do not reside within his local jurisdiction*

*but who it was alleged, habitually committed theft, robbery and house-breaking within such limits. It is only when a person residing within such limits is of such bad repute that a Magistrate is competent to take action under that section.*

This was a rule issued on the 25th of April 1900, against the order of the Sub-Divisional Magistrate of Naraingunge, dated the 9th of January 1900, which order was, on reference under sec. 123, C. Cr. P., affirmed by the Sessions Judge of Dacca, on the 26th of February 1900.

The facts of the case material to the report were as follows:—The accused were residents of the district of Tipperah and were suspected of being in the habit of committing theft and robbery within the jurisdiction of the Magistrate of Naraingunge and were on that account put under arrest and were in confinement in the under-trial ward of the lock-up at Naraingunge when proceedings were taken against them under sec. 110, C. Cr. P. The accused, *inter alia*, objected before the Magistrate that he, as Magistrate of Naraingunge, within the district of Dacca, had no jurisdiction to try this matter as they were residents of another district. The Magistrate overruled this objection which was affirmed by the District Judge of Dacca on reference under sec. 123, C. Cr. P.

The Magistrate gave the following as his reasons:—

One further question remains for me to consider and that is raised in the *jawab* of the Defendants. It is said that I have no jurisdiction.

The words of the section are:—

"Whenever a Sub-Divisional Magistrate receives information that any person within the local limits of his jurisdiction is by habit a robber, house-breaker or thief such magistrate may, etc.

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"These words may of course be read to include only persons residing within the magistrate's jurisdiction, but I can find nothing in the code to show that the words should be restricted to this use. The words can equally well be interpreted to mean habitually commits thefts and robbery and house-breaking within his jurisdiction and it appears to me that the section is carefully worded in such a way as to embrace both these meanings. If this is not so it is impossible to have any hold over a gang of this kind which residing just over the border commits offences in a different jurisdiction where the police of the district in which the offenders reside make no active attempt to prevent the persons from committing crime except by removing the means of its commission within their jurisdiction, I therefore find that I have jurisdiction."

*Mr. K. N. Sen Gupta and Babu Pramatha Nath Sen* for the Petitioner.

*Mr. Leith (Deputy Legal Remembrancer)* for the Crown.

The JUDGMENTS OF THE COURT were as follows :—

**PRINSEP, J.**—The Petitioners who are residents of the district of Tipperah were under arrest and in confinement in the under-trial ward of the lock-up at Naraingunge when proceedings were taken against them under sec. 110, C. Cr. P., with the object of requiring them to give security for good behaviour.

It was objected before the Magistrate that he, as a Magistrate of Naraingunge within the district of Dacca, had no jurisdiction to try this matter concerning persons who were residents of another district.

The Magistrate has overruled this objection, and, on reference to the Sessions Judge under sec. 123 for confirming the order passed by the Magistrate, the Sessions Judge has adopted the same view. The law runs thus :—"Whenever a Magistrate receives information that

any person within the local limits of his jurisdiction (a) is by habit a robber, house-breaker or thief or (b)" and so forth.

The Magistrate has found that the terms of the section enable him to try such a case because the law may be read thus :—"Whenever a Magistrate receives information that any person is by habit a robber, house-breaker or thief within the local limits of his jurisdiction." But the law is not so expressed and, under the ordinary rules of construction, it would not bear that interpretation. In my opinion it is when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description given above, that the Magistrate can take action and it is not contemplated that the Magistrate in such a case should issue a warrant so as to pursue the person concerned into another jurisdiction. It also seems to me that, under the terms of this section, the reputation which the person is found to have must necessarily mean the reputation of that person in the neighbourhood. And the persons residing in that locality could be best able to speak to his character. Moreover that if he were called upon for his defence, he would naturally produce witnesses of that neighbourhood. Thus a trial held in another district and at some distance from his residence would probably result in his being unable to obtain the attendance of his witnesses or to obtain them at an expense which it would be unreasonable to call upon him to bear. In my own experience I would add that I have never come across a case of this description in which jurisdiction has

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been assumed by a Magistrate of another district and from this I take it that the practice has been universal in regard to restricting the jurisdiction of a Magistrate to cases of persons reputed to be of bad character, and residing in his own district. The proceedings, therefore, are without jurisdiction and the order must accordingly be set aside. If the Petitioners are in jail in consequence of their failure to give the security required, they must be released.

HANDLEY, J.—I am of the same opinion and I entirely concur in the observations made by Mr. Justice Prinsep.

*Rule made absolute.*

S. C. S.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 299 OF 1900.

PRINSEP, J.	} RAHIMUDDI and others, Petitioners, v. ASGARALI, Opposite Party.
HANDLEY, J.	
1900.	
6, June.	

*Indian Penal Code (Act XLV of 1860), secs. 379, 147—Theft—Rioting—Common object charged, when disbelieved, finding by Appellate Court of a different, if proper—Unlawful assembly.*

*If the common object fails and the substantive charge is disbelieved the accused should be acquitted. It is not proper for an Appellate Court, while disbelieving the alleged common object of an unlawful assembly to find out a different common object regarding which the accused were never called upon to plead nor tried and to affirm the conviction.*

This was a rule issued on the 20th of April 1900, against the order of the Deputy Magistrate of Dacca, dated the 7th of February 1900, which order was on

appeal affirmed by the Sessions Judge of Dacca on the 31st of March 1900.

The facts of the case appear from the judgment.

Babu Harendra Narayan Mitter for Mr. P. L. Roy at the hearing of the rule.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

The Magistrate has convicted the Petitioners of theft of mangoes, and also of riot, the common object of the unlawful assembly being the forcible taking away of mangoes belonging to the complainant.

In appeal, the Sessions Judge has entirely disbelieved the evidence relating to the taking of the mangoes or that that was the common object of the unlawful assembly. He, however, finds—and about this there is apparently no doubt—that a fight took place between the two parties and on this he has endeavoured to ascertain from the evidence what the common object of the assembly which caused this fight and, so far as we understand his judgment, he has not only found that the cause was not the taking of the mangoes but that it was something else. The Sessions Judge has accordingly dismissed the appeal confirming the conviction and sentence but on a different finding of fact from that to which the Petitioners were called upon to plead and to defend themselves at the trial. The Petitioners have accordingly been convicted by the Appellate Court of an offence for which they have never been tried. They are consequently entitled to an acquittal. The result may be unfortunate if the Petitioners have broken the peace and caused bodily

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injuries to persons in a fight but, on the findings of the lower Court, they cannot possibly be convicted. The sentences are accordingly set aside and the fine, if paid, must be refunded.

*Rule made absolute.*

H. P. C.

**[CRIMINAL AND VISIOINAL JURISDICTION.]**

REV. NO. 313 OF 1900.

PRINSEP, J.

HANDLEY, J.

1900.

6, June.

BHAGIRATHI NAIK,

Petitioner,

v.

GANGADHUR MAHANTI,

Opposite Party.

*Cattle Trespass Act (I of 1871), sec. 22—Illegal seizure of cattle—Fine on conviction, legality of—Imprisonment in default if proper—Compensation.*

*A magistrate is not competent under sec. 22 of the Cattle Trespass Act to pass a sentence of fine. He can only award compensation for an illegal seizure of cattle.*

*An order of imprisonment in default of payment of such fine is also illegal.*

This was a rule issued on the 21st of April 1900, against the order of Syed Abdul Malik, Deputy Magistrate of Balasore, dated the 2nd of March 1900.

The facts of the case were briefly these:—

The complainant charged the accused Bhagirathi Naik, a village tutor and pound-keeper, with taking four cows of the complainant and putting them in the pound. On trial the accused was convicted under sec. 22 of the Cattle Trespass Act by the Deputy Magistrate of Balasore on the 2nd of March 1900, and was directed to pay a fine of Rs. 10 and the costs of the case and in default of pay-

ment of fine to undergo simple imprisonment for a week. Rs. 5 was directed to be paid to the complainant out of the fine, if realised.

Against that order the Petitioner moved the High Court and obtained the present rule.

*Babu Provash Chandra Mitter* for the Petitioner.

No one appeared to show cause against the rule.

The following judgment was delivered by the Court:—

The Magistrate, in a case under sec. 22 of the Cattle Trespass Act, 1871, has fined the petitioner Rs. 10 and the costs of the case and has directed that, out of this sum, Rs. 5 be paid to the complainant. He has also ordered that, in default of payment of the fine, the Petitioner do suffer one week's simple imprisonment.

The order throughout is bad and not in accordance with the terms of sec. 22 of the Cattle Trespass Act. The Magistrate is not competent under that law to pass any sentence of fine. He can only award compensation for an illegal seizure of cattle. In this view, we must set aside the order of fine and direct that, in substitution thereof, the accused do pay the sum of rupees five as compensation to the complainant and do also pay the costs of the case. The order of imprisonment in default of payment of this fine is also illegal and must be set aside.

*Rule made absolute.*

H. P. C.

REPORTER'S NOTE. See *Kistaki v. Munderji*, (2 C. L. R. 507 1875) per Markby & Prinsep, JJ.

## PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

SIR HENRY DE VILLIERS.

SIR FORD NORTH.

1900.

Heard, 8, May.

Judgment, 27, June.

GARURUDHWAJA  
PERSHAD

v.

SAPARANDHWAJA  
PERSHAD SINGH.

*Evidence Act (I of 1872), secs. 48, 49 and 60*  
—Relationship—Opinion—Grounds of such  
opinion based on information, admissibility of  
—Wajib-ul-urz, value of, as evidence.

*A statement by a witness of his opinion on the existence of a family custom and as the grounds of that opinion, of information derived from deceased persons is admissible in evidence, but it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.*

*The weight of such evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion.*

*A special family custom involving a departure from the ordinary Hindu law should be properly proved.*

*Certain Wajib-ul-urz put in were evidence in favour of the Respondents but they were not sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate.*

This was an appeal from the Allahabad High Court (Justices Blair and Tyrrell) reversing the decision of the Sub-Judge of Aligarh.

The parties were brothers, and the litigation was concerned with the right of succession to their father's estate. The Appellant was the elder of the two

uterine brothers; they were the only two surviving sons. The suit was brought by the Respondent.

The family to which the parties belong is known as the Beswan family sprung from one Makhan Singh from whom also sprung the important families of Mursan and Hathras.

Mr. Branson for the Appellant contended that the High Court was wrong in holding that the Appellant had not proved that the custom of primogeniture obtains in the Beswan family, and regulates the descent of the property of that family. He relied on the case of *Thakur Nitpal Singh v. Thakur Jai Singh Pal* (1).

With reference to the Wajib-ul-urz and entries in public records, Mr. Branson pointed to sec. 35, Indian Evidence Act, and *Uman Pershad v. Gandharp Singh* (2).

SIR RICHARD COUCH.—There is a case regarding the admissibility of Wajib-ul-urz in which Sir Montague Smith gave judgment.

Mr. Branson.—Yes, that is the case of *Rani Lakraj Kuar v. Wahpal Singh* (3).

LORD DAVEY.—Wajib-ul-urz are admissible as official documents made in accordance with law.

Mr. Branson then commented on the evidence and referred to secs. 48 and 49 of the Evidence Act in support of the admissibility of the evidence of witnesses having special means of knowledge of the fact in issue in this case.

LORD DAVEY.—After looking into those sections, I see it goes considerably beyond the English law.

No one appeared for the Respondent.

(1) 28 I. A. 147 (1896).

(2) 14 I. A. 127 (1887).

(3) L. R. 7 I. A. 43 (1879).

## GARUBUDHWAJA PERSHAD v. SAPARANDHWAJA PERSHAD SINGH.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DAVEY.—The question on this appeal relates to the devolution of the ancestral estate of Thakur Girpershad Singh who died in the year 1880. The Defendant in the suit and present Appellant is the eldest son of Girpershad and contends that there is a custom of primogeniture in the family and that consequently he is alone entitled to succeed to the estate. The Plaintiff in the suit is his younger brother. He denies the existence of the alleged custom and claims to share in the estate in accordance with the ordinary Hindu law of inheritance. The Subordinate Judge decided in favour of the alleged custom and dismissed the suit with costs, but his decision was reversed by the High Court of Allahabad and the appeal is from the judgment and decree of the latter Court. It is unfortunate that the Plaintiff and present Respondent has not appeared on this appeal. There are questions of the admissibility as well as the effect of evidence on which their Lordships would have been glad of the assistance of Counsel for the Respondent.

The parties belong to a family known as the Beswan family. This family and two other families in the same district called the Mursan and Hathras families are Jat families of the Tenwa clan and are descended from a common ancestor, named Nandram Faujdar, who is said to have died in the year 1695. The Mursan family is said to have been founded by Khushal, son of Zulkaran, one of the fourteen sons of Nandram. The Beswan and Hathras families alike have their descent from Jai Singh, another son of

Nandram. The Hathras branch was divided from the Beswan branch in the person of Dyaram Singh in the fourth generation from Nandram who died in the year 1823. The circumstances under which this separation took place are in controversy and will be more fully considered hereafter. In the year 1817 Dyaram was deprived of the greater part of his possessions in consequence of his resistance to the British military forces and his family do not now reside at Hathras.

It appears from the evidence and was accepted as a fact by both Courts that the custom of primogeniture prevails in both the Mursan and the Hathras families. Their Lordships attach importance to this admitted fact. It points to a custom derived from a common ancestor and lends strong antecedent probability to the Appellant's case. The present Raja of Mursan was called as a witness by the Appellant but he was supporting the Respondent with a loan of money to be used for the purpose of the litigation. He could not therefore be expected to be very friendly to the Appellant. But he does not venture to deny the existence of the custom in the Beswan family and singularly enough had made no inquiry on the subject. He says: "In my family the custom of guddinashini prevails. When a guddinashini dies leaving several sons one of them becomes guddinashini and inherits all the property and the others only get maintenance. I have heard that that custom of guddinashini prevails in the Hathras Raj family. I do not know whether the custom of guddinashini prevails in the Beswan family or not. I have no



## GARURUDEHWAJA PERSHAD v. SAPARANDEHWAJA PERSHAD SINGH.

about it and I did not make any inquiry on the point." Raja Harnarain Singh, the present representative of the Hathras family, is a son adopted by the widow of the preceding Raja and was only 22 years of age at the time of the trial. He also is said to be unfriendly to the Appellant on account of some previous litigation with Girpershad in which the latter claimed his estates. Raja Harnarain does not profess to know anything about the question in issue.

There are no records of any kind prior to the British conquest in 1803. The most important documentary evidence since that date is the record of a proceeding of the Court of the Collector of Aligarh District, dated 22nd November 1809. From the pedigree which is set out in the judgment of the Subordinate Judge and was accepted in the High Court it appears that Bhuri Singh, the third in descent from Nandran, died in the year 1775, leaving two sons, Nawal and Dyaram, who as already mentioned was the founder of the Hathras family. Nawal Singh is stated to have died before 1800 leaving two legitimate sons, Harkishan (the eldest) and Jiwaram, and three illegitimate sons. Harkishan succeeded to Beswan in exclusion of Jiwaram his younger brother and died in 1808. He had two legitimate sons (who are stated to have been uterine brothers), Jey Kishore and Jogul Kishore. It is disputed whether Jogul Kishore survived his father but for reasons to be presently stated their Lordships think with the Subordinate Judge that the weight of evidence is in favour of his having done so and of his having died without issue shortly afterwards. Harkishan also left three illegitimate sons. By his order of

the 22nd November 1809 Mr. Elliot, the Collector of Aligarh directed, that a *parwana* be issued to Dyaram and Raja Bhagwant Singh (the then representative of the Mursan family) asking them to give information whether there is any son of Harkishan other than Jey Kishore and whether according to the custom of Hindus the property of Harkishan devolves upon Jey Kishore and whether the *sanads* of jagir and *istimrar* should be granted to Jey Kishore.

The reply of Dyaram to this request was in the following terms:—

"After paying my compliments and expressing my wish to pay my respects to you, I beg to state that I received your kind note enquiring whether Jey Kishore was the rightful person owing to the death of Thakur Harkishen, and granting the *sanad* of jagir and *istimrar* to Barkhurdar\* Jey Kishore on condition of its being ascertained that he was entitled to it under the custom of the Hindus. It is known to you that Thakur Harkishen and others, and now Jey Kishore are among my *farzand*† (sons). Formerly Thakur Harkishen, who was senior in age to his other four brothers, was distinguished from, and surpassed them all, by his qualities as a sirdar and head, and also during his lifetime his four other brothers were of one mind with him and obedient to his orders and carried on the affairs zealously. In the time of Thakur Harkishen Barkhurdar, Jey Kishore, who is also senior in age to his other four brothers and is distinguished from, and surpasses them all, used to be called the heir-apparent and successor. At present after the death of the said Thakur he has the control of all the affairs, small and great, of his father and it is Jey Kishore who is entitled to the favours of the British Company. In accordance with their usual practice the turban of *sirdari* was tied round the head of Jey Kishore. It is hoped that the *sanads* of jagir and *istimrar* will be kindly granted to the said Barkhurdar.

"Submitted for information. Further respects.

"(Sd.) THAKUR DAYARAM SINGH,  
of Hathras, son of Shipuri (?)."

\* Literally may you eat the fruit of life.

† Literally means children.

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The reply of the Raja of Mursan was in almost the same words and they were evidently written in concert.

Upon these reports a further order, dated the 18th December 1809, was made by the Collector in the following terms:—

“On the 14th petition was made by Thakur Dyaram stating that after the death of Thakur Harkishen his estate devolves upon Thakur Jey Kishore his eldest son and to-day a petition was made by Raja Bhagwant Singh stating that Thakur Jey Kishore was the eldest son of Thakur Jey Harkishen deceased and that the estate of the deceased Thakur devolved upon him and consequently all the brethren deeming Thakur Jey to be the rightful person and eldest son tied the turban of the Sirdari.” The petitions were then ordered to be forwarded to the Board.

The terms of this order clearly show the sense in which the Collector understood the reports of Dyaram and the Raja of Mursan. Accordingly two sanads, dated the 19th January 1810, were granted by the Government to Jey Kishore. By the first of these documents after noticing that under the orders of the Governor-General Taluka Beswan had been settled with and granted to Harkishan for his lifetime and his death before the issue of the perpetual sanad of the taluka, it was stated that his Excellency therefore thought it advisable and proper that instead of the said deceased the taluka should be maintained in the name of his eldest son, Thakur Jey Kishore, for his lifetime at the *jama* therein mentioned. The second sanad contained the grant of a village called Jhanga by way of jagir in similar terms.

From the two letters of Dyaram and the Raja of Mursan it appears that Jey Kishore had then four brothers living. The inference is that Jogul Kishore his uterine brother was then living. It is true that in two documents, dated the 16th March 1845, it is stated by Tikam then Raja of Mursan and by a *tehsildar*, named Sayed Hardar Ali, that Harkishan had four sons only, Jey Kishore and three illegitimate sons. It is more probable that (Jogul Kishore having died young and childless) his existence was forgotten or overlooked after a lapse of nearly forty years than that Dyaram and the Raja Bhagwant were mistaken and their Lordships agree with the Subordinate Judge that the balance of evidence is in favour of Jogul Kishore having survived his father. The witness Dharag Singh, whose evidence is vouched by Mr. Justice Blair, says indeed that Jogul Kishore died in his father's lifetime but in an earlier part of his examination he had said that he “did not know whether Jogul Kishore died in his father's lifetime or after his death.” This witness was born some years after Jogul Kishore's death and was speaking from hearsay only and there are many witnesses of the same kind some of whom say that Jogul Kishore died in his father's lifetime and others of whom say he survived him. The oral evidence (even if admissible) is quite inconclusive.

Jiwaram might have claimed to share the taluka with his brother Harkishan and he as well as Jogul Kishore (if living) might have claimed to share it with Jey Kishore if the succession was regulated by the ordinary Hindu law. From the record of a proceeding before the Deputy

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Collector and Settlement Officer of the District of Aligarh on the 30th April 1846 it appears that on the death of Jey Kishore which took place in 1844 or 1845 Ram Pershad and others, sons of Jiwaram who was also then dead, claimed to be entitled to one half of the estate of Beswan and to have a settlement thereof made in their names. This claim was dismissed by the Collector. The document contains a history of the case gathered from a perusal of "the papers in the records of the Collectorate and those received from the Commissioner's Office as well as those filed in the Settlement Department together with the records of the Khazi's office, civil side, relating to Jiwaram and Jey Kishore deceased minor and fixing a monthly allowance for Jiwaram." Shortly told the story is that Jiwaram was appointed manager of the estate during Jey Kishore's minority, but in consequence of some irregular proceedings on his part, which were thought to manifest an intention to dispossess his nephew, litigation ensued with the result that Jiwaram was deprived of the management of the estate and subsequently an allowance of Rs. 400 a month was made to him which he continued to receive during his lifetime. On his death Jey Kishore stopped the payment but the Commissioner by a rubkar of the 12th August 1836 directed that until an order should be made to the contrary or till the institution of a civil suit to establish right by the heirs of Jiwaram it should be continued as theretofore and the heirs of Jiwaram received the monthly allowance during the life of Jey Kishore. There is other evidence that Jiwaram enjoyed an allowance of

Rs. 400 per mensem for maintenance and there is no evidence whatever that he brought any suit in the Civil Court to dispute his brothers' or his nephew's possession of the family estate. Nor did the sons of Jiwaram ever bring any suit to contest the possession of Girdhar, the eldest son and successor of Jey Kishore. The Collector by a subsequent proceeding held the allowance of Rs. 400 per mensem to be a pension only and he reduced the allowance to Rs. 120 per mensem divisible between the sons of Jiwaram. They thereupon commenced a suit to establish their right to the Rs. 400 as a malikana allowance and applied for leave to sue *in forma pauperis* but the claim was rejected by the judgment of the District Judge of the 25th June 1856.

It thus appears that Harkishan succeeded his father Nawal in exclusion of his younger brother Jiwaram and on his death in 1808 Jey Kishore succeeded in exclusion not only of his younger brother Jogul Kishore but also of his uncle Jiwaram, and on Jey Kishore's death in 1844 or 1845 Girdhar his eldest son succeeded to his estate. Jiwaram and his sons though challenged to assert their claim to share in the estate by a civil suit abstained from doing so and contented themselves with an allowance for maintenance. Girdhar died about eighteen months after his father and was succeeded by his only brother Gir Parshad. But as the latter was a minor throughout his elder brother's tenure of the estate no strong inference can be drawn from his not claiming to share in the estate. Gir Parshad died early in 1880. It results that for a period of nearly 80 years from the time of the British occupation

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the enjoyment has been consistent with the alleged custom and for the earlier and greater part of that term has been inconsistent with any other legal basis.

The High Court minimise the inference to be drawn from these successive descents of the estate to an eldest son in three generations and the circumstances accompanying them. (1) They say that the inquiry made by order of the Collector of Dyaram and Rajah Bhagwant Singh in 1809 was directed to the custom of Hindus and not to the custom peculiar to this family and they suggest that the reports made in pursuance of that inquiry related only to management and control of the estate not to property. (2) It is suggested that Jiwaram was awarded his allowance of Rs. 400 a month as compensation for being dispossessed of the zemindari and being content with his position did not care to claim a share in the estate.

Their Lordships observe on the first point that the customs of Hindus would include any custom regulating the succession in a particular family and that the inquiry was whether the property "devolves on Thakur Jey Kishore." They have already observed that the Collector evidently understood the replies of Dyaram and the Raja of Mursan as directed to the question who was entitled to the property. The sanads were grants of the property to Jey Kishore described as eldest son and in short the transaction was not merely a settlement of the estate in his name for the purpose of revenue as suggested in the High Court. On the second point it is extremely unlikely that Jiwaram would have rested content with an allowance if he had a claim to one

half the estate which he could prosecute with any prospect of success. Jiwaram (apparently) and his sons certainly asserted a claim to be sharers in the estate though they never ventured to bring their claims to the test of a legal decision. The records of the Collectorate so far as concerns the relations between Jiwaram and his sons on the one hand and Jey Kishore and afterwards Girdhar on the other do not disclose a picture of a perfectly united and contented family.

But the learned Judges in the High Court thought that the acquiescence of the descendants of Nawal Singh in the usurpation of Dyaram was far more impressive than the acquiescence of Jiwaram and his descendants. Their Lordships must therefore examine what is known of the relations between Nawal Singh and Dyaram and their respective descendants. Nawal Singh and Dyaram were sons and so far as appears the only sons of Bhuri Singh who is said to have died in the year 1775. The Subordinate Judge says that Dyaram forcibly wrested the bulk of his father's property including taluka Hathras from his elder brother on their father's death and being a man of great energy he managed to dispossess the other descendants of Nandram from their estates and annex their estates to his extensive possessions. His authorities for this statement are apparently the settlement reports of Aligarh made by Mr. Thornton in 1834 and by Mr. Smith in 1874 and Atkinson's Gazetteer published in 1875. These works are not before their Lordships and they cannot say whether they bear out the learned Judge's statement which however seems to go further than the oral evidence of tradition.

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warrants. It may be that the reports and gazeteer in question are not strictly evidence of the truth of all the statements contained in them. And it may be that if examined they would not bear out the conclusions drawn from them by the Subordinate Judge. They were however used apparently without objection and probably no objection would be taken to their being read for what they are worth in a similar case in this country. But if you exclude evidence of tradition what evidence is there that Hathras ever was part of the ancestral property of Bhuri Singh? In the last century when the Mogul Empire was breaking up and when (to quote Mr. Justice Blair) "law was in abeyance" it was not uncommon for an able and energetic man to carve out a large property for himself by the sword at the expense either of his own relatives or of strangers. If you look to tradition as disclosed by the oral evidence the statements as to Hathras are conflicting. Indeed Keheri Singh says that Dyaram acquired the Hathras estate from the Poreh Thakurs. In the opinion of their Lordships it is impossible to presume a partition between the brothers or to say with any approach to certainty whether any or what portion of Dyaram's possessions was or was not ancestral property or from whom or by what means they were acquired. All that can be said is that tradition points to his having acquired them by force and not by right. Dyaram was at first confirmed in possession of his estates by the British Government but in 1817 was deprived of the bulk of them for rebellion. It appears from documents in evidence that 20 of Dyaram's villages under the appellation

of taluka Shahzadpur were conferred on Jey Kishore and 31 were conferred on Jiwarani. It is probable that these villages were only a comparatively small part of the estates confiscated by the Government. The learned Judges in the High Court ask why the heirs of Nawal Singh did not then ask for reinstatement in the fiefs which had been seized by Dyaram as had been alleged in violation of Nawal Singh's right of primogeniture. And it is this acquiescence to which they attach so much importance. Their Lordships cannot agree for the simple reason that they do not know enough of the facts or circumstances or of the motives or policy of the British Government to form any reliable opinion on the subject.

Their Lordships now turn to the oral evidence in the case. No less than fifty-six witnesses were called and examined on behalf of the Appellants. Their evidence mainly divides itself into two branches. (1) Evidence of the existence of the custom of guddinashini in the Beswan taluka and of the successive holders of the taluka within living memory having sat on the guddi and received the customary offerings. (2) Evidence of tradition relating to the family learnt by the witnesses from their deceased relatives and others.

In commenting on the evidence of the custom of guddinashini the High Court says: "In order to constitute that a valid argument it ought to have been shown not only that guddinashini and the presentation of nazars was the ordinary concomitant of the possession of an impartible Raj but also that it was an exclusive attribute of families in whom the custom of primogeniture prevails." The

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judgment of the High Court was delivered on the 7th February 1893. Subsequently to that date a case of *Thakur Nitpal Singh v. Thakur Jai Singh Pal* (1) (which in many of its circumstances is strikingly like the present one) was before this Board. The case related to the succession to the ancestral property of a Rajpoot family long settled in the Agra District. In delivering the judgment of their Lordships, Lord Hobhouse observes :—

“The other remark is a suggestion that there is no necessary connection between guddinashini and primogeniture. That may be so : but it is impossible to read the evidence without seeing that the witnesses on both sides treat the two as identical or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied guddinashini for the purpose of disconnecting it from primogeniture. . . . It is clear that the Subordinate Judge had had no suspicion that the evidence applying to guddinashini could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny guddinashini they mean to affirm or deny primogeniture : and their constant identification of the two things shows how closely they are connected in the minds of the families of that part of the country. The custom of guddinashini has clearly an important bearing on that of primogeniture though the connection between them may not be a necessary one.”

Their Lordships think that these observations are directly applicable to the

case before them. The language in which the Raja of Mursan spoke of the custom of guddinashini has already been referred to. The Respondent himself in denying that the custom prevailed in his family says “By guddinashini or masnadnashini I mean the practice of one person or the eldest son succeeding to the whole estate and the other sons only getting maintenance.” Kharag (a son of Jiwarām) says “By guddinashini I mean that he (guddinashin) used to sit on a guddi and receive nazar and one son inherited the property while the other sons received maintenance.” Kasi Ram the jaga (bard or genealogist) of the Beswan family (whose father and grandfather were jagas before him) after deposing to the custom says “I call that guddinashini that is that the eldest son sits on the guddi and younger sons receive maintenance.” And expressions of this kind showing the identification in the minds of the witnesses of the right of sitting on the guddi with succession to the estate constantly occur in the course of the evidence. There are five witnesses who say they saw Jey Kishore sit on the guddi and receive nazar. There are seven witnesses who say they saw Girdhar do so and there are numerous witnesses who saw Gir Parshad. Their Lordships agree with the High Court that a good deal of the evidence of statements made by deceased persons is of doubtful admissibility. By the 32nd sec. (5) of the Evidence Act such statements are relevant when they relate to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the ques-

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tion in dispute was raised. For this purpose and to this extent statements of deceased relatives and servants and dependents of the family are admissible. By sec. 49 when the Court has to form an opinion on (*inter alia*) the usages of any family the opinions of persons having special means of knowledge thereon are also relevant. But by sec. 60 if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. In this way some of the evidence of such witnesses as Kharag, a son of Jiwarman Pershad, a nephew of Lala Lachminarain, who was dewan at Beswan for about 25 years, of Keheri Singh, a descendant of Sakat, who made out a genealogical tree of Nandram's family from the information of his grandfather, of Ganga Ballabh and others of the same class would perhaps be admissible evidence of the custom and when corroborated by the proved facts as to the descent of the estate during the last eighty years is not without value. But their Lordships would not be disposed to place much reliance upon it standing alone.

Another class of evidence consists of the

Wajib-ul-urzes of various villages comprised in the taluka. The Plaintiff put in evidence ten of these documents compiled in the years 1862 and 1863. They do not support the Appellant's case and they afford negative evidence against it because they contain a provision for the appointment of lambardar in certain events according to the will of the co-sharers, and in one of them relating to the village Bhawan it is said that if there be no son then one of the heirs shall be the lambardar with the consent of the other heirs. On the other hand the Appellant also put in evidence the Wajib-ul-urzes of ten villages compiled in the year 1873. They contain a declaration by Gir Parshad himself of the custom. "After my death my eldest son if he is fit and well-behaved shall according to the custom and usage of my family succeed me to the guddi and the other sons if they are fit shall receive Rs. 200 a month and if they are unfit Rs. 50 a month." Their Lordships do not place much reliance on these later documents which are only an expression of the opinion or aspiration of Gir Parshad himself. The documents of 1862 and 1863 are no doubt evidence in favour of the Respondent but their Lordships do not think that they are sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate and other evidence in favour of the Appellant to which they have already adverted.

Their Lordships are fully sensible of the importance of requiring that a special family custom involving a departure from the ordinary Hindu Law should be properly proved but they think that in this

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case the Appellant has satisfied the burden of proof. They will therefore humbly advise Her Majesty that the decree of the High Court be reversed and instead thereof the Respondent's appeal to that Court be dismissed with costs. The Respondent will also pay the costs of this appeal.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

*Appeal allowed with costs.*

C. W. A.

## [CRIMINAL REVISIONAL JURISDICTION.]

No. 435 OF 1900.

PRINSEP, J.	}	SEWNANDAN RAI KAYAB,
HANDLEY, J.		Petitioner,
1900.		v.
13, July.		THE VICE-CHAIRMAN OF THE DARJEELING MUNICIPALITY, Opposite Party.

*Bengal Municipal Act (III of 1884), secs. 273 (1), 238—Sanction to build when not given within specified period—Right to build without sanction—Period of sanction, computation of—Adoption of suggestion of Municipality, if waiver of right.*

*A person who submitted for the sanction of the municipal commissioners plans and specifications of a building and the commissioners omitted to pass orders within six weeks cannot be convicted under sec. 273 (1) of the Bengal Municipal Act for commencing to build according to his own plan after such period.*

*That he made certain alterations after such period at the suggestion of the Municipality does not make him forfeit his right under sec. 238 of the Act to build on his own plan.*

*The period in such cases is to be computed from the date when complete*

*plans and specifications are submitted in such a form as makes it possible of its being considered by the municipal commissioners.*

This was a rule issued on the 4th of June 1900, against the order of the Deputy Magistrate of Darjeeling, dated the 7th of May 1900.

The accused was charged in this case with having built a house contrary to the sanctioned plans and building regulations of the Municipality and was sentenced by the Magistrate to pay a fine of Rs. 50 and was further ordered to pay a daily fine of Rs. 10 if he did not within ten days effect the alterations in the building as indicated in the order of sanction given by the Municipality. Whereupon the Petitioner moved the High Court on grounds which appear sufficiently from the judgment.

*Mr. E. P. Ghose* and *Mr. J. R. Percival* for the Petitioner.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner has been convicted under sec. 273 (1) of the Bengal Municipal Act (III of 1884) for building a house contrary to the provisions of sec. 238, that is to say, contrary to the plan sanctioned by the Municipality.

It is objected before us that, inasmuch as no orders had been passed within six weeks of the plans or specifications having been submitted by him for the sanction of the Municipality, the Petitioner was at liberty to proceed with the erection of the house and that therefore the conviction is bad.

The Magistrate in his explanation sub-



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mitted to us, states that "as the whole chain of correspondence shows that the Petitioner was in active communication on the subject with the Municipality up to the time he received the municipal sanction to build," there is no force in the objection.

We can find on the record no correspondence which took place after 6th June, the date on which the complete plans and specifications were furnished to the commissioners, up to the expiration of the period of six weeks calculated therefrom. We understand the law to be that such period should be calculated from the date of a complete and proper notice, with a general description of the building to be erected with its plans and specifications, being submitted in such a form as to be capable of consideration by the municipal commissioners. The period should not be calculated from March, when the first notice was given but from the 6th of June when it was submitted in a complete form and, calculated from this date, there was ample time such as is contemplated by the law, that is, a period of six weeks, within which the municipal commissioners could or should have passed orders thereupon and the law declares that, on neglect or omission within such time to pass orders on the application, the person desirous of building shall be entitled to commence work on the ground that the Municipality, by their silence, shall be deemed to have given their sanction. But the Magistrate proceeds to state in addition that not only did the Petitioner learn from the correspondence that there was hesitation on the part of the municipal commis-

sioners to give sanction, but that he did not avail himself of the privilege given to him by sec. 238, that is, he did not commence the work after the expiry of six weeks without waiting for the sanction, because he did wait for the sanction and he did not begin building until after the receipt of the sanction, so that he is bound to act in compliance with the terms of the sanction given. If this were so, we think the Petitioner could have no reasonable ground for objection. But there is no evidence of this on the record and such evidence as there is goes to show that the Petitioner did commence the building before the end of July, whereas the orders of the municipal commissioners were not passed until the 10th of September and were not communicated to him until the 16th idem. No doubt we have the fact that when it was found that, the Petitioner was not conforming to the plan as sanctioned by the Municipality, he endeavoured to satisfy the objections raised and he did not claim the privilege to build on the plan submitted by him without the modifications subsequently made by the municipal commissioners on the ground that the municipal commissioners had neglected to pass orders thereon within the period of six weeks. But the fact that he did not at once make this objection and claim this privilege does not, in our opinion, preclude him from raising it now at the trial. It was clearly his interest to endeavour, without any opposition on his part, to obtain the withdrawal of any objection on the part of the Municipality to his proceed-

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ing with his work. But he was not bound to defy the Municipality and there may be good reason why he should not wish to do so.

We think that the Magistrate has sufficiently met the objection taken that he has tried this case without a formal order of transfer to his own Court, for he has reported and this has not been disputed before us that he did give notice of this verbally to the pleaders in the case and he proceeded with the trial after such notice and without any objection whatsoever.

It is, however, to be regretted that the Magistrate did not conform to the terms of the law and did not formally record an order in writing for transfer to his own Court together with reasons for the same.

The conviction under sec. 273 (1) of the Bengal Municipal Act of 1884 is, for these reasons, bad. We accordingly set aside the conviction and sentence and we direct that the fine, if paid, be refunded. Any monies realized from the accused on this account will also be repaid.

H. P. C. *Rule made absolute.*

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 387 OF 1900.

PRINSEP, J.	GOBERDHONE PRAMANICK,
HANDLEY, J.	Petitioner,
1900.	v.
28, June.	ISWAR CHUNDER PRAMANICK,
	Opposite Party.

*Registration Act (III of 1877), sec. 82—Refusal to register deed denying execution, prosecution for—Stay of proceeding pending civil suit to declare deed a forgery.*

*Petitioner denied execution and refused*

*to register a mortgage deed. On appeal the special Sub-Registrar found the deed to be genuine and ordered registration and sanctioned prosecution of the Petitioner under sec. 82 of the Registration Act, subject to the approval of the District Registrar; the sanction was given but the Petitioner applied for stay of proceedings pending decision in a suit he had filed in the civil Court for having the deed declared a forgery and on the refusal of the Magistrate to stay proceedings:*

*Held—That the Magistrate should have stayed proceedings pending the decision in the civil suit.*

This was a rule issued on the 19th of May 1900, against the order of the Registrar and District Magistrate of Midnapur, dated the 5th of February 1900.

The facts appear sufficiently from the judgment.

*Babu Bidhu Bhusan Ganguli* for the Petitioner.

No one appeared to show cause.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

In this case the Petitioner denied the execution of a mortgage bond which had been brought to the Sub-Registrar for registration, registration being refused.

On appeal the special Sub-Registrar held that the mortgage bond was a genuine document. He ordered registration and, subject to the approval of the District Registrar, he gave sanction to prosecute the Petitioner under sec. 82 of the Indian Registration Act. This sanction has been granted. The Petitioner then brought a declaratory suit for the purpose of proving that

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the mortgage bond was forgery and not binding on him and he asked the District Magistrate to defer the criminal proceedings until the decision of that suit. The Magistrate has refused to do so and that is the matter which is now before us.

Now, if it should so happen that the declaratory suit in the civil Court is decided in favour of the Petitioner, there will be a decision that the mortgage bond is a forgery and consequently the order to prosecute the Petitioner under sec. 82 of the Registration Act will be a bad and an unjust order. Under such circumstances we think that it was incumbent on the Magistrate to stay his hand until the decision of the civil suit and we may observe that the proceedings in the civil suit are much more likely to result in a proper conclusion in respect to the conduct of the Petitioner than the summary proceedings taken before the registration officers.

The rule is, therefore, made absolute and the District Magistrate is directed to stay further proceedings until the decision of the declaratory suit now pending in the civil Court regarding the mortgage deed.

H. P. C. *Rule made absolute.*

## [CIVIL REFERENCE.]

No. 6 of 1900.

MACLEAN, C. J.

BANERJEE, J. In the matter of NRITYA  
1900. GOPAL SEN, a Pleader.

31, July.

*Legal Practitioners Act (XVIII of 1879),  
as amended by (Act XI of 1896), secs. 13, 14  
—Professional misconduct—Grossly improper  
conduct—Legal practitioner advising payment*

*of money to witness to speak the truth or to prevent giving false evidence—False statements by legal practitioner in letter to induce speedy remittance for such purpose.*

*A legal practitioner by paying or offering to pay money to a witness to induce him to speak the truth or to prevent him from giving false evidence may not be guilty of any offence criminally punishable but is guilty of unprofessional conduct.*

*A legal practitioner in pressing his client for the payment of money to a witness to induce him to keep back unfavourable evidence is guilty of grossly improper conduct in the discharge of his professional duties within the meaning of sec. 14 of the Legal Practitioners Act.*

This was a reference under sec. 14 of the Legal Practitioners Act (XVIII of 1879), made by the District Judge of Birbhum, dated the 11th of April 1900.

The facts of the case appear from the judgment and are also fully stated in 4 C. W. N. cccxxii (or p. 232, short note).

*Mr. Garth and Babu Saroda Churn Mitter* for the Pleader.

The JUDGMENT OF THE COURT was as follows:—

This case has been reported to us under sec. 14 of the Legal Practitioners Act by the Munsif of Bolepur in the District of Birbhum through the Judge of that district. The Munsif and the District Judge agree in finding that the legal practitioner reported against, namely, Babu Nriya Gopal Sen, a pleader, practising in the Munsif's Court, is guilty of grossly improper conduct in the discharge of his professional duty. The District Judge recommends the dismissal of the pleader, while the Munsif, without

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making any definite recommendation asks us to take into consideration the past good conduct of the pleader upon the question of punishment.

The misconduct imputed to the pleader consists in his having, on the 10th of September 1898, written to Babu Aghore Nath Barat (since deceased) who was interested in upholding an alleged Will of one Tincowrie Roy of Supur, propounded in a Letter of Administration case then pending, pressing for the payment of a sum of Rs. 900 to two witnesses, Moti Lal Chaudhuri and Ram Das, to prevent their going over to the opposite side, and stating that he (the pleader) had executed in favour of the two witnesses promissory notes for that amount.

The pleader in the written explanation submitted by him admits writing the letter, but denies having done any thing wrong, and he also denies having executed any promissory notes. His account of the matter is shortly this, that he acted as a pleader for Tincowrie Roy, and after Tincowrie Roy's death he acted as a pleader for his daughter Manjanali by whom the Will in question was propounded; that he was told by Manjanali's son-in-law, Aghore Nath Barat, whom he had every reason to believe, that the witness Moti Lal Chaudhuri was threatening to produce certain papers which might go against the Will, unless the witness was paid a large sum of money; that he was subsequently requested by Aghore Nath Barat by a letter which has been lost, to accommodate him (Aghore Nath Barat) by paying the witnesses Moti Lal Chaudhuri and Ram Dass the sum of Rs. 900 out of his own

pocket; and that as he had no money in hand, it was on the suggestion of Moti Lal Chaudhuri that he wrote the letter of 10th September stating that he had executed the promissory notes though he had not really done so, merely with a view to secure speedy remittance of the money by Aghore Nath Barat. The Munsif finds that the pleader executed the hand-notes, and that his conduct in the matter, assuming that the Will propounded was genuine, was still grossly improper. The District Judge goes further and is of opinion that the Will was a forgery and the pleader was not unaware of that fact.

I agree with the Munsif in thinking that having regard to all the circumstances of the case it should be dealt with upon the assumption that the Will was a genuine document. Assuming that to be so, let us see whether the conduct of the pleader was such as would make him liable to dismissal or suspension.

Mr. Garth, who appeared for the pleader, contended that a legal practitioner does nothing wrong if he advises his client to pay money to a witness to induce him to give true evidence in his favour or to prevent him from giving false evidence against him.

I do not consider this contention correct. By giving such advice a legal practitioner may not become guilty of any criminally punishable offence; but the question before us is not whether the pleader has committed any criminally punishable offence but whether he has done anything for which he is liable to dismissal or suspension; and I feel very little hesitation in answering this question in the affirmative. A witness is no

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doubt entitled to be paid his travelling expenses; the law expressly allows that. He may also under certain circumstances be entitled to compensation for loss of time. But to pay him money to induce him to speak the truth or to prevent him from giving false evidence would be bargaining for truth; and if it were allowed, it would be fraught with consequences dangerous to the administration of justice. But it is unnecessary to pursue this discussion further, because in this case on the pleader's own showing (see paragraphs VI and VII of his explanation) the money in question was paid not simply with a view to induce the witnesses to tell the truth or dissuade them from telling an untruth, but really for the purpose of preventing one of them (Moti Lal Chaudhuri) from producing certain papers which are not alleged to be false, but which were apprehended to be capable of throwing suspicion upon the Will which is said to be genuine. The pleader here, therefore, not only advised but pressed and actively helped his client to pay money to a witness for the purpose of inducing him to keep back from the Court evidence which is not shown to be false, so that it might not raise any doubt as to the genuineness of the Will which was believed to be true. Such a course was absolutely indefensible and reprehensible in the highest degree. It was for the Court to decide whether the Will was genuine or not; and for the purpose of determining that question, it was entitled to have all the relevant evidence on the point placed before it. And the pleader, in pressing for the payment of money to a witness to induce him to keep back

unfavourable evidence, clearly sought to obstruct the investigation of truth and the administration of justice. His conduct, therefore, was grossly improper conduct in the discharge of his professional duties within the meaning of the law. I may add that the pleader on his own shewing is further guilty of professional misconduct in falsely writing to his client or her son-in-law who was looking after her case that he had executed the promissory notes when he says he had not done so, merely for the purpose of expediting the remittance of money.

It remains only to consider the question of punishment. The misconduct of the pleader was of a very grave character and it merits a severe penalty. The only thing that weighs in his favour is his past good conduct. Having regard to all these circumstances, I think suspension from practice for two years from this date will meet the requirements of justice.

MACLEAN, C. J.—I have had the advantage of reading the judgment of Mr. Justice Banerjee which he is about to deliver, and, concurring as I do both in his reasoning and in his conclusion, I propose to add only one short word. That the vakil in this case has been guilty of grossly improper professional conduct, there cannot be a shadow of a doubt. His conduct, to my mind, was most unprofessional and very wrong, conduct calculated in a marked degree to prevent the ends of justice and to interfere most seriously with the due administration of justice. I do not think it is necessary that I should say anything further.

S. C. S.

*Suspension ordered.*

## [CIVIL REFERENCE.]

No. 5 of 1900.

MACLEAN, C. J.  
BANERJEE, J.  
1900.  
30, July.

In the matter of  
JOGENDRA NARAYAN  
BOSE.\*

*Legal Practitioners Act (XVIII of 1879), as amended by (Act XI of 1896), secs. 13, sub-sec. (f), 14—Pleader, when he does something as a litigant or member of the public and not as pleader, if to be regarded as professional misconduct—“Any other reasonable cause,” construction of.*

*An allegation, made by a pleader as a Defendant in a suit and not as a pleader, that the Plaintiffs had bribed some officer of the record-room to tamper with certain documents produced at the instance of the Plaintiff did not amount to professional misconduct.*

*That in the words “any other reasonable cause” in sec. 13, sub-sec. (f) of the Legal Practitioners Act, the expression “other” means “other” “ejus dem generis,” that is, of the class or description of misconduct which is referred to in the preceding sub-sections, that is to say, professional misconduct.*

*The Legal Practitioners Act is aimed against the misconduct of legal practitioners in relation to their professional duties and not in relation to other matters.*

This was a reference under sec. 14 of the Legal Practitioners Act, by the District Judge of Hughly, dated the 2nd of March 1900.

The facts appear from the judgment.

Babu Sib Chandra Palit for the Pleader.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—I do not think that this is a case for our interference under the Legal Practitioners Act, nor has any case within that Act been satisfactorily established against the pleader. The Act is aimed against the misconduct of pleaders in connection with, and in relation to, their professional duties, and not in relation to other matters. The facts of this case are very short. A suit was instituted with reference to some property and in that suit the pleader in question was a Defendant in his personal capacity, and as a Defendant, he engaged a pleader to act for him and to defend the suit. In the course of that suit it was proposed on behalf of the Plaintiffs, that certain documents should be produced from a certain record-room, and, when they were produced, the pleader, whose conduct is now impugned, said openly in Court that these documents had been tampered with, and that the Plaintiffs had bribed some official of the record-room to tamper with those documents. But he did not say that as a vakil of the Court, or as a vakil engaged in the case, he uttered the words in question as a litigant, and as a member of the public. It may have been, and possibly was, a very improper thing, and a very intemperate thing, for him to have said, and it may be—I don't say it will be, for I certainly do not propose to say anything about the truth or otherwise of his statement—that he may have slandered some one and may be responsible for that slander. We have nothing to do with that to-day, all we have to determine to-day is whether or not this gentleman has been guilty of professional misconduct, within the meaning of the

\* See in the matter of Purna Chunder Pal, 4 C. W. N., p. 389 (decided by Ghose, Rampini and Hill, JJ.).—REPORTER.

## IN THE MATTER OF JOGENDRA NARAYAN BOSE.

Act. It is quite clear that the case does not fall within any of the first five sub-sections of sec. 13 of the Legal Practitioners Act of 1896, and the only question is, whether it falls within the general words of sub-sec. (f), "any other reasonable cause." To my mind the expression "other" means "other" "*ejusdem generis*," that is, of the class or description of misconduct which is referred to in the preceding sub-sections, that is to say, professional misconduct. However intemperate and however ill-advised his action may have been, I do not see how we can properly say that the pleader has been guilty of professional misconduct. In my opinion we ought not to interfere.

BANERJEE, J.—I am of the same opinion.

S. C. S. *Reference discharged.*

## PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD HOBHOUSE.	SURJAN SINGH and
LORD MACNAGHTEN.	ors., Plaintiffs,
LORD LINDLEY.	Appellants,
SIR RICHARD COUGH.	v.
SIR H. DE VILLIERS.	SARDAR SINGH and
1900.	ors., Defendants,
21 <sup>st</sup> July.	Respondents.

*Evidence Act (I of 1872), sec. 32—Pedigree, admissibility of, to prove relationship—Wajib-ul-urz.*

*Where a pedigree was tendered in evidence but neither any of the bards who were said to have prepared it nor the Raja who assembled the bards of the family and with their assistance had the pedigree drawn up was called as a witness, and no proof was adduced that they were within any of the descriptions given in sec. 32 of*

*the Indian Evidence Act which made it unnecessary to call them :*

*Held—That the Court below was right in not admitting the pedigree in evidence.*

*The Wajib-ul-urz was too vague to be of any value in support of Appellants' claim.*

Munnu Singh was the last male proprietor of village Piparya Andu, the property in dispute. He died before the confiscation of the soil of Oudh. The summary settlement after the re-occupation was made with his widow Gulab Kuar, he having left no male heirs, and in 1869 the regular settlement was made with her and co-sharer. She died in July 1881, and upon a dispute between the Appellants who claimed to be his reversionary heirs and the Defendants who were two sons of his daughter and the husband of that daughter, mutation of names in 1881 was made in the latter's favour and they got into possession.

Nearly 12 years after the widow Gulab Kuar had died, the present suit was instituted by the Appellants, claiming to be reversioners of Munnu Singh. The Defendants denied their relationship and also denied that the custom of Chanban Thakurs under which daughters and their sons did not succeed while there were male collaterals alive, alleged by Plaintiffs, existed. Defendants also set up that the regular settlement was made with Gulab Kuar as full proprietor.

*Mr. C. W. Arathoon* for the Appellants contended that the oral evidence of relatives of the family and the several *Wajib-ul-urz* had made out the custom and the relationship. He referred to secs. 49 and 50 of the Evidence Act and sec. 36; also to *Bijai Bahadur Singh v.*

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*Bhupindar Bahadur Singh* (1), regarding the Kanungoe's statement during the regular settlement and the fact that the pedigree table was produced during the mutation proceedings. As regards the *Wajib-ul-urs* he cited *Rani Lekraj Kuar v. Mahpal Singh* (2).

*Mr. Mayne* for the Respondents argued that neither the custom nor the relationship had been proved, that on several matters witnesses who could have thrown considerable light on the subject had not been called, such as Raja Balbhadar Singh, the bards, who are said to have made the genealogical table, and the present talukdar of Oel. He referred to *Uman Parshad v. Gundharp Singh* (3). He also contended that the grant by Government after confiscation was an absolute grant to Gulab Kuar, and referred to letter No. 1, to Act I of 1869, para. 5, and to *Nawab Maitka Jahan Sahiba v. Dy. Commissioner of Lucknow* (4).

**THE COURT.**—Surely the settlement was made with Gulab Kuar as a Hindu widow.

**LORD HOBHOUSE**—It was for you to make out that it was made with her as absolute proprietor.

**SIR R. COUCH.**—Do you say that the Government intended to change the course of succession by the settlement?

*Mr. Arathoon* replied, and as regards *Mr. Mayne's* last contention referred to *Jehan Kadr v. Afsar Bahu Begum* (5).

Their LORDSHIPS' JUDGMENT was delivered by

**SIR RICHARD COUCH.**—The Appellants in this case sued for possession of the village of Piparya Andu on the ground that on the death of Mussammat Gulab Kuar the property devolved on them as the reversionary heirs of her deceased husband Munnu Singh. He was the proprietor of the village and the first summary settlement was made with him on the annexation of the Province of Oudh. After that he died and the second summary settlement of the village after the Mutiny was made with Gulab Kuar. The judgment of the Assistant Commissioner given on the 3rd August 1869 on a claim by her against the Government stated that Munnu Singh being hereditary proprietor held up to annexation, the summary settlement of 1857 was made with him, he died without leaving male issue and the settlement was therefore made with his widow. And the Court decreed the proprietary right in the entire village in favour of Gulab Kuar and also in favour of co-sharer. On the 7th January 1881 Gulab Kuar made a Will by which she devised the village to her deceased daughter's three sons, Sardar Singh and Baldeo Singh, the Respondents, and Bahadur Singh, who died before her. On the 8th July 1881 she made a gift of some land in the village to Durga Singh, the other Respondent, their father. Gulab Kuar died on the 12th July 1881 whereupon on the 10th August 1881 an order for mutation of names of Munnu Singh was made in favour of Sardar Singh and Baldeo Singh and the other claimants, the Appellants, being referred to the Civil Court. Their

(1) L. R. 22 I. A. 139, see p. 151 (1895).

(2) L. R. 7 I. A. 63 (1879).

(3) L. R. 14 I. A. 127 (1887).

(4) L. R. 6 I. A. 63 at p. 75 (1879).

(5) I. L. R. 12 Cal. 1 (1885).



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sult was not instituted till the 30th November 1892, more than eleven years after the dismissal of their claim.

The case stated in their plaint is that they and Munnu Singh are the descendants of Raja Jugraj Sah by his second wife, that they are entitled to inherit the estate of Munnu Singh as his next heirs, that Gulab Kuar was in possession of the village only with the rights of a Hindu widow and as such was not competent to alienate the property beyond her lifetime, that the Will and deed of gift are consequently invalid and that according to a well-established family custom daughters and their issue are excluded from inheritance. The Respondents denied the alleged relationship of the Plaintiffs with Munnu Singh and their reversionary title and the existence of any custom by which daughters and their issue are excluded from inheritance. They alleged that the Will and deed of gift were valid as Gulab Kuar was in possession of the village and had the rights of an absolute proprietor and that, apart from the Will, Sardar Singh and Baldeo Singh being sons of Munnu Singh's daughters were entitled under the Hindu law to inherit his property on the death of his widow in preference to collateral heirs.

The Subordinate Judge who tried the suit found that the Appellants' relationship to Munnu Singh and their reversionary title were proved, that Gulab Kuar's possession was only that of a Hindu widow, and that the Will and deed of gift were invalid and made a decree in the Plaintiffs' favour. The Defendants appealed to the Court of the Judicial Commissioner of Oudh which has decided only one of the questions that were raised,

*viz.*, whether the Appellants are the reversionary heirs of Munnu Singh.

To prove this the Appellants produced a pedigree of the family of Raja Pertab Singh which shows that the Plaintiffs are the collateral heirs of Munnu Singh. This pedigree was objected to as not being admissible in evidence. It was admitted by the Appellants' counsel that it was prepared under the following circumstances as deposed to by one of their witnesses. He was examined in 1894 and his evidence is that the pedigree was prepared in his family 13 years ago. The bards were called to dictate it. It was prepared from the history given by them. It was copied from certain papers in the possession of the bards. In the year when the Raja's marriage was settled in Surajpur a dispute about it arose. Then they sent for the bards and got the pedigree prepared. The dispute was said to have been about the class of Thakurs to which the Raja referred to belonged and arose about the time of the death of Gulab Kuar. In their Lordships' opinion the Appellate Court has rightly held that the pedigree was not admissible, or as the Indian Evidence Act says, relevant. Sec. 32 of the Act which would make the statements in the pedigree relevant only applies when the statements are made by a person who is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable. Neither any of the bards nor Raja Balbhadar Singh who assembled the bards of the family and with their assistance had the pedigree drawn up was

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called as a witness and no proof was given that they were within any of those descriptions which made it unnecessary to call them. A *Wajib-ul-urz* of the village Aurungabad, dated 26th October 1894, was relied upon for the Appellants. It contained a statement purporting to have been made by Pitam Singh, deceased, but it is too vague to be of any value in proof of the Appellants' claim. The oral evidence produced by the Plaintiffs was that of six witnesses, three of whom appear to have derived their information from family pedigrees which were not produced, and the others did not state the source of their information. The Appellate Court was of opinion that this evidence was not sufficient to prove the relationship with Munnu in which view their Lordships agree. Apparently the Subordinate Judge who decided in the Plaintiffs' favour was of this opinion as in his judgment he says it was "shown by the genealogical table" and did not rely upon other evidence. The pedigree not being admissible the Appellants failed to prove that they were the collateral heirs of Munnu Singh and the Appellate Court without giving any finding on the alleged custom to exclude daughters and their issue set aside the decree of the lower Court and dismissed the suit. Their Lordships being of opinion that it was rightly dismissed they will humbly advise Her Majesty to affirm that decree and to dismiss this appeal. The Appellants will pay the costs.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

**C. W. A.** *Appeal dismissed with costs.*

### PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HOBHOUSE.	RAJA BHUP INDAR
LORD MACNAGHTEN.	BAHADUR SINGH,
LORD LINDLEY.	Defendant,
SIR RICHARD COUGH.	Appellant,
SIR HENRY STRONG.	v.
1900.	BIJAI BAHADUR
21, July.	SINGH, Plaintiff
	Respondent.

*Civil Procedure Code (Act XIV of 1882), secs. 2, 211 and 540—Mesne profits, period during which recoverable—Order determining mesne profits, interlocutory or final, if appealable—Decree.*

*A decision in execution proceedings determining the period for which mesne profits are recoverable is appealable both under general principles and under secs. 2 and 540 of the Civil Procedure Code.*

*Where a decree for possession with mesne profits was taken to the Privy Council in appeal and was affirmed by Her Majesty in Council:*

*Held—That the three years up to which mesne profits may be given under sec. 211, Civ. P. C., must be counted from the date of the Queen's order and not from that of the original decree.*

*Where the original Court granted a decree for possession with "future mesne profits" and, on appeal, Her Majesty in Council affirmed that decree without expressly mentioning the mesne profits:*

*Held—That the Queen's order granted mesne profits by reference to the original decree.*

*Mr. Rose* for the Appellant.

*Mr. Rankes* for the Respondent.

## RAJA BHUP INDR BAHADUR SINGH v. BIJAI BAHADUR SINGH.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—This appeal is presented against an order made in the course of execution proceedings. The Plaintiff in the suit who was the original Respondent in the appeal claimed possession of land. On the 12th November 1887 the District Judge passed a decree in his favour, ordering possession, and adding "the Plaintiff is also entitled to future mesne profits." The Defendant, now Appellant, appealed to the High Court, who on 19th July 1889 reversed the decree and dismissed the suit. The Plaintiff then appealed to the Queen in Council who on 11th May 1895 ordered that the decree of the High Court should be reversed and the District Judge's decree of the 12th November be affirmed.

After that the Plaintiff prosecuted his claims in execution of the decree so affirmed by the Queen in Council. He recovered possession on 30th November 1895. Then he proceeded to recover mesne profits. He claimed them from 23rd September 1886, on which day his suit was brought down to the recovery of possession by him. The Defendant objected that no decree remained to be executed except that of the Queen in Council which made no mention of mesne profits; but the District Judge held that the Queen's order had come down for execution and "its effect causes reference to be made to the original decree of this Court as a final decree in all applications for execution."

Having thus settled that the Queen's order gave mesne profits by reference to the original decree the District Judge went on to frame issues. The second

of such issues was, "For what period are mesne profits recoverable?" It was arranged that this issue should be treated as preliminary to taking accounts, and should be argued separately. That was done, and the District Judge decided that mesne profits were due for the three years next after the date of the original decree, *i.e.*, from 12th November 1887 to 12th November 1890.

From this decree the Plaintiff appealed to the High Court, who in the first instance addressed themselves to a preliminary objection made by the Defendant that no appeal is given by the Procedure Code in such a matter. The High Court overruled that objection. As it has been renewed here, and earnestly pressed upon their Lordships by Mr. Ross it may be convenient to dispose of it in the first instance.

The High Court felt considerable difficulty on the point. They allowed the appeal on the ground that the District Judge had tried the question separately, and had embodied his finding in a formal order. They remark that it practically dismisses the claim of the decree-holder for some five or six years' profits; and that in a way which in the Court of the District Judge is final. Therefore they hold it to be an appealable order.

Treating the question as if it were whether the order under consideration is final or interlocutory in its nature, and testing it by the ordinary principles applicable to such questions their Lordships think not only that the High Court are right in the particular circumstances of the case, but that there is not any need to rely upon the accident that the District

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Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable; though it is also in another way interlocutory and may result in the exoneration of the accounting party or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect and as such equally open to appeal.

But then Mr. Ross urges that we are not testing the question by general principles, but by the expressions of the Code which relate to appeals. That is true and their Lordships turn to the Code to see what it says.

Sec. 540 gives a right to appeal to the proper Court from the decrees or from any part of the decrees of Courts exercising original jurisdiction. By sec. 2 a decree is thus defined, "The formal expression of an adjudication upon any right claimed or defence set up in a civil Court, when such adjudication so far as regards the Court expressing it decides the suit . . . An order . . . determining any question mentioned or referred to in sec. 244, but not specified in sec. 588, is within this definition." Sec. 244 is that which gives to the Court engaged in executing a decree jurisdiction to determine questions arising between

the parties relating to the execution of the decree. Sec. 588 specifies a large number of orders from which appeals lie, including many made in execution proceedings but not including such an order as the one under discussion. It appears to their Lordships that the plain meaning of sec. 2 is to make this order a decree appealable under sec. 540. Mr. Ross has not shown any reason why the words of the Code should not be construed in their plain and obvious sense. On the contrary the obvious sense is that which best accords with ordinary convenience and ordinary rules of practice.

Turning from this purely technical question to the substance of the appeal, the High Court found the issue before them to be very simple. The District Judge held that it turned on the construction of secs. 211 and 244 of the Code. Sec. 244 prescribes that questions arising in execution including this question should be decided in the execution and not by separate suit. Sec. 211 enacts that in suits for possession of immoveable property "the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs)."

The effect of the District Judge's application of these sections is somewhat startling; because though executing the Queen's order he holds himself to be limited in point of time as though he was executing his predecessor's decree made in his own Court, and he counts

## RAJA BRUP INDIR BAHADUR SINGH v. BIJAI BAHADUR SINGH

the three years for which alone he thinks he has the jurisdiction to estimate mesne profits not from the date of the Queen's order, but from the date of the decree of his own Court.

Now the Plaintiff, it must be held, was entitled to possession throughout. In 1887 he got a decree for it, and had that been executed he would have had the profits. But there was an appeal, and in 1889 the High Court took a view adverse to him and passed a decree in the face of which he could claim nothing. Five years afterwards he succeeded in displacing that decree and in re-establishing his original right to possession. Then he is told that from the 12th November 1890 down to the 30th November 1895 the law debars him from recovering the income of his property, and allows his opponent to keep it.

The District Judge expresses an opinion that the Plaintiff might have brought a separate suit for this income and that if he has lost some years' profits it is by his own laches. How he could be charged with laches for not instituting a suit which with the decree of the High Court standing against him must have come to naught, is not easy to say. And if he were now to bring a fresh suit or if he had done so in 1895 after reversal of the adverse decree a substantial part of his just claim would be barred by Art. 109 of the Limitation Act. But their Lordships will not further discuss the exact bearings of the two cited sections of the Code, because the High Court has given the simple and obvious solution of the difficulty which puzzled the District Judge.

The Court is now executing not the

District Judge's decree of 1887, but the Queen's order of 1895, which by affirming the District Judge's decree has adopted its terms and has carried on their effect down to a later date. All that the Courts below had to do, and all that this Board has now to do, is to construe the order of May 1895 and to carry it into execution. Its meaning is hardly open to doubt. It affirms the District Judge's decree which awarded "future mesne profits." That signifies profits future to the 12th November 1887. The order of 1895 speaking with the language of the decree of 1887 clearly carries all profits up to its own date. If there had been delay for three years after 11th May 1895 sec. 211 would be called into operation with reference to the order of that date. But to call it into operation with reference to the decree of 12th November 1887 is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the Defendant was that the later order has no meaning as regards mesne profits because they are not expressly mentioned; but that is clearly wrong and was hardly pressed at this Bar.

Agreeing with the High Court their Lordships will humbly advise Her Majesty to dismiss this appeal and the Appellant must pay the costs.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

Solicitors: *Mr. Summerhays* for the Respondent.

*Appeal dismissed with costs.*

C. W. A.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 1437 of 1898.

RAMPINI, J.	}	MOTI LAL SHAHA and
PRATT, J.		another, Plaintiffs,
1900.		Appellants,
30, May.		v.
		MONMOHAN GOSSAMI,
		Defendant, Respondent.

*Debt, suit for recovery of—Promissory note, if false or forged, if Plaintiff can succeed on proof of loan.*

*Where the Plaintiffs brought a suit for recovery of money on the allegation that the Defendant had taken from the Plaintiffs a loan by executing a note in favour of one of the Plaintiffs :*

*Held—That even if the promissory note be a forgery the Plaintiffs would succeed if they could prove the loan by independent evidence.*

This was an appeal preferred on the 22nd of July 1898, against the decree of Babu Monmotha Nath Chatterji, Subordinate Judge, 1st Court of Zillah Dacca, dated the 29th of March 1898, modifying the decree of Babu Nobin Chunder Nag, Sudder Munsif, 4th Court of that district, dated the 30th of September 1896.

The suit out of which the present appeal arose, was brought by the Plaintiffs for recovery of two sums of money, which, they said, the Defendant had borrowed from them, and for which sums he executed promissory notes. The first paragraph of the plaint ran thus :—

From the *ijmali tahabli* of the two Plaintiffs the Defendant took from the Plaintiffs' house a loan of Rs. 200 by executing a hand-note in favour of the Plaintiff No. 1 on 29th Assin 1299, and by executing a second hand-note on 17th

Kartick of the same year the Defendant took Rs. 350 as loan or *howlat* on a promise of repaying on demand the amounts with interest at Rs. 1½ per cent. per month.

The Defendant denied the receipt of the money and the execution of the promissory notes. The first Court found that the promissory notes were not genuine, but finding from a book of account filed on Defendant's behalf that a sum had been lent on the 29th Assin 1299, B. S., by the Plaintiffs to the Defendant, decreed the Plaintiffs' claim on the promissory note of that date and dismissed the Plaintiffs' claim on the promissory note of the 17th Kartick 1299, B. S. The lower Appellate Court held that the suit having been based upon the promissory notes and the same not having been proved the Plaintiffs were not entitled to any relief. The Plaintiffs preferred this second appeal which related only to the sum of Rs. 200 which the Plaintiffs alleged they lent to the Defendant and which the Munsif held to have been proved by the account book filed by the Defendant.

*Babu Basanta Kumar Bose* for the Appellants.

*Babu Shiba Prasanno Bhattacharji* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal against a decision of the Subordinate Judge of Dacca dated the 29th of March 1898.

The suit is one brought by the Plaintiffs for two sums of money, which, they say, the Defendant borrowed from them, and for which it seems he executed promissory notes.

## MOTI LAL SAHA, v. MONMOHAN GOSSAMI.

The Defendant denies the receipt of the money and the execution of the notes.

The Court of first instance held that the promissory notes were not genuine; but it found from the account books filed by the Defendant that the Defendant had borrowed from the Plaintiffs a sum of Rs. 200, as alleged by the Plaintiffs, on the 27th of Assin 1299, which was the very date upon which the Plaintiffs say that the Defendant took the first loan from them. The Munsiff, therefore, gave the Plaintiffs a decree for Rs. 200 and dismissed the rest of the suit.

On appeal the Subordinate Judge reversed the decision of the Munsiff and dismissed the Plaintiffs' whole suit, holding that the suit, having been based upon the promissory notes, and upon them only, and the Plaintiffs not having proved the promissory notes, they were not entitled to any relief at all in this case.

The learned pleader for the Plaintiffs-Appellants in this Court urges that the Subordinate Judge has misread the plaint. He says that the suit is not based upon the promissory notes, but is a suit for money and that the promissory notes are evidence of the loan made by them. Therefore it is said that the promissory notes may be false; but if it is proved by the evidence in this case that the Plaintiffs made the loans, or, at least one of them, then they are entitled to a decree for the amount so borrowed.

We think that this contention must prevail, and that the Subordinate Judge has taken a wrong view of the case. From paragraph 1 of the plaint (page 2 of the paper-book) it is clear that the Plaintiff sues for two sums of Rs. 200

and Rs. 350 and that the promissory notes which he puts forward in this case are only evidence of the loans. We think, therefore, that although the promissory notes are forgeries, it does not follow that the Plaintiffs are not entitled to a decree for the money lent by them if they can prove the loan in any other way. And in support of this view we need only cite the case of *Promotha Nath Senial v. Dwarka Nath Dey* (1), the facts of which case are somewhat similar to those of the present case. This appeal relates only to the first sum of Rs. 200 which the Plaintiffs allege that they lent to the Defendant, and which the Munsiff held to have been proved by the account book filed by the Defendant. The Subordinate Judge has come to no definite finding with regard to this sum. He says:—"It may be that Defendant borrowed Rs. 200 from the Plaintiff on the 29th Assin 1299, as he admittedly borrowed money from the Plaintiff on the previous occasion." But he nowhere finds whether, as a matter of fact, the Defendant had borrowed Rs. 200.

We must therefore remand the case to the lower Appellate Court for a definite finding as to this amount. We accordingly modify the decree of the Subordinate Judge, that is to say, we set it aside so far as it relates to the sum of Rs. 200 alleged to have been lent to the Defendant on the 29th Assin 1299; and we direct that the case be sent back to that officer to be disposed of in accordance with the above remarks.

The costs of this appeal will abide the result.

S. C. S.

*Case remanded.*

(1) I. L. R. 23 Cal. 851 (1896).

## [CIVIL APPELLATE JURISDICTION.]

RULE No. 1095 OF 1900.

GHOSE, J. STEVENS, J. 1900. 17, July.	}	AJODHYA PERSHAD SINGH, Applicant, v. SHEO PERSHAD SAHU, and ors., Opposite Party.
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*Civil Procedure Code (Act XIV of 1882), sec. 108—Sufficient cause—Non-appearance of guardian of a minor, in a suit, whether a good and sufficient cause—Ex parte decree, setting aside of, against one of several Defendants, effect of, as to the decree against other Defendants.*

*The simple fact that a guardian did not appear in a suit is not a good and sufficient cause within the meaning of sec. 108, C. P. C., for setting aside an ex parte decree passed against a minor. There are different considerations which bear upon the matter, the question always being whether, in what the guardian did, he acted in the best interest of his ward.*

KESHO PERSHAD v. HIRDAY NARAIN (1) explained.

*In a case where an ex parte decree was set aside against one of the Defendants, and the Subordinate Judge set aside the decree against others who did not appear and one of whom made an application to set aside the ex parte decree :*

Held—That this was rightly done.

MAHOMED HAMIDULLA v. TOHUREN-  
NISSA (2) approved of.

This was a rule issued on the 30th of April 1900, against the orders of the Subordinate Judge, 1st Court, Tirhoot, at Mezufferpore, dated the 24th of February 1900.

(1) 6 C. L. R. 69 (1880).

(2) I. L. R. 25 Cal. 155 (1897).

The Petitioner brought a suit to enforce a mortgage against three persons one of whom was a minor and represented by his father-in-law, Ram Sahay, as guardian. None of the Defendants appeared and the suit was decreed *ex parte*. An order was subsequently made making the decree absolute and in execution of the decree the property was sold. The minor represented by one Futeh Bahadur, as next friend, made an application to have the *ex parte* decree set aside under sec. 108, C. P. C.; similar application was made by one of the other Defendants. The lower Court without taking any evidence, was of opinion that, so far as the minor was concerned, the non-appearance in the suit of the guardian was a sufficient cause within the meaning of sec. 108, C. P. C., and that the *ex parte* decree ought to be set aside. The decree being set aside against the minor Defendant, the Subordinate Judge was of opinion that the decree against the other Defendants ought to be set aside. Against this order the Petitioner made an application and obtained the present rule.

*Babus Umakali Mukherjee and Surendra Krishna Dutt* for the Petitioner.

*Babu Makhon Lall* (for *Babu Buldeo Narain Singh*) for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

The facts out of which this rule arises are shortly these :—

The Petitioner before us sued to enforce a mortgage security, said to have been executed by three brothers, Bishen Deo, Burun Deo and Mutuk Deo. At the time when this suit was brought, Mutuk Deo had died, leaving a minor son Ajudhya, and this minor was represented in the suit by his father-in-law, Ram



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Sahay, as his guardian, appointed as such by the Court. None of the Defendants appeared at the trial, and an *ex parte* preliminary decree was passed in favour of the Petitioner on the 8th September 1898. Subsequently, an order absolute for sale of the mortgaged property was passed and the property was sold in November 1899. In December following, two applications were made for setting aside the *ex parte* decree of the 8th September 1898, under sec. 108 of Code of Civil Procedure—one by the minor, through one Futeh Bahadoor, describing himself as the next friend and the other by Bishen Deo—upon the ground that no summons in the suit was served upon them, and that they had been prevented by sufficient cause from appearing at the trial.

The Subordinate Judge, however, without recording any evidence in support of the allegations of the applicants, was of opinion, relying upon the case of, *Kesho Pershad v. Hirday Narain* (1) that so far as the minor was concerned, the non-appearance in the suit of the guardian was a sufficient cause within the meaning of sec. 108 of the Code, and that the *ex parte* decree should be set aside upon this single ground. And as regards the other applicants, he thought that the decree being set aside upon the application of the minor Defendant, their application must also be granted. Accordingly, the said *ex parte* decree was set aside.

Dissatisfied with these orders, the Petitioner moved this Court, and upon his application, a rule was granted calling upon the opposite side, to shew cause

why the said orders should not be set aside.

We have heard the learned vakils on both sides ; and it appears to us that the orders of the Subordinate Judge, as they now stand, cannot be supported.

We are of opinion that it could not be laid down so broadly as the Sub-Judge seems to think that the case of *Kesho Pershad v. Hirday Narain* (1) quoted by him did lay it down, that the guardian of a minor Defendant is bound in every case to appear at the trial, and that the simple fact of his non-appearance is a good and sufficient cause within the meaning of sec. 108 for setting aside the *ex parte* decree.

On referring to the judgment of this Court in that case, we do not understand the learned Judges to have meant to hold that in any given case, where the guardian fails to appear at the trial, it is necessarily a sufficient cause, without anything else, entitling the minor to have the *ex parte* decree made against him set aside ; rather it would appear that they proceeded upon the fact that the guardian in that particular case had, by neglect of duty, failed to protect the interest of the minor, though no doubt there are certain words in their judgment which might possibly lend support to the view adopted by the Subordinate Judge. It is quite possible to conceive that the guardian of the minor in this case had just and proper reason not to enter appearance on behalf of the minor : he might have been satisfied, after proper enquiry, that the claim against the minor was true, and hence he thought it would be entailing upon the minor unnecessary

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cost if he were to appear. On the other hand, it is no doubt possible that the guardian wantonly, and without any enquiry or consideration of the interest of the minor, failed to enter appearance. There are indeed different considerations which bear upon this matter, the question always being whether, in what the guardian did, he acted in the best interest of his ward. But it is unnecessary to discuss them at this stage. All that we now desire to say is that the Sub-Judge was not in a position to determine whether there was sufficient cause for the non-appearance of the guardian, without recording any evidence which the parties might have desired to adduce. In this view of the matter we set aside his order and send back the case to him for reconsideration.

In the other case the Sub-Judge, as already noticed, made the order in favour of the applicants, because he had already set aside the *ex parte* decree upon the application of the minor Defendant. This seems to have been a correct view to take. And in this connection, we need only refer to the case of *Mahomet Hamidulla v. Tohurennissa* (2) in the decision of which case, we concur. But as the other order of the Sub-Judge upon which this order was made to depend is now set aside, this matter should also be remitted back for reconsideration.

*Case remanded.*

S. C. S.

(2) 1. L. 1 25 Cal. 155 (1897).

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE .

No. 1762 of 1898.\*

SHEIKH MONGOLA, De-  
fendant No. 1, Appellant,  
v.  
AMEER ALI, J.  
BRETT, J.  
1900.  
25, May.  
MAHARAJAH KUMUDCHUN-  
DER SINGH BAHADUR,  
and ors., Plaintiffs,  
Respondents.

*Bengal Tenancy Act (VIII of 1885), sec 50, cl. (2)—Presumption as to uniform payment of rent.*

*When a tenant has paid rent for over twenty years prior to the date of suit at a uniform rate which has not changed, the presumption of law under sec. 50, cl. (2) of the Bengal Tenancy Act would arise if there is no allegation or proof that a tenancy commenced in a particular year after the Permanent Settlement.*

*The mere fact that the tenant shows by documentary evidence that the rate of rent has not changed from a particular year would not preclude him from the benefit of the presumption given by cl. (2) of sec. 50.*

This was an appeal preferred on the 29th of August 1898, against the decree of Babu Mohendra Nath Roy, Sub-Judge, first Court of Zillah Mymensingh, dated the 26th of April 1898, modifying the decree of Babu Tej Chandra Mukerjee, Munsif, second Court of Netrokona, dated the 5th of April 1897.

The facts of the case appear from the judgment.

*Babu Jnanendra Nath Bose (for Dr. Asutosh Mukerjee) for the Appellant.*

\* This appeal is analogous to appeal from Appellate Decrees Nos. 1907 to 1909 of 1898,—  
REPORTER.

## SHEIKH MONGOLA v. MAHARAJAH KUMUD CHUNDER SINGH BAHADUR

*The Advocate General (Mr. J. T. Woodroffe), Babus Dwarka Nath Chuckerbarty, Mohendra Nath Bhattacharjee and Taruk Chunder Chuckerbarty* for the Respondents in 1762 of 1898.

*Babus D. N. Chuckerbarty and Taruk Chunder Chuckerbarty* for the Respondents in 1907 of 1900.

The JUDGMENT OF THE COURT was as follows :—

These appeals arise out of certain proceedings taken by the Respondents under sec. 158 of the Bengal Tenancy Act for determining (to use the language of the lower Appellate Court) the incidents of the holdings in the occupation of the Defendants, the Appellants in this Court.

The Munsif before whom the applications were originally made referred the cases to a revenue officer under the provisions of the 2nd clause of sec. 158 of the Bengal Tenancy Act and upon his report the first Court held that the Defendants were occupancy raiyats, and that the *pattas* put forward by them were fabricated.

The Defendants appealed, and the Subordinate Judge states that the question which he had to determine was whether the Defendants were occupancy raiyats or tenure-holders, and upon a consideration of the evidence before him he came to the conclusion that the *pattas* propounded by the Defendants were genuine documents, and that the predecessors of the Defendants and the Defendants themselves had held the *jotes* for a long time, and all the *jamas* mentioned in the *pattas*. That finding respecting the genuineness of the *pattas* has not been and could not be questioned in second

appeal. He further found that the Defendants were tenure-holders, but that there was nothing to show they had been holding the *jotes* at unchanged rates from the time of the Permanent Settlement, and that consequently their *jamas* were liable to enhancement.

From that finding regarding the enhanceability of their *jamas* the Defendants\* have preferred this second appeal.

The learned Advocate General who appeared for the Respondents took the objection, on the basis of the cross-appeal, that the Subordinate Judge had not found that the lands held by the Defendants were the lands covered by the *pattas*. He did not however wish to take this as a substantive objection, but contended that if the case is remanded on the appeal of the Appellants that question might also be tried. We do not know whether the requisite Court-fee has been paid for the hearing of the cross-objection; but as the objection has been raised we may say at once that in our opinion the Subordinate Judge has distinctly found in his judgment that the lands covered by the *pattas* have been held by the Defendants as their *jotes*.

The cross objection must therefore fail.

As regards the contention put forward on behalf of the Defendants, the Appellants in this Court, it is to be observed that they produced *dakhilas* showing the payment of a uniform rate of rent for many years past, in some cases from 1221, B. S., in others from 1224, B. S. Sec. 50 of the Bengal Tenancy Act provides that "Where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the

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Permanent Settlement the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding ;" and then it goes on to say :—"If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement." With regard to this presumption the Subordinate Judge says as follows :—"Neither can any presumption be made in favour of the Defendants, for they themselves say that they have been paying rent at unchanged rates from 1221, B. S., at the earliest." In their written statement the Defendants make the following allegation :—"That of the lands comprised in the *mokurari chok pattas* granted by the former proprietor Krishna Das Surma in the name of our ancestors Sheikh Meherulla and Poran Mundle, and of the lands now in dispute, we have been in the enjoyment and possession by paying rent at a uniform rate of Rs. 23 odd from 1221 up to the present time ;" and we assume that the allegation of the Defendants in the other cases was similar to that of the Defendants in appeals from Appellate Decree No. 1762 of 1898 which we have just quoted.

There is nothing upon that allegation to suggest that the tenancy began from the year 1221, B. S. Of course if the Defendants admit that the tenancy com-

menced in the year 1221, B. S., there can be no question of any presumption. The presumption must be carried back to the time of the Permanent Settlement in order to make the rent or rate of rent not enhanchible. But if the allegation is not to that effect or if there is no evidence establishing the fact that the tenancy began in 1221, B. S., and if the Defendants have paid rent for over twenty years prior to the date of suit at a uniform rate which has not changed, the presumption of law would be, unless rebutted, that that has been the rate from the time of the Permanent Settlement. The mere fact that the Defendants have only been able to show by documentary evidence that their rate of rent has not changed from 1221, B. S., would not preclude them from having the benefit of the presumption given in cl. (2) of sec. 50 of the Bengal Tenancy Act.

We are not in a position on second appeal to say how the matter stands with reference to that question. It will be for the Subordinate Judge to say upon the evidence taken in connection with the allegation of the Defendants whether the tenancy commenced after the Permanent Settlement so as to defeat any question of presumption. If the tenancy did not commence at the period whence the Defendants have been able to show uniform payment of rent or if it commenced at some anterior time and if the Defendants have shown that the rate of rent has remained unchanged for a number of years extending over twenty years from date of suit, they ought to have the benefit of the presumption. We set aside the decrees of the Subordinate

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Judge in so far as the question of enhanceability is concerned and send back the cases for him to come to a conclusion in view of the observations we have made.

The costs will abide the result.

S. C. S.

Case remanded.

## [CIVIL REVISIONAL JURISDICTION.]

CIVIL RULE NO. 67 OF 1900.

NITYA NANDA PATRA,

Petitioner,

v.

RAMPINI, J.

WILKINS, J.

1900.

22, March.

{HIRA LAL KARMAKAR and  
another, Opposite  
Party.

*Civil Procedure Code (Act XIV of 1882), sec. 310A—"Whose immovable property is sold," meaning of, in sec. 310A—Sale in execution of rent decree—Simple mortgagee, right of, to apply to set aside sale.*

*A simple mortgagee is not a person entitled to have a sale set aside under sec 310A, C. P. C.*

HAMIDAL HUQ v. MATANGINI DAS (3), RAKHAL CHUNDER BOSE v. DWARKA NATH MISSEER (4) distinguished.

This was a rule issued on the 11th of January 1900, against the order of the Munsif of Kotalpure, District Bankura, dated the 8th of November 1899.

The Petitioner in this case had obtained a decree for rent and in execution of that decree had caused the sale of the Defendant's tenure. Thereupon the opposite party, who was a simple mortgagee of the tenure, applied under sec. 310A, Civ. P. C., and had the sale set aside. The Petitioner obtained the present Rule against the opposite party to show cause why the order setting aside the sale should not be set aside.

(3) 2 C. W. N. cclviii (1898).

(4) I. R. R. 13 Cal. 346 (1886).

*Dr. Ashutosh Mookerjee and Babu Joy Gopal Ghosh* for the Petitioner.

*Babu Shoshi Sekhar Bose* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule calling upon the opposite party to show cause why the order complained of by the Petitioner should not be set aside.

The order complained of is one passed by the Munsif of Kotalpure, on the 8th of November 1899, setting aside a sale of a tenure sold in execution of a rent decree under the provisions of sec. 310A of the Code of Civil Procedure.

The learned pleader who appears in support of the Rule points out that the sale in this case was held at the instance of the landlord under the provisions of Chapter XIV of the Bengal Tenancy Act, and that, that being so, the opposite party had no right to apply to have the sale set aside. The opposite party in this case is not the judgment-debtor but a person who alleges that he is the holder of a simple mortgage on the tenure which has been sold. The learned pleader for the applicant further contends that even if the provisions of sec. 310A be held applicable to the sale, then the opposite party, being only a simple mortgagee, is not a person whose immovable property has been sold within the terms of sec. 310A.

We think that this latter contention must prevail. The sale is *prima facie* one which would appear to come under the provisions of sec. 174 of the Bengal Tenancy Act. But in the case of *Janardhan Ganguli v. Kali Kristo Thakur* (1), it has been held that sec. 310A,

(1) I. L. R. 23 Cal. 393 (1895).

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C. P. C., applies to sale of a tenure in execution of a decree for its own arrears ; and this case has been followed in another case, *Bungshidhar Haldar v. Kedar Nath Mundal* (2).

But we are certainly of opinion that the opposite party, being a simple mortgagee, is not a person who can come under the provisions of sec. 310A and apply to have a sale set aside on the ground that he is the person whose immoveable property has been sold. He may have an interest in the property ; but he is certainly not the owner of the property. He is only a mortgagee ; and it is impossible to see how he can contend that he is the person whose immoveable property has been sold.

The learned pleader for the opposite party has called our attention to the ruling in the case of *Hamidul Huq v. Mutangini Dasi* (3) in which, according to the short notes, it has been held that a mortgagee is a person whose immoveable property has been sold within the meaning of sec. 310A. But, in referring to the facts of that case we find that they are very different from those of the present case. The mortgagee in that case was a mortgagee by conditional sale, and no doubt, the legal title in the property had vested in him, and for those reasons it must have been held by the Judges who decided that case that he was a person whose immoveable property had been sold within the meaning of sec. 310A. The case of *Rukhal Chunder Bose v. Dwarka Nath Misser* (4) has also been cited by the learned pleader for

the opposite party. In that case it has been held that a mortgagee, who has obtained a decree for foreclosure, is a person whose immoveable property has been sold within the meaning of sec. 311, C. P. C. But the facts of that case also are different from those of the present : for the mortgagee in the present case has obtained no decree for foreclosure, but is simply a mortgagee and nothing more. And for these reasons we cannot but think that he is not entitled to apply to have the sale set aside under sec. 310A.

A further objection has been raised to the sale by the pleader for the applicant in this case, namely, that he was an auction purchaser as well as a decree-holder, and that he got no notice of the application under sec. 310A before the order under that section was passed. Now, it is clear that under the ruling in *Janardhan Ganguli v. Kuli Kristo Thokur* (1) already cited, and also under the ruling in *Bungshidhar Haldar v. Kedar Nath Mundal* (2) an auction-purchaser is entitled to notice before an order under sec. 310A for the setting aside of a sale is made and that therefore the proceedings in this case would seem to be bad for want of the notice in question.

But we need say nothing more on this point, as the first of the grounds of the learned pleader for the applicant is sufficient for the disposal of this Rule.

For these reasons we make the Rule absolute and set aside the order complained of, with costs, which we assess at two gold mohurs.

S. C. S.

*Rule made absolute.*

(2) 1 C. W. N. 114 (1896).

(3) 2 C. W. N. cclviii (1898).

(4) I. L. R. 13 Cal. 346 (1886).

(1) I. L. R. 23 Cal. 393 (1895).

(2) 1 C. W. N. 114 (1896).

## [CRIMINAL-REVISIONAL JURISDICTION.]

REV. NO. 501 OF 1900.

STEVENS, J.	}	ISAB MANDAL, Petitioner,
HANDLEY, J.		v.
1900.		THE QUEEN-EMPRESS,
13, August.		Opposite Party.

*Indian Penal Code (Act XLV of 1860), sec. 193—Evidence Act (I of 1872), sec. 35—Intentionally giving false evidence in a judicial proceeding—Statement of a witness made to a police-officer in the course of an investigation, admissibility of—Code of Criminal Procedure (Act V of 1858), sec. 162—Statement made to a Magistrate making an enquiry—Judicial proceeding.*

*Statement of a witness to a police-officer under the provisions of sec. 162, Cr. P. Code, though reduced into writing is not a public or official document and the writing in question cannot be used as evidence in any proceeding to prove that the statements contained therein were in fact made, there being nothing in sec. 162, Cr. P. Code, which limits the prohibition of the use of such a document as evidence only in the matter of the charge which is actually under investigation.*

*Such a document is not a "record" within the meaning of sec. 35 of the Indian Evidence Act and the document in question is not therefore admissible in evidence under the provisions of that section.*

*It is irregular in a charge of intentionally giving false evidence to put the whole of a long statement bodily to a witness at once, and in such a case no conviction can properly be had except on proof that the accused person had made to the police-officer each and every one of the statements contained in the document.*

This was a rule issued on the 27th of June 1900, against the order of the

Deputy Magistrate of Bogra, dated the 5th of May 1900, which order was, on appeal, affirmed by the Sessions Judge of Pubna and Bogra on the 15th of May 1900.

The facts of the case appear fully from the judgment of the Court.

Mr. P. L. Roy and M. Abdul Jawad for the Petitioner.

Mr. Leith for the Crown.

The following JUDGMENT was delivered by the Court:—

This rule was issued in the following circumstances:—The police began an investigation into a case of murder but, while that investigation was pending, on a representation made by the District Superintendent to the District Magistrate, the Deputy Magistrate, Babu Bhowany Persad Neogi, was sent to make an inquiry into that case and into a counter-charge which had been made, as we understand, against the informant in that case. The Deputy Magistrate accordingly went to the spot and instituted an inquiry. In the course of that inquiry, he examined the present Petitioner as a witness and, in consequence of the statements which he made on that occasion, he confronted him with a written statement which had been taken down by the Sub-Inspector of Police under the provisions of sec. 162, C. Cr. P. The Deputy Magistrate, after asking the Petitioner whether he had made a certain statement to the Sub-Inspector, recorded a note that the witness was evidently speaking falsehood and that he should show cause why he should not be prosecuted under sec. 193, I. P. C. A proceeding was instituted against him, the Sub-Inspector was examined and, after stating specifically that

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the Petitioner had made certain statements to him, he attested the statement taken down under sec. 162, which statement was put upon the record and marked as Exhibit (B). Another witness gave evidence as to certain statements, which, he alleged, had been made by the Petitioner to the Sub-Inspector. On these materials, the Petitioner was sent up to the District Magistrate for prosecution under sec. 193, I. P. C. The case was made over to another Deputy Magistrate, who proceeded to try the Petitioner and finally convicted him of intentionally giving false evidence in a stage of judicial proceeding and sentenced him to rigorous imprisonment for a year and a half under sec. 193, I. P. C. The Sub-Inspector, who had been examined as a witness in the former proceeding, again gave evidence. He again attested the statement taken down in writing under sec. 162, and said:—"This" (Ex. B shown) "is a record of his statement prepared by me." In addition to that he orally gave evidence as to certain statements which had been, as he alleged, made to him by the Petitioner. Another Sub-Inspector was similarly examined with reference to a further statement in writing which he had taken down under sec. 162. The rest of the evidence, so far as it relates to the statements made to the police-officer by the Petitioner, is concerned only with isolated statements and not with the whole of the statement as committed to writing by the Sub-Inspector in the document marked Exhibit (B).

In the charge, the act charged against the Petitioner was that he had said on solemn affirmation that he had not made

before the Sub-Inspector, Golam Hossein, the statement recorded by him in the document marked Exhibit (B) by the Deputy Magistrate.

The conviction was upheld by the Sessions Judge on appeal.

A rule was granted to show cause why the conviction should not be set aside on two grounds; first, that the written statement recorded by the police had been improperly used as evidence contrary to sec. 162, C. Cr. P., and, next, that the Deputy Magistrate, Babu Bhowany Persad Neogi, not being competent to hold a judicial inquiry in this matter, any statement made by the Petitioner could not be properly regarded as a statement made in the course of a judicial proceeding.

We are clearly of opinion that the rule must be made absolute on the first ground. The Deputy Magistrate who tried the case has sent in an explanation, in which he submits, *first*, that as the document was not used in the course of the murder case, the provisions of sec. 162 did not apply to it and it was admissible under the general provisions of sec. 35 of the Indian Evidence Act; and, *secondly*, that, as a matter of fact, it was not used as evidence either by him or by the Deputy Magistrate who held the inquiry.

On the first point, there is nothing in sec. 162 which limits the prohibition of the use of such a document as evidence to a matter of the charge which is actually under investigation by the police-officer when the statement is made and, to our mind, it extends also to the use of such a document against the person who is alleged to have made the state-



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ment. We think that it was intended to recognize the danger of placing implicit confidence in a record more or less imperfectly made by a police-officer who would not necessarily be competent to make an exactly correct record of the statement of a witness with due regard to the provisions of the law of evidence and who might possibly in some cases not be entirely free from an inclination (perhaps unconscious) to take the statement as being somewhat more definite and precise in a particular direction than the witness had intended it to be. We are unable to see that sec. 35 of the Evidence Act has any application in the matter, for, we do not consider that a document of this nature, which, moreover, it is not necessarily a part of the official duty of a police-officer to prepare at all, comes within the description of a "record" within the meaning of that section, nor, even if it did, are the provisions of the section capable of being applied so as to enable the document to be used in evidence in the manner in which the Deputy Magistrate has used it.

With regard to the second submission of the Deputy Magistrate, we can only express our surprise at it, for, it is, as we have shown, at variance with the actual facts, as they appear on the face of the record. The statement taken down in writing under sec. 162 was, as a matter of fact, admitted as an exhibit and marked as such by both the Deputy Magistrates and the Sub-Inspector was allowed to attest it as a "record" of the statement which the Petitioner had made to him. We may say that we regard it as very irregular, in a charge of intentionally giving false evidence, to put the

whole of a long statement bodily to a witness at once, but as the Deputy Magistrate did so in this case, the conviction could be properly had only on proof that the accused person, now the Petitioner, had made to the police-officer each and every one of the statements contained in the document. That has not been proved by oral evidence. It is unnecessary, in the view that we take of the question arising under sec. 162, C. Cr. P., to express any opinion on the other point with reference to which the rule was granted. The conviction and sentence are set aside and the Petitioner will be discharged from bail.

H. P. C. *Rule made absolute.*

## [CRIMINAL REVISIONAL JURISDICTION.]

CRIMINAL REVISION No. 347 of 1900.

In the matter of		
PASUPATI NATH BOSE and		
DHANUKDHARY SARAN		
PRINSEP, J. HANDLEY, J. 1900. 27, July.	}	LAL or SING, 2nd party, Petitioners,  v. NANDO LAL BOSE and GOURI SINGH, 1st party, Opposite Party.

*Code of Criminal Procedure (Act V of 1898), sec. 147—Construction and meaning of the section—Comparison of the language used in sec. 147 (Act V of 1898), sec. 147 (Act X of 1882) and sec. 532 (Act X of 1872)—Previous law bearing on the subject—Meaning of the terms "such thing shall be done, &c."—Form of the order—Order whether affects persons not parties to the proceedings—Magistrate, power of, to order removal of obstruction to the enjoyment of right of easement—Parties, adding of, in proceeding under sec. 147, C. P. C., legality of.*

PASUPATI NATH BOSE v. NANDO LAL BOSE.

*Where it was found that the first party had a right to the flow of water for purposes of irrigation from a certain channel passing through the village of the second party who obstructed such flow by erecting certain bunds :*

*Held—That under sec. 147 of the Criminal Procedure Code the Magistrate is competent to direct that the obstruction be removed.*

*A Magistrate is not competent to add parties to a proceeding under sec. 147, Cr. P. C., any more than he is in proceedings under sec. 145 of the Code.*

*That the order of the Deputy Magistrate so far as it purports to affect the persons not parties to the proceedings under sec. 147 is null and void, but that does not render the whole order bad and so far as persons who are parties to the proceedings are concerned it is binding on them.*

*That the finding of the Deputy Magistrate "that the first party have proved an uninterrupted user of water of the channel for twenty years which they have enjoyed as an easement and as of right and that the erection of the bunds led to the dispute" is a sufficient finding that the right in dispute had been exercised within either of the periods mentioned in the proviso to sec. 147, Cr. P. C.*

This was a rule issued on the 30th of April 1900, against the order of the Sub-Divisional Magistrate of Nowada, dated the 2nd of March 1900.

The facts of the case appear from the Judgment.

Mr. Jackson and Babu Mahendra Coomar Mitter for the Petitioners.

Mr. Dunne and Mr. P. L. Roy and Babu Atulya Charan Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This rule is to consider an order passed under sec. 147, Code of Criminal Procedure, as bad on three grounds ; first, because it has been directed to persons who were not parties to the proceedings ; second, that in its form, the order is not in accordance with sec. 147 ; third, that the Magistrate has not found that the right claimed had been exercised within either of the periods specified in the proviso to that section.

Sir G. Evans in obtaining the rule, drew our attention to the terms of sec. 147 which, he contended, were so expressed as to make it impossible for any Magistrate to pass an order within that section.

We propose to consider this matter. First, sec. 147 of the Code of 1898 is in modification of the terms of sec. 147 of the previous Code of 1882 which again appears to us to reproduce the corresponding sec. (532) of the Code of 1872, though it is expressed in somewhat different language and requires that a Magistrate shall be satisfied that the dispute is likely to cause a breach of the peace. It does not appear that the legislature has ever intended to alter the law in regard to the subject-matter of the dispute. The intention seems rather to have been to express it in the Code of 1882 in what was considered to be more appropriate technical language, and next, when the Code of 1898 came under consideration, to return to the language of the former Code of 1872, inasmuch as reported cases had amply shown that there had been confusion and uncertainty, in applying sec. 147 of the Code of 1882,

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in consequence of the novel expressions made use of. The expression "tangible immoveable property" which for the first time, appeared in secs. 145 and 147 of the Code of 1882, had been imperfectly understood, and so the more familiar language of the former Code was adopted. This is especially clear if reference be made to sec. 145 and in abstaining from the use of that expression also in sec. 147 we have no doubt that the legislature was influenced by the same considerations. Sec. 147 of the Code of 1882 runs thus :—

"Whenever any such Magistrate is satisfied as aforesaid.....as the case may be," And sec. 147 of the Code of 1898 re enacted the law on this subject in the following terms :—

"Whenever any such Magistrate is satisfied.....as the case may be." It is obvious that sec. 147 of the Code of 1898 has not been happily expressed and that, if strictly construed, it is meaningless. A Magistrate is empowered to enquire into a dispute likely to cause a breach of the peace concerning the right of use of land or water including any right of way or other easement over the same, and it is clearly the object of the law that by his order, he shall settle that dispute; and that his order is to be in force until the party against whom the order is passed shall have obtained the decision of a competent Court in his favour. But what are to be the terms of the Magistrate's order? If he finds that the right in dispute exists, he is to "make an order permitting such thing, to be done or directing that such thing shall not be done as the case may be" which is to have effect until the decision

of a competent Court shall have been obtained to the contrary. If in such Court an order be passed affirming the Magistrate's finding, that order would, it is presumed, be the final order in the matter and take the place of the *ad interim* order of the Magistrate, but as the law is expressed, the Magistrate's order would be made absolute. No provision is made for a case in which the Magistrate's order may be modified, though from the nature of the matter in issue, this may constantly happen. But what does sec. 147 mean by stating that the Magistrate's order is to permit "*such* thing to be done" or to direct that "*such* thing shall not be done?" The word "*such*" must refer to something in the context, but the section is silent in this respect.

An explanation is suggested by learned counsel that "*such* thing" means the matter in dispute connected with the right of use of land or water. This may be what was intended. It is to be regretted that the law should have been so imperfectly and inartistically expressed. A comparison between the corresponding sections of the Code of 1872 and 1882 sufficiently shows that this was probably intended, and that the confusion has arisen from the draftsman substituting for the first portion of sec. 147 of the Code of 1882 the terms of the first portion (with verbal corrections in language) of sec. 532 of the Code of 1872 without noticing that the latter portion of that section would also need amendment to express the law correctly and intelligibly.

The matter in dispute between the parties which has led to proceedings

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under sec. 147 was the right to use certain water for purposes of irrigation and after declaring the existence of that right in favour of the first party, who are respectively the *malik* and *thikadar* of Charaul, the Magistrate has coupled with them "the men of Charaul" who are no parties to these proceedings, and he has also forbidden the second party, the *malik* and *thikadar* of Bhikrampur, as well as the men of Bhikrampur, who also are no parties to the proceedings, from erecting a bund in this *nala* or obstructing in any way the flow of water proceeding by this *nala* from Bhikrampur *Pahar* by the Gadna chur to Charaul. In its form the order is not bad because to use the words of sec. 147 it professes to "direct that such thing shall not be done."

The erection of this bund so as to prevent the exercise of the right to the flow of this water by the first party has caused the proceedings under sec. 147 and the right being found in favour of the first party, the Magistrate is competent to direct that the obstruction of that right by the erection of the bund shall be removed. Such an order is, we think, what the legislature contemplated if any meaning can be derived from the words of sec. 147. This disposes of the second objection taken.

The first objection is substantial. The Magistrate was not competent to add parties to the proceeding under sec. 147 any more than he could to proceedings under sec. 145 and in regard to proceedings under sec. 145 the law has been thus settled in many reported cases decided by this Court. The result may be unfortunate in its consequences, for in such a dispute the landlords, the

*malik* and *thikadar*, are not so directly concerned as their tenants. It would be impossible to make all the tenants of the two villages parties to a proceeding under sec. 147 and there is no provisions in the Code of Criminal Procedure as in the Code of Civil Procedure for dealing with such a matter so as to bind the community through some one representing it. The result may thus be that although the *malik* and *thikadar* may be prevented from erecting this bund, a difficulty may arise if the bund is erected by some villagers of Bhikrampur. Possibly a remedy will be found if such a case arises. At all events the order under sec. 147 is bad so far as it professes to affect the men of Charaul or of Bhikrampur because they are no parties to the proceedings under sec. 147.

The next matter for consideration in connection with this order is whether it is altogether bad by the inclusion of these persons. We think not. There is no reason why it should not be binding on those to whom it is properly directed. In the present case moreover the improper inclusion of the tenants of the parties to the proceedings cannot affect the order in respect of the landlords. Consequently it will be sufficient if we declare that the order under sec. 147 is null and void in respect of the tenants of Charaul or the tenants of Bhikrampur. The last objection is that the order is bad because the Magistrate has not found that the right in dispute had been exercised within either of the periods mentioned in sec. 147. This is not so. The Magistrate has thus expressed himself on this point:—"To summarize the evidence—The Court is of opinion that

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the first party, the *thikadar* and zemindar of Charaul, have proved an uninterrupted use of the water of this *nala* for twenty years which they have enjoyed as an easement and as of right."

This in our opinion, is a sufficient finding for the purposes of this case, for we understand from it that the erection of the bund which had led to the dispute likely to cause a breach of the peace has caused an interruption in the exercise of the right claimed and proved to exist.

The order under sec. 147 will therefore stand with the modification which has been ordered by us.

*Order modified*

N. N. M.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 333 OF 1900.

KEFATULLAH, 1st party,  
Petitioner,

PRINSEP, J.  
HANDLEY, J.

*v.*

1900. FERUZUDDIN MIAH and  
29, June. KHABIRUDDI, 2nd party,  
Opposite Party.

*Code of Criminal procedure (Act V of 1898) secs. 145, 438—Summary finding of possession by Magistrate in proceeding under sec. 145—Written statement in such proceeding, proof of—Warrant, issue of, for attendance of parties, legality of—Sessions Judge, power of, on application for redress of irregularity under sec. 145, to report to High Court under sec. 148, C. Cr. P., for order s.*

*In a case under sec. 145 of the Code of Criminal Procedure a Magistrate cannot on the failure of one party to file a written statement, summarily pass an order declaring possession with the party who has filed a written statement without taking evidence in proof of such statement.*

*He has no jurisdiction to issue a warrant to compel the attendance of a party in such proceeding.*

*On application to the Sessions Judge for relief against such illegality he should report the matter under sec. 438 of the Code for orders of the High Court, if he is of opinion that the order is illegal and without jurisdiction.*

This was a rule granted on the 24th of April 1900, against the order of the Joint-Magistrate of Mymensingh, dated the 21st of February 1900, an application for the revision of which order was rejected by the Additional Sessions Judge of Mymensingh on the 19th of March 1900.

The facts of the case appear from the judgment.

*Babu Sarat Chandra Basak* for the Petitioner.

*Babu Taruk Chunder Chuckerbarty* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

The order passed by the Magistrate in this case is clearly without jurisdiction. He has taken proceedings under sec. 145 and, on the day fixed for receiving written statements from the disputing parties, the second party alone put in a written statement, and the first party asked for a postponement. The Magistrate declined to grant any postponement and he has summarily passed an order declaring the second party to be in possession and maintaining his possession. There was no evidence upon which the Magistrate could have passed such an order. The written statement would not be a sufficient ground,

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for the law requires that, on perusing the written statements so put in, the Magistrate shall hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence as he may think necessary and then decide which of the parties was in possession at the date of the order made under sub-sec. (1) The statements made by a party in a written statement require to be proved in the same way as any other statements and, therefore, the Magistrate was not competent to pass an order in favour of the second party merely on the written statement filed by that party. The order, therefore, is without jurisdiction and must be set aside and the case must be tried in accordance with law.

We also observe that, on the date originally fixed for the written statement, one of the second party in whose favour this order has been passed was absent and the Magistrate thereupon thought proper to issue a warrant for his attendance. There was no authority for such proceeding. In this particular instance, the matter in issue was not the commission of an offence but the settlement of a dispute between the parties as to the possession of land and, therefore, it was entirely optional with the parties or any one of them to attend or not. In his absence, the case should have been decided as in default. The rule is made absolute. We observe that on application made the Additional Sessions Judge has considered the matter now before us on this rule and he has expressed himself very properly on the illegal order of the Magistrate but having done

this the Additional Sessions Judge has added "I am afraid I have no power to take any step in the matter." The Additional Sessions Judge should have known that the object of the application to him was to obtain a reference by him to this Court under sec. 438, Criminal Procedure Code, and thus to avoid the expense of coming to this Court directly and as the Additional Sessions Judge found that the order of the Magistrate was illegal he should have reported the case for the orders of this Court on revision.

*Rule made absolute :*

*Order set aside.*

H. P. C.

**[CRIMINAL REVISIONAL JURISDICTION]**

\* REV. NO. 68 OF 1900.

PRINSEP, J.	}	JALIRAM ALOM GANBURAH,
STANLEY, J.		Petitioner,
1900.		v.
4, April.		RAJKUMAR UMAR SINGH, Opposite Party.

*Code of Criminal Procedure (Act V of 1898), sec. 437—Further enquiry—Magistrate, power of, to direct further enquiry into offences, some of which formed component parts of an offence of which accused was acquitted—Indian Penal Code (Act XLV of 1860), secs. 147, 323, 342—Rioting, acquittal of—Fresh trial for causing hurt.*

*Where an accused person was tried on a charge of being a member of an unlawful assembly with the common object of assaulting the complainant but was acquitted of the offence of rioting and subsequent thereto the District Magistrate directed a further enquiry into the offences under secs. 323 and 342, I. P. Code, committed in the same occurrence :*

**JALIRAM ALOM GANBURAH v. RAJKUMAR UMAR SINGH.**

*Held—That the offence under sec. 323, I. P. Code, being one of the offences which formed the subject of the previous trial, the matter cannot be re-opened until the order of acquittal shall have been set aside.*

*That no order within the terms of sec. 437, Cr. P. Code, having been passed in respect of the offence under sec. 342, I. P. Code, the District Magistrate was not competent to order further enquiry in regard to that offence.*

This was a rule issued on the 25th of January 1900, against the order of the Deputy Commissioner of Sibsagor, dated the 8th of November 1899.

The facts of the case, so far as they are material to this report, appear from the judgment.

*Babu Surendra Nath Roy* for the Petitioner.

No one appeared for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

This rule has been granted to consider an order for further enquiry passed by the Deputy Commissioner of Sibsagor. It appears that the Petitioner has already been tried by a Magistrate for the occurrence, which forms also the subject of the proceedings which the District Magistrate now proposes to take. The charges in that case, as set out in the Magistrate's judgment, were that the Petitioner was a member of an unlawful assembly with the common object of assaulting the complainant and that he assaulted the complainant in prosecution of the common object of such unlawful assembly and, after a trial professedly under sec. 147, I. P. C., the Magistrate has acquitted the Petitioner.

The District Magistrate has, on motion made to him, ordered a further enquiry into the offences under secs. 323 and 342, I. P. C., notwithstanding this order of acquittal. Now, in regard to the offence under sec. 323, it has been sufficiently shown that that really was one of the offences which formed the subject of the trial already held and this matter cannot be re-opened until the order of acquittal shall have been set aside.

In regard to the proceedings which it is now proposed to take under sec. 342 by way of further enquiry, we would remark that the Magistrate was not competent to pass such an order because no order within the terms of sec. 437, C. Cr. P., so as to give the Magistrate jurisdiction has been passed in respect of this offence and we may observe that, having regard to what has already taken place, we think that no prosecution should be instituted in regard to the offence under sec. 342, inasmuch as the whole occurrence has already formed the subject of a trial which has resulted in an acquittal. The rule will accordingly be made absolute.

*Rule made absolute.*

H. P. C.

## PRIVY COUNCIL.

[ON APPEAL FROM THE MADRAS HIGH COURT.]

LORD HOBHOUSE.	}	RAJA YARLAGADDA
LORD MACNAGHTEN.		MALLIKARJUNA
LORD LINDLEY.		PRASADA, Defendant,
SIR RICHARD COUCH.		Appellant,
SIR H. DE VILLIERS.		v.
1900.	}	RAJA YARLAGADDA
11, July.		DURGA PRASADA,
		Plaintiff, Res-
		pondent,
		and Same
	}	v.
		RAJA YARLAGADDA
		VENKATA RAMA-
		LINGAMMA, Plaintiff,
		Respondent.

*Hindu Law—Maintenance, suit for, after dismissal of previous suit for partition—Arrears of maintenance—Maintenance, wrongful withholding of.*

*A suit for partition of a zemindary, in which the zemindary was found to be impartible and a decree was made for partition of a portion of the family property unconnected with the impartible zemindary, does not make the family a divided one, and a subsequent claim for maintenance is not inconsistent with the previous claim for partition.*

*The right to arrears of maintenance for any period not excluded by the law of limitation, is not forfeited by the claim for partition made in the previous suit.*

*In order to recover arrears of maintenance it is not necessary to prove a demand for each year's maintenance as it became payable, and although the non-payment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears, it constitutes a prima facie proof of wrongful withholding.*

*Whether such prima facie proof has been rebutted or not must depend on the circumstances of each particular case.*

SARTAJ KUARI v. DEORAJ KUARI (1) referred to.

JIVI v. RAMJI (2), SRI MANITAM MAHA-  
IAKSHIMAMMA v. SRI MANIYAM VENKATA-  
RATNAMMA (3) and NARAYAN RAO RAM  
CHANDRA PANT v. RAMA BAI (4) discussed.

MOTILAL PRANNATH v. BAI KASHI (5)  
discussed and a portion doubted.

Quære—*Whether, if the Defendant had been misled by the previous suit for partition into the belief that the claim for maintenance was abandoned and had not in consequence set aside any portion of his annual income to meet such a claim, he would have a good defence to a subsequent suit for arrears of maintenance.*

These were two appeals and two cross-appeals, consolidated respectively, from decisions of the Madras High Court, which had reversed the decisions of the Subordinate Judge granting arrears of maintenance to the two Plaintiffs-Respondents. The facts of the case are shortly these:—

Raja Akinidu, zemindar of Devarkota, died on the 6th April 1875 leaving three sons, of whom the Appellant was the eldest and the Respondent, cross-Appellant, the youngest. The second son was one Durga Pershad. After an unsuccessful attempt for an amicable division of the inheritance in a suit which was instituted in 1880 by Durga Pershad, it was finally decided by the Privy Council in 1890 that that zemindari was an impartible estate descendible to the

(1) I. L. R. 10 All. 272 (1887).

(2) I. L. R. 3 Bom. 207 (1879).

(3) I. L. R. 6 Mad. 83 (1882).

(4) I. L. R. 3 Bom. 415 at p. 421 (1879).

(5) I. L. R. 17 Bom. 45 (1892).



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eldest son only, but partition of certain property other than the zemindari estate was allowed.

While that suit was proceeding the present cross-Appellant commenced a similar suit in 1887 against the zemindar and his minor son and against Durga Pershad seeking like relief as was sought in the suit of Durga Pershad. Such suit was dismissed on 23rd March 1891.

Pending the said appeal to Her Majesty in Council the cross-Appellant, the Respondent in the second appeal, was not allowed by the High Court to execute the decree of that Court, but he was allowed a sum of Rs. 500 a month for his maintenance pending the appeal.

After the decision of the Privy Council the cross-Appellant on 30th March 1891 wrote to the zemindar calling upon him to pay his maintenance at and after the rate of Rs. 2,000 a month and arrears thereof. Receiving no reply he commenced the present suit claiming maintenance and arrears.

The Sub-Judge granted the claim for maintenance and arrears for 12 years.

Upon the Appellant's appeal to the High Court a Division Bench of that Court reversed that order as follows :—

“The District Judge has granted arrears at the rate of Rs. 500 per mensem for twelve years prior to the institution of the suit. In this we think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of

action for arrears. On proof of failure to maintain, without more, he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled [*Jivi v. Ranji* (2) and *Sri Maniyam Mahalakshamma v. Sri Maniyam Venkataratnamma* (3)]. If it were not so, it would mean that the manager of the family could, at the choice of any member preferring to reserve his claim for maintenance out of current income, be compelled to pay him from time to time sums of accumulated arrears which could only be paid out of capital. In this case it is admitted that the Plaintiff has since the 1st May 1875 been living apart from the Defendant and has neither asked for nor received maintenance except what he received under the order of the High Court pending the appeal to the Privy Council, that is, between December 1887 and July 1890.

In our opinion it is clearly the Plaintiff's own fault that he has not received maintenance for the whole period of twelve years for which he claims it. In his suit brought in 1880, he made another and inconsistent claim and therefore he has no right, now that he has failed in that litigation, to complain that a claim not made by him though conceded by the Defendant was not satisfied. There has been no wrongful withholding on the part of the Defendant. We must, therefore, reverse the decision of the District Judge with regard to the arrears except as regards the period abovementioned.

(2) I. L. R. 3 Bom. 207 (1879).

(3) I. L. R. 6 Mad. 83 (1882).

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tioned, during which payment was actually made."

*Mr. Branson* for the cross-Appellant.

*Mr. Mayne* for the Respondent in the cross-appeal.

Their LORDSHIPS' JUDGMENT was delivered by

SIR HENRY DE VILLIERS.—These are Appeals and cross Appeals against a decision of the High Court of Madras which modified a decision of the District Court of Kistna. Two separate suits for maintenance had been brought in the lower Court against the Zemindar of Challapalli by his two younger brothers respectively but all the proceedings in the two cases were identical and the observations of their Lordships upon the one case will be equally applicable to the other.

The Appellant, the Defendant in the lower Court, is the eldest son of Ankinidhu, late Zemindar of Challapalli, who died on the 6th of April 1875 leaving three sons, viz., the Defendant and the two Plaintiffs. Not long after their father's death quarrels arose between the brothers and in April 1880 one of the younger brothers brought an action for partition against the present Appellant in the District Court of Kistna. That Court decided that the zemindary estate was impartible but awarded to the then Plaintiff one-third of certain property not forming part of the zemindary estate. That judgment was reversed by the High Court of Madras but, on appeal to Her Majesty in Council, the judgment of the High Court was reversed on the 1st of May 1890 and that of the District Court was restored. In April 1891 the

two younger brothers instituted the present suits for maintenance. The plaintiffs claimed (1) maintenance at the rate of Rs. 2,000 per month (2) Rs. 5,31,938 for arrears of maintenance (3) Rs. 12,000 towards the marriage expenses of the Plaintiffs' children (4) the provision of suitable houses, lands, utensils and furniture for the Plaintiffs and (5) an order declaring that the arrears and future maintenance constitute a charge upon the Challipalli estate or such portion thereof as may seem proper to the Court. The District Court by its judgment decreed future maintenance at the rate of Rs. 750 per month and arrears of maintenance for twelve years at the rate of Rs. 500 per month, the whole to be a charge upon the zemindary estate. The District Judge found that the claim for maintenance was not affected by the decree in the partition suit and was not barred by limitation. In regard to the claim for arrears of maintenance, he held that although no demand had been made, maintenance had been practically withheld and could be recovered for a period of twelve years immediately preceding the institution of the suit. Against this judgment the Zemindar appealed while the Plaintiffs filed objections. The Judges of the High Court agreed with the lower Court upon all points except as to arrears of maintenance and as to the maintenance being a charge upon the whole of the zemindary estate. They held that the arrears were not claimable except a certain sum actually received by the Plaintiffs under a previous order of the High Court and they reduced the amount of arrears from Rs. 56,000 to Rs. 23,000. As to the

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question whether the maintenance decreed should be a charge upon the whole of the zemindary they say : " We think that the Zemindar is justified in objecting to the decree as framed by the District Judge inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages." The Defendant now appeals against the judgment of the High Court in so far as it allows any maintenance at all, while on the other hand the Plaintiffs respectively cross appeal against that part of the judgment which refuses further specific relief and reduces the amount of the arrears of maintenance.

Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that, in that suit, a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion and had no relation whatever to the zemindary estate. As to the zemindary estate this Board held that it was impartible and the consequence is that the Plaintiffs, as the younger brothers of the Zemindar, retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir [*Sartaj Kuari v. Deoraj Kuari* (1)]. In regard to the amount of maintenance the Judges of the High Court very properly refused to disturb the finding of the District Judge

whose experience in the district they fully recognise.

The only question upon which there has been any serious argument before their Lordships is whether the arrears of maintenance awarded by the lower Court ought to have been reduced by the High Court. The Plaintiffs no longer object to the arrears being limited to the period of twelve years but they claim that for that period at all events they should receive the amount awarded to them. Among their reasons for the view that arrears of maintenance are not claimable the learned Judges of the High Court state the following : " The District Judge has granted arrears at the rate of Rs. 500 per mensem for twelve years prior to the institution of the suit. In this we think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of action for arrears. On proof of failure to maintain, without more, he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled." In support of these views the learned Judges refer to two cases of *Jivi v. Ramji* (2) and *Sri Maniyam Mahalakshamma v. Sri Maniyam Venkataratnamma* (3), but these cases by no means support the conclusions at which

(1) I. L. R. 10 All. 272 at p. 285 (1887).

(2) I. L. R. 3 Bom. 207 (1879).

(3) I. L. R. 6 Mad. 83 (1879).

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the High Court has arrived. The first of them, decided by the High Court of Bombay in 1879, was a case in which a Hindu widow sued her late husband's undivided brother for four years' arrears of maintenance. The High Court, reversing the judgment of the District Court, held that the widow had a legal right, irrespective of demand and refusal, to maintenance and may recover arrears for any period not excluded by the law of limitation. The question raised in the second case, which was decided by the High Court of Madras in 1882, was whether a Hindu widow entitled to maintenance can have the payment thereof secured by a charge on part of the inheritance in the hands of the heir. The question was decided in the affirmative and the learned Judges in the course of their judgment made the following remarks at p. 84: "It is argued that the claim to past maintenance ought to have been disallowed, but we are unable to assent to this view. . . . Although no previous express demand is necessary to sustain a claim to past maintenance, and it is only evidence of a wrongful withholding of maintenance which, as observed by the Privy Council in *Narayan Rao Ram Chandra Pant v. Rama Bai* (4) is the ground of liability—the Subordinate Judge has also found in this case that demands were made but not complied with since 1876." The case before this Board to which reference was made in the case last cited was decided in 1879. Three questions were raised before their Lordships, namely, whether the suit of the Plaintiff, a Hindu widow, for maintenance and

arrears under a will is barred by limitation on the expiration of twelve years from the testator's death, whether she had disentitled herself to maintenance by living apart from the son, and whether the suit could be maintained notwithstanding that there had been no demand and refusal of the maintenance. Their Lordships answered the two first questions in the negative and as to the third question they made the following observations:—"It was said that no action could be maintained because a demand and refusal had not been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused; and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it." Among the circumstances thus taken into consideration was the antecedent litigation which showed the state of hostility between the members of the family and accounted for the withholding of the maintenance. The case is no authority for the proposition that in order to recover arrears of maintenance it is necessary to prove a demand for each year's maintenance as it became payable. On the contrary the fair deduction from this and other cases cited is that, while the learned Judges of the High Court were right in holding that non-payment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears, it constitutes *prima facie* proof of wrongful

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withholding. It is only upon a full consideration of all the circumstances of each particular case that it is possible to decide whether such *prima facie* proof has been rebutted. The only case which might appear to conflict with this view is that of *Matilal Prannath v. Bai Kashi* (5). In that case the learned Judges of the High Court of Bombay admitted that a withholding of maintenance might be proved otherwise than by a demand or refusal, and if they intended moreover to decide that non-payment of maintenance when due does not constitute *prima facie* proof of such withholding, their Lordships are unable to agree with the decision. In the present case it is said that the claim for maintenance is inconsistent with the claim for partition in the previous action, and in one sense this may be true, but it by no means follows that the right to arrears of maintenance was forfeited in consequence. It is not alleged that the Plaintiff did not act in perfectly good faith in instituting his suit for partition and the fact that there was considerable diversity of opinion in the different Courts which had successively to decide the case shows that the Plaintiff's claim for partition was not wholly baseless. So long as that action was pending the Plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council. The Defendant, on the other hand, if he had been willing to allow full maintenance in lieu of a partition, might have made an unconditional offer of a reasonable amount of maintenance or he might have set aside a certain sum for the purpose. It is true that, in an

affidavit, he made a vague admission of his liability but he never went any further. It is reasonably clear from the proceedings in the present suit that he would not have been willing to provide maintenance at the rate of Rs. 750 per month, if that sum had been demanded in the previous suit instead of a decree for partition. One of the express grounds stated by him for his appeal in the present suit to the High Court was that "even granting that the Plaintiff is entitled to maintenance, the rate of maintenance awarded to him is excessive." And among his grounds of appeal to Her Majesty in Council are the following: "(4) The High Court failed to notice that it is for the Plaintiff to set up and prove any custom entitling him to maintenance and that he has not done so. (5) The High Court erred in thinking that there was any admission by the Defendant of his liability for maintenance. (10) The amount of maintenance awarded is excessive." After these objections, and in view of the strained relations between the brothers ever since their father's death, it is impossible to believe that the Defendant would have paid maintenance at the rate of Rs. 750 per month or at any other rate if it had been demanded from him in the first instance. He does not allege, in his defence, nor is there any evidence, that he was in any way prejudiced by the form of the previous action. It may well be that, if he had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present

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action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the Defendant have forfeited an undoubted right merely because they were in the first instance advised to institute a wrong suit and did not claim their maintenance as it fell due. The District Court, therefore, properly held that the younger brothers were entitled to recover arrears for any period not excluded by the law of limitation.

The result is, that, in the opinion of their Lordships, the Defendant's Appeals should be dismissed and the Plaintiff's cross Appeals allowed to this extent that the judgment of the District Court for arrears be restored and the Defendant ordered to pay the Plaintiff's costs of appeal to the High Court and their Lordships will humbly advise Her Majesty accordingly. The costs of these Appeals will also be paid by the Defendant, but the Registrar will be directed not to include in such costs any expenses occasioned by the printing of irrelevant or unnecessary matter in the bulky record presented to their Lordships.

Solicitor: *Mr. R. T. Tasker* for the Appellant.

Solicitors: *Messrs. Frank, Richardson & Sadler* for the Respondent.

*Appeal dismissed ;  
Cross-appeal allowed.*

C. W. A.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM ORDER

No. 92 of 1900.

MACLEAN, C. J. BHOLA NATH DAS and  
BANERJEE, J. another, Appellants,  
1900. v.

Heard, 6, July. PROFULLA NATH  
Judgment, KUNDU CHAUDHURI,  
29, August.] Respondent.

*Limitation Act (XV of 1877), Sch. II,  
Art. 179—Limitation—Application for execu-  
tion.*

*Where on an attachment in execution of a decree upon notice under sec. 248, C. P. C., the judgment-debtor pleaded limitation, but, after certain adjournments at the instance of the decree-holder neither party appeared at the hearing and orders were made refusing the application for execution and dismissing the judgment-debtor's objection for default :*

Held—*That the aforesaid order does not preclude the judgment-debtor from urging when subsequently another application for execution is made, that the previous application was barred by limitation.*

MUNGUL PERSHAD DICHIT v. GRIJA KANT LAHIRI (1) explained and distinguished.

TILSHAR RAI v. PARBATI (2) relied upon.

RUN BAHADUR SINGH v. LUCHO KOER (3) referred to.

This was an appeal preferred on the 12th of March 1900, against the order of H. R. H. Coxe, Esq., District Judge of Zillah Hooghly, dated the 8th of December 1899, reversing the order of

(1) I. L. R. 8 Cal. 51 (1881).

(2) I. L. R. 15 All. 198 (1898).

(3) I. L. R. 11 Cal. 301 at p. 306 (1884).

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**Babu Gopal Krishna Ghose**, Munsif of Howrah, dated the 31st of August 1899.

The facts of the case are shortly as follows :—

The present appeal arose out of an application for execution of a decree obtained by the decree-holder, Respondent, against the judgment-debtors. An application, preceding the present application, for execution of the decree was made in November 1896. Thereupon notice was issued to the judgment-debtors. The decree was then transferred to another Court in consequence of change of jurisdiction. An order of attachment was issued by this second Court. The judgment-debtors then came and urged that the application for execution was barred by limitation : and after several adjournments granted principally at the instance of the decree-holder, when the case came on for hearing, neither party having appeared, the Court by its order refused the application for execution and disallowed the objection of the judgment-debtors.

On appeal, the District Judge reversed that order and allowed the present application for execution to go on. Against this order the judgment-debtors Nos. 2 and 3 preferred this appeal.

*Babu Mohendra Nath Roy* for the Appellants.

*Mr. U. P. Roy* and *Babu Shashi Sekhar Bose* for the Respondent.

The JUDGMENTS OF THE COURT were as follows :—

**BANERJEE, J.**—The question for determination in this case is whether the present application for execution of the decree obtained by the Respondent is barred by limitation.

The first Court held that the application was barred by limitation ; on appeal the lower Appellate Court has reversed that decision ; and hence this appeal by the judgment-debtors.

The contention on behalf of the Appellants is, that the present application is barred, because the application preceding it was barred, and when once an application for execution is barred by limitation, no subsequent application, though made within three years after it, can be held to be in time. In answer to this contention the learned counsel for the Respondent says, as the Court of Appeal below has said in its judgment, that though the last preceding application for execution might have been barred by limitation, yet the Appellants are precluded by an order of the Court from urging that it was so barred.

Now this is how the facts as found by the lower Appellate Court stand. The last preceding application for execution was made in November 1896. Thereupon notice was issued to the judgment-debtors. The decree was then transferred to another Court in consequence of change of jurisdiction. An order of attachment was issued by this second Court. The judgment-debtors then came and urged that the application for execution was barred by limitation, and after several adjournments granted principally at the instance of the decree-holders, when the case came on for hearing, neither party having appeared, the Court by its order refused the application for execution and disallowed the objection of the judgment-debtors.

The last-mentioned order disallowing the judgment-debtors' objection, it is contended for the Respondents, precludes the Appellants from urging now that the

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previous application was barred; and in support of this contention the case of *Mungul Pershad Dichit v. Grija Kant Lahiri* (1) is relied upon; while on the other hand, the learned vakil for the Appellants argues that the case cited is distinguishable from the present, that the order relied upon merely disallowed the judgment-debtors' objections for default without deciding on the merits that they were invalid, and that such an order, it has been held by the Allahabad High Court in *Tilashar Rai v. Parbati* (2), cannot debar the Appellants from raising the same objections again.

The case of *Mungul Pershad Dichit v. Grija Kant Lahiri* (1) differs from the present in this, that whereas in that case the judgment-debtors acknowledged the validity of the order for attachment made upon the previous application; in the case before us the judgment-debtors impugned the attachment and the execution proceedings instituted by the previous application; and this is certainly a point of difference in favour of the Appellants. But then it is argued that there is another point of difference between the two cases which has the opposite effect, and makes the present case a stronger one against the Appellants than the case cited and that point is this, that whereas in the case cited there was only an order for attachment of property acquiesced in by the judgment-debtors, which was held to preclude them from objecting to the validity of the application on which that order was made, here there was an express order disallowing the very objection that the judgment-debtors are now rais-

ing, namely, that the previous application was barred by limitation; and that order remaining unreversed must, upon the authority of the case cited, operate as a bar to the present contention of the Appellants. But I am unable to accept this view as correct. There is nothing to show that the Court disallowed the objection of the judgment-debtors on the merits. On the contrary the fact appearing upon the ordersheet that the case was adjourned at the instance of the decree-holder to enable his pleader to produce authority in support of his contention, would rather go to show that the merits were on the other side. The dismissal of the objection was evidently on account of the objectors' default in appearing; and as simultaneously with such dismissal, the application for execution was itself refused and not simply struck off, the dismissal of the objection cannot rightly be held to operate as a bar to its being urged when the decree-holder applies for execution again. This view is in accordance with the case cited for the Appellants.

Again, as the order refusing the application for execution which was the order disposing of the execution proceeding instituted was not based upon the order disallowing the judgment-debtors' objection, but was made in spite of it, the order disallowing the judgment-debtors' objection cannot be held to be conclusive against them. This view is supported by the observations of the Privy Council in the case of *Run Bahadur Singh v. Lucho Koer* (3). I may add that as the application for execution was refused and not simply struck off, the order for

(1) I. L. R. 8 Cal. 51 (1881).

(2) I. L. R. 15 All. 198 (1893).

(3) I. L. R. 11 Cal. 301 at p. 306 (1884).



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attachment and any attachment made in pursuance thereof must be taken to have become inoperative upon the refusal of the application for execution.

For the foregoing reasons I am of opinion that the contention of the Appellants should prevail, the order of the Court of Appeal below should be set aside, and that of the first Court refusing the present application for execution restored with costs in this Court and in the Court below.

MACLEAN, C. J.—I concur.

S. C. S. *Appeal allowed.*

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM APPELLATE DECREE**

No. 1016 OF 1898.

RAMPINI, J.	}	GIRISH CHUNDER DEY and
SALE, J.		others, Defendants,
1900.		Appellants,
23, November.		v.
		JURAMONI DE, Plaintiff,
		Respondent.

*Transfer of Property Act (IV of 1882), secs. 60, 85, 91, cl. (a)—Redemption, right of, of purchaser of portion of the equity of redemption—"An interest or charge upon property," in sub-sec. (a), sec. 91, meaning of—Raiyati interest, if sufficient to entitle one to redeem—Review, granting of, to bring in necessary parties in a suit for redemption if proper after dismissal of suit.*

*"That the words "any person having any interest in or charge upon the property," in sub-sec. (a) of sec. 91 of the Transfer of Property Act, means any person having an interest in or charge upon the property which is affected by the mortgage and a raiyati interest is not such an interest.*

*That the Plaintiff as a purchaser of a portion of the equity of redemption was*

*not entitled, against the will of the mortgagee, to redeem the whole; he should be restricted to the redemption of that portion only.*

NAWAB AZMUTALI KHAN v. JOWAHIR SING (1) *followed.*

*That having regard to the provisions of sec. 85 of the Transfer of Property Act as to necessary parties, the review granted after dismissal of suit to bring in the heir of one of the mortgagees as a party Defendant was not improper.*

This was an appeal preferred on the 18th of May 1898, against the decree of G. Gordon, Esq., Judge of Chittagong, dated the 25th of February 1898, preferred on appeal from the decision of Babu Charu Chunder Mukerjee, Munsif of Hat Hazari, dated the 20th of July 1897.

The facts of the case were as follows :—

The property in suit was owned by Isafali, Defendant No. 7, and his two nephews, Latif Ali and Pataa Mia, Defendants Nos. 5 and 6, the former having 8 annas and the latter 4 annas each. On the 7th of Kartic 1247, they mortgaged the land to Girish Chunder Dey and his two brothers, Defendants Nos. 1 to 3, Appellants in the present appeal. On the 2nd of Asar 1249 Defendants Nos. 6 and 7 sold their rights in the property in Sch. II to one Abdul Ali, Defendant No. 4, and on the 19th of Chaitra 1253 Abdul Ali granted a raiyati lease to the Plaintiff-Respondent, Juramoni Dey. On the 30th of Chaitra 1254 Defendants Nos. 5 and 6 sold their rights in the property in Sch. I to the Respondent, and the Respondent became

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entitled to 8 annas of the property in Sch. I and 12 annas of that in Sch. II.

In 1893 the Defendant No. 1, Girish Chunder Dey, instituted a suit for foreclosure against Defendants Nos. 5, 6 and 7 and obtained a decree. The Respondent attempted to save his property by deposit of the money due on the mortgage but as his title was denied, his application was rejected. He then instituted a suit which was dismissed by the Munsif in May 1894, but he obtained permission from the Appellate Court in January 1895 to withdraw the suit with leave to bring a fresh suit upon the same cause of action. He then instituted the present suit on the 16th of September 1895, chiefly for declaration of his rights to the properties as also for redemption of the properties mortgaged.

The Munsif found all the issues in favour of the Plaintiff except a new issue framed by the Court and upon the finding of that issue, i.e., that the suit was bad for non-joinder of necessary parties the Munsif dismissed the suit on the 17th of March 1897. Subsequently the Plaintiff applied for a review which was granted on the 19th April 1897, and the widow of Defendant No. 2 being made a party, the suit was tried in her presence and was decreed. On appeal by the Defendants, Girish Chunder Dey and others, the District Judge dismissed the appeal and affirmed the decree of the first Court and declared Plaintiff's right to redeem the whole of the mortgaged properties.

Against that decree the Defendants preferred this appeal and on their behalf it was contended, *first*, that the Plaintiff having merely a *raiyati* interest in the

12 annas of the property mentioned in Sch. II was not entitled to redeem that portion of the mortgaged property; *secondly* that his right of redemption must be restricted to the 8 annas share of the property specified in Sch. I; and, *thirdly*, that the Court of first instance improperly granted a review in this case, and that the suit, having been dismissed for non-joinder of parties, should not have been allowed to be reviewed.

*Babu Harendra Narayan Mitter* (for *Babu Jatra Mohan Sen*) for the Appellants.

*Babu Dharendra Lal Kastagir* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the District Judge of Chittagong, dated the 25th of February 1898.

The facts of the case are set out in the judgments of the lower Courts. It is sufficient to say here that the suit is one brought to redeem a mortgage of certain properties. The Plaintiff is the purchaser of the rights of the mortgagors to the extent of 8 annas of the property specified in schedule No. 1, and he has further a *raiyati* interest to the extent of 12 annas in the property mentioned in schedule No. 2.

The District Judge has held that the interests which the Plaintiff has acquired in these properties are sufficient to give him a right to redeem the whole of the mortgaged properties.

The Defendants in the suit, who are the mortgagees, now appeal on three grounds, *first*, that the Plaintiff having merely a *raiyati* interest in the 12 annas of the property mentioned in schedule

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No. 2, is not entitled to redeem this portion of the mortgaged property; *secondly*, that his right of redemption must be restricted to the 8 annas share of the property specified in schedule No. 1; and, *thirdly*, that the Court of first instance improperly granted a review in this case, and that the suit, having been dismissed for non-joinder of parties should not have been allowed to be reviewed.

With regard to the first of these grounds we think that the plea of the Appellants must prevail. We do not think that the Plaintiff as a *raiyat* has such an interest in the property named in schedule No. 2 as would entitle him to redeem it. The learned pleader for the Respondent cites sub-sec. (a) of sec. 91 of the Transfer of Property Act, in which it is said that "any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property, can redeem." But we think that this must mean any person having an interest in or charge upon the property which is affected by the mortgage. A *raiyat* has no such interest. Therefore, we think that the decision of the District Judge is incorrect to this extent.

The second plea of the Appellants that the Plaintiff's right to redeem is restricted to the 8 annas share of the property in schedule No. 1, seems to be also correct. The learned pleader for the Respondent contends, that being the purchaser of the equity of redemption of a portion of the property, his client is entitled to redeem the whole. We think, however, that this is not so. No doubt, under the last clause of sec. 60

of the Transfer of Property Act a person interested in a share only of the mortgaged property can be compelled to redeem the whole of the mortgage. But this would seem to depend on the wish of the mortgagee. If the mortgagee is not willing to have the whole redeemed, he can redeem only to the extent of his share in the property. We think that the law as laid down in the case of *Nawab Azmutali Khan v. Jowahir Sing* (1) is to the effect that the purchaser of a portion of the equity of redemption must be restricted to the redemption of that share.

With regard to the third ground of appeal it is sufficient to say that we see no reason to suppose that the review has been wrongly granted. Under sec. 85 of the Transfer of Property Act it is clear that the Plaintiff was bound to bring on the record all persons interested in the mortgage; and we think that the Court of first instance was wrong in allowing the suit to proceed in the absence of the heirs of the Defendant No. 1. That being so, we consider that the Munsif was perfectly justified in granting a review of his order and in allowing the Plaintiff to bring in the heirs of the Defendant No. 1. The suit has now been disposed of in the presence of all the persons interested: and there is no defect of parties.

With these observations we decree the appeal to this extent, namely, that the Plaintiff must not be allowed to redeem the 12 annas of the property specified in schedule No. 2, but must be restricted to the redemption of the 8 annas share of the property mentioned in schedule

(1) 13 Moo. I. A. 404 at p. 415 (1870).

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No. 1. The case is, therefore, remanded to the lower Appellate Court to have the rights of the parties determined in accordance with the above instructions. This order carries costs—the Appellant being entitled to his costs in proportion to the extent to which his appeal has been allowed.

*Appeal allowed :*

*Case remanded.*

H. P. C.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 748 OF 1898.

GHOSE, J.	}	GOPAL DAS, Plaintiff,
HARINGTON, J.		Appellant,
1900.		v.
27, April.	}	HARDEO DAS, Defendant,
		Respondent.

*Public Demands Recovery Act (VII of 1880), secs. 8, 10, 12 and 15 (I of 1895, B. C.)—Sale, setting aside—Notice under sec. 10, non-service, effect of—Limitation.*

*When the notice under sec. 10 of Act VII of 1880 (B. C.) is not served the certificate does not acquire the force of a decree and is not binding upon the judgment debtor and the sale held in execution of such a certificate is necessarily bad in law and may be set aside by a suit if brought within the statutory period allowed by the Limitation Act.*

*Sec. 15 of Act I of 1895 (B. C.) refers to a suit to have a certificate cancelled or modified, and it has no application to a suit to have a sale held in execution of such a certificate set aside.*

*If a person is entitled under Act VII of 1880 (B. C.) to bring his suit within one year or if otherwise the suit is within time,*

*the mere fact of his presenting an appeal to the Commissioner, and the Commissioner having rejected his appeal under Act I of 1895 (B. C.) would not deprive him of the full period of limitation, which, having regard to the provisions of Act VII of 1880 under which the sale was held, he is entitled to.*

This was an appeal preferred on the 15th of April 1898, against the decree of A. Mackie, Esq., District Judge of Zillah Tirhoot, dated the 12th of January 1898, affirming the decree of Babu Bhagwan Chandra Chatterjee, Additional Subordinate Judge of that district, dated the 26th of August 1897.

The facts of the case appear from the judgment.

*Babu Karuna Sindhu Mukherjee* for the Appellant.

*Mr. C. Gregory* (for *Babu Baldeo Narain Singh*) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit instituted by the Plaintiff for setting aside a sale held in execution of a certificate issued by the Collector under the provisions of Act VII (B. C.) of 1880. The sale in question took place on the 4th March 1895 at a time when the said Act VII of 1880 was in full force.

The District Judge, in affirming the judgment of the Subordinate Judge, has held that the suit is barred under sec. 15 of Act I (B. C.) of 1895, because the Plaintiff did not bring the suit within six months from the date when his appeal was decided by the Commissioner, which was on the 18th July 1895; and with reference to the question that was

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raised before him that no notice under sec. 10 of Act VII of 1880 was served upon the Plaintiff, he held that this was of no importance upon the view that he had adopted. He was further of opinion that the case was not governed by Art. 12, cl. (c) of Sch. II of the Limitation Act, as it did not apply to suits to set aside a certificate.

In order to see how the law upon the subject really stands, it will be necessary, in the first place, to refer to some of the provisions of Act VII (B. C.) of 1880, under which the certificate in question is said to have been made and served, and the sale took place.

Sec. 6 of that Act provides that "subject to the provisions of this Act, every certificate made under the provisions of sec. 5 shall, as regards the remedies for enforcing the same, and so far only, have the force and effect of a decree of a civil Court, and the Secretary of State for India in Council shall be deemed to be the decree-holder, and the person therein named as debtor shall be deemed to be the judgment-debtor." Sec. 8 cl. (a) provides that "subject to the provisions of this Act, every certificate made under the provisions of sec. 7 shall, as regards the remedies for enforcing the same, and so far only, have the force and effect of a decree of a civil Court." And then in cl. (b) of the same section it is provided—"such judgment-debtor may at any time within one year after the service upon him of such notice as is mentioned in sec. 10 bring a suit in the civil Court to contest his liability to pay the amount stated in the said certificate and to have such certificate cancelled: but no such suit shall be en-

tertained unless such judgment-debtor has stated in a petition presented to the Collector under sec. 12 the ground upon which he claims to have such certificate cancelled, or unless, having omitted to state such ground in such petition as aforesaid, he can satisfy the civil Court that there was good reason for such omission. If no such suit is instituted within the said period of one year, or if any such suit having been instituted is decided against such judgment-debtor, such certificate shall become absolute, and shall have, to all intents and purposes, the same force and effect as a final decree of a civil Court." Sec. 10 provides that, "when a certificate has been filed in the office of a Collector under the provisions of sec. 5, or sec. 7, or sec. 9, such Collector shall issue to the judgment-debtor a copy of such certificate and a notice in form No. 4 in the second schedule annexed to this Act. From and after the service of such notice, such certificate shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of sec. 274 of the Code of Civil Procedure."

Now it will be observed on a reference to the sections to which we have just referred that it is only in the event of a certificate being made in accordance with the provisions of the law, and also in the event of a notice of the certificate being served upon the judgment-debtor, that it shall have the force and effect of a decree, and shall bind all the immoveable property of such judgment-debtor situate within the jurisdiction of the

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Collector in the same manner and with like effect as if such immoveable property had been attached under the Code of Civil Procedure. [See *Mahomed Abdul Hai v. Gujraj Sahai* (1), *Baijnath Sahai v. Ramgout Singh* (2)].

Then we have sec. 12 which lays down : "If any person, who has been served with a notice under sec. 10, denies his liability to pay the whole or any part of the amount for which such certificate has been made and filed against him, he may at any time within thirty days after service of such notice or, where no such notice has been duly served, within thirty days after the execution of any process for enforcing such certificate, file a petition, denying his liability as aforesaid, before the Collector by whom such certificate has been made. Such petition shall be in, or as nearly as possible in, the form No. 5 in the second schedule annexed to this Act."

This section contemplates, among other matters, the case of a notice under sec. 10 being served as also where it is not duly served, but process for enforcing the certificate has been executed; and leaves it, in those events, open to the judgment-debtor to apply to the Collector by whom the certificate had been made, denying his liability under such certificate. And referring back for a moment to sec. 8, cl. (b), we find that a suit may be brought by the judgment-debtor within a year to contest his liability to pay the amount stated in the certificate, but that no such suit should be entertained unless the judgment-debtor had stated in his petition presented to the Collector under

sec. 12 the ground upon which he claims to have such certificate cancelled. Now in the present case, the sale having been held on the 4th March 1895, while Act VII of 1880 was in force, *prima facie* the Plaintiff would be entitled to bring a suit within one year from the service of notice under sec. 10, if there was such service, and it will be observed that the Act does not prescribe any period of limitation for a suit of the kind, where the judgment-debtor was not served with any notice under sec. 10. In such a case, the certificate, not having acquired the force of a decree, is not binding upon the judgment-debtor and the sale held in execution of such a certificate is necessarily bad in law, and may be set aside by a suit, if brought within the statutory period allowed by the Indian Limitation Act.

The Plaintiff in the present case contends in the first instance, that the certificate was not made out according to law. In the second place he says that notice of the certificate was not served upon him, and in the third place he states that the proceedings in connection with the sale that took place were all fraudulent and that the sale was therefore bad in law; and he accordingly sues to have it set aside.

Neither the Subordinate judge nor the District Judge in appeal has found any of the facts in this case, indeed no facts were gone into, the suit having been dismissed, as we understand it, upon a preliminary point, that point being that the suit is barred by the provisions of sec. 15 of Act. I (B. C.) of 1895.

That section provides—"The person deemed to be the judgment-debtor under

(1) I. L. R. 20 Cal. 826 (1893).

(2) I. L. R. 23 Cal. 775 (1896).

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the provisions of sec. 8 may, at any time within six months from the service upon him of notice under sec. 10, or, if he files a petition of objection under sec. 12, from the date of the determination thereof, or, if he appeals under sec. 19, from the date of the decision of such appeal, bring a suit in the civil Court to have the said certificate cancelled or modified."

Now, this section refers to a suit to have a certificate cancelled or modified, and it has no application to a suit to have a sale held in execution of such a certificate cancelled or modified. The section, however, so far as the matter of limitation is concerned, cuts down the period from 12 months, as was provided by Act VII of 1880, to six months from the date of service upon the judgment-debtor of the notice under sec. 10; and there is the further provision, that if a petition of objection under sec. 12 has been presented, the suit must be brought within six months from the date of the determination of such petition of objection, or, in the event of an appeal to the Commissioner, within six months from the date of the decision of such appeal, a provision which was not to be found in Act VII of 1880. But in any case, unless notice of the certificate has been served upon the judgment-debtor, the limitation of six months, as is provided in the section, is not applicable, unless the judgment-debtor applies to the Collector under sec. 12, or unless he appeals to the Commissioner. In the present case, however, the judgment-debtor did appeal to the Commissioner, and the suit has not been instituted within six months from the date of the

Commissioner's order. But it seems to us that if the Plaintiff is entitled under Act VII of 1880 to bring his suit within one year, or if otherwise the suit is within time, the mere fact of his presenting an appeal to the Commissioner, and the Commissioner having rejected his appeal under Act I of 1895 would not deprive him of the full period of limitation which, having regard to the provisions of Act VII of 1880, under which the sale was held, he is entitled to.

We have already stated that the Courts below have not gone into the facts of this case in order to see whether the suit, so far as it seeks to set aside the certificate, is barred by limitation. We may further observe that the plaint in this case alleges that the proceedings in connection with the sale were altogether fraudulent; and the Plaintiff is therefore entitled to have a decision at the hands of the Court (even if the certificate is binding upon him by reason of limitation or otherwise) upon the question whether the sale is a good sale. The learned Judge, we think, is not right in holding that the sale cannot be set aside unless the certificate is set aside.

With these observations we set aside the judgments of both the Courts below, and send the case back to the Court of first instance for retrial according to law.

Costs will abide the result.

*Case remanded.*

S. C. S.

**CIVIL APPELLATE JURISDICTION.]****APPEAL FROM ORIGINAL ORDER**

No. 175 OF 1900.

GOURI KANT BURMAN,

MACLEAN, C. J.

Judgment-debtor,

BANERJEE, J.

Appellant,

1900.

v.

5, September.

| DAMODAR DAS BURMAN,

Decree-holder,

Respondent.

*Insolvency—Civil Procedure Code (Act XIV of 1882), secs. 345, 346 and 350—Insolvent, examination of.*

*The examination of an insolvent under sec. 350, Civ. P. C., is only necessary where the judgment-debtor is declared an insolvent upon his own application, not where he is adjudicated an insolvent at the instance of the judgment-creditor.*

There was an appeal from the order of H. R. H. Coxe, Esq., District Judge of Hooghly, dated the 21st day of April 1900, adjudicating the Appellant to be an insolvent. That order was made upon the application of the Respondent who was a decree-holder against the Appellant to the amount of Rs. 1,100. After certain proceedings, a date was fixed for the examination of the Appellant and on his failure to attend on that day, he was adjudicated to be an insolvent. He now appealed from that order, both upon the merits and on the ground that the Judge did not comply with the provisions of sec. 350, Civ. P.C., which requires a personal examination of the debtor.

*Babus Boidya Nath Dutt and Bepin Behari Ghose for the Appellant.*

*The Advocate-General (Mr J. T. Woodroffe) and Babu Lal Mohan Das for the Respondent referred to Ram Komal Saha v. Bank of Bengal (1).*

(1) See 5 C. W. N. 91 (1900).

The JUDGMENT OF THE COURT WAS AS follows :—

This is an appeal from an order of the District Judge of Hooghly, dated the 21st of April of this year, adjudicating the Appellant to be an insolvent. The insolvency order was made upon the application of the Respondent who was a decree-holder against the Appellant to the amount of about 1,100 rupees; and on the 16th of September 1899, as such holder of a decree for money, he applied to have the Appellant declared an insolvent, and his application was in accordance with secs. 345 and 346 of the Code of Civil Procedure. On the 29th of November the Appellant put in objections and in those objections stated that he was a man of means, that he was the owner of many zemindaries, that he had a very large sum in this Court due to him, a sum considerably over a lac of rupees, and that he had other properties of considerable value. He forgot, however, to mention that his zemindaries were very heavily incumbered, if not up to the hilt; he forgot to mention that the money in Court was more than covered by attachments against it, and he also made the singular mistake of stating in Court, that he was the owner of sixty bighas of land in Alipore, which turned out to be sixteen and not sixty bighas. That was at least an unfortunate slip. He put in an affidavit verifying the statement I have made as to his property, forgetting to say anything about the incumbrances; and although on the 13th of December 1899, an affidavit was filed by the present Respondent, stating in precise terms that all this property was heavily incumbered and attached, and although he was examined on the 6th of January 1900, al



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he said on that occasion was, that he had the sixty bighas, which turned out to be sixteen. He never said a word in answer to the affidavit made against him by the Respondent. The matter was postponed from time to time at his instance, and ultimately came on on the 17th April. I ought to have said that it also came on on the 29th of March, when the Judge evidently thought that the Appellant was doing his best to delay and keep back the matter and put off the payment of his debt, and on that date the 19th of March, he was directed to attend for examination on the 17th of April. He did not attend on the 17th of April, he said he was ill, he said he had been ill for a considerable time, but no application was made for postponement until the last moment. The Judge did not comply with that application; and the Appellant did not ask for a commission to issue for his examination. The case then came on on the 21st of April, and he was declared to be an insolvent. I think the best evidence that he was not in a state of insolvency would have been, if he had all this valuable property, to have paid the Respondent's decretal debt, a small debt of 1,100 rupees. It is odd that he should not have done so if really solvent. Upon the evidence there cannot, I think, be a shadow of a doubt that he was an insolvent when the order complained of was made.

Then it is said that apart from the merits, the Judge in the Court below has erred in practice in that he did not comply with the requirements of sec. 350 of the Code which requires a personal examination of the debtor on the

hearing of the application to be declared an insolvent. But I think it is pretty clear that sec. 350 only applies to the case where the judgment-debtor himself makes the application and it appears to me that the Judge in the Court below has not infringed any provision of the Code. There does not seem to be any precise procedure laid down as to how the Court should hear cases where the decree-holder is the applicant; but the Judge heard it partly on oral evidence and partly on affidavit evidence; and at any rate the Appellant did not think fit either to go himself into the box or to put in any oral evidence on his behalf. There is nothing in the point that the procedure adopted by the Court below is not in accordance with the Code. Upon that point also the appeal fails. The appeal therefore must be dismissed with costs, 5 gold mohurs.

BANERJEE J.—I concur.

*Appeal dismissed.*

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER

No. 248 OF 1898.

AMEER ALI, J.	Nos. 10 to 14, Appellants,
BRETT, J.	
1900.	v.
30, May.	BANK OF BENGAL OF AKYAB, Petitioners, Respondents.

*Civil Procedure Code (Act XIV of 1882), sec. 435—Verification on behalf of a Corporation—Verification of plaint, defective, effect of, on appeal—Insolvency—Civil Procedure Code (Act XIV of 1882), secs. 347, 350, 351, 353 and 578—Notice of insolvency,*

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*irregularity in posting, effect of—Examination of insolvent in application by judgment-creditor—Adjudication order, grounds for setting aside—Fraud—Collusion—Creditor, claim by a—Onus of proving claim when so required under sec. 353, Civ. P. C.—Receiver in insolvency, purchase by.*

Where a petition by the Bank of Bengal was verified by a person described as the Officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not the officer authorised to sue or verify the petition on behalf of the Bank at Chittagong or that he was not able to depose to the facts of the case :

Held—That the petition was properly verified under sec. 435, Civ. P. C.

Defective verification, if there is no reason to suppose that any one is prejudiced thereby, is no ground, at an appellate stage, either for returning the plaint for amendment or for refusing relief on the basis of the alleged defect in the plaint.

RAJIT RAM v. KATESAR NATH (1) and BASDEO v. JOHN SMIDT & ORS. (2) followed.

The provision of sec. 347 with regard to posting up the notice of insolvency in Court is, especially in the case of an application by the decree-holder, merely of a directory character and does not go to the jurisdiction of the Court to deal with the matter.

REID v. CROFT (3) and WIGHT v. MAUNDER (4) referred to.

Non-compliance with the above provision is a mere irregularity, which, in the

absence of any proof of prejudice, is cured by sec. 578, Civ. P. C.

The provisions of secs. 350 and 357, Civ. P. C., relate to an application by the judgment-debtor for relief under Chap. XX and not to an application by the judgment-creditor.

An adjudication order can only be set aside on the ground that it has been obtained by a fraudulent representation of indebtedness in favour of the creditor who has obtained the order when there is no debt whatsoever, or for want of jurisdiction.

When charges of fraud and collusion are made, they must be put in a sufficiently specific manner to enable the other side to combat them.

WALLINGFORD v. THE MUTUAL SOCIETY (5) and GANGA NARAIN GUPTA v. TILUKRAM CHOWDHRY & ORS. (6) referred to.

Under sec. 353, Civ. P. C., when any creditor requires any other creditor to prove his claim, the onus is upon the creditor who has to prove his claim to establish it. It is a matter to be dealt with by the Judge upon the evidence forthcoming in the case.

The purchase by a Receiver in insolvency of property belonging to the insolvent's estate is irregular and the Court ought not to sanction such a purchase.

This was an appeal preferred on the 12th of July 1898, against the order of G. Gordon, Esq., Officiating District Judge of Zillah Chittagong, dated the 7th, 19th and 26th of April and the 21st of May 1898.

This appeal arose out of certain insolvency proceedings taken by the Bank of

(1) I. L. R. 18 All. 396 (1896).

(2) I. L. R. 22 All. 55 (1890).

(3) 5 Bing. N. C. 68 (1888).

(4) Beav. 512 (1842).

(5) 5 App. Cas. 697 (1881).

(6) I. L. R. 15 Cal. 583 (1888).

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Bengal against a firm of Mahomedan merchants carrying on business in co-partnership under the name and style of Haji Nasu Malum & Co. at Chittagong and Akyab. On the 14th March 1898, the Bank of Bengal obtained a decree for Rs. 55,280 and odd with interest and costs, making together Rs. 58,000 odd, against Abdool Ali, Rohim Buksb, Abdool Rauf and Mahomed Yakub, the members of the above firm. The business at Akyab was managed by one Anu Meab, who, according to the judgment-debtors, had an eight annas share in the Akyab business; the decree, however, was obtained only against the four persons named and not against Anu Meab.

On the 4th April 1898, the Bank, on the strength of that decree, applied before the District Judge of Chittagong for an order under sec. 344, Civ. P. C., declaring the judgment-debtors to be insolvents. That petition was verified by one Henry Gray, described as the Officiating Inspector of Branches, Bank of Bengal. On the 5th April, the Court ordered the petition to be registered and notice to be issued upon the pleaders of the judgment-debtors. The 7th April was fixed as the date of hearing. On that day, the judgment-debtor, Rahim Buksb, put in a petition declaring his readiness and willingness to be declared an insolvent and asking for time to file his list of creditors. Three of the judgment-debtors were examined on that day. The fourth judgment-debtor did not appear in person and the Court being of opinion that there was no necessity to insist upon his attendance, declared the judgment-debtors to be insolvents. A Receiver was appointed and notices were ordered to be

published as directed by sec. 354, Civ. P. C. The 21st of May was fixed for "the filing of schedules by the other creditors" and notices were ordered to be published in the local papers and at the Court-house.

It should here be mentioned that the Receiver appointed on this occasion subsequently declined to act and another gentleman was appointed at the instance of the Bank of Bengal.

On the 19th April, the Bank, through one Joseph Coutts, Agent for the Bank at Akyab, applied to be scheduled as secured creditors to the extent of Rs. 1,16,005. In support of their application he put in an affidavit stating that besides the sum of Rs. 58,000 odd due on the decree of the 14th March, the insolvents were indebted to the Bank in further sums on three Bills of Exchange and on another decree which the Bank had obtained against the insolvents and Anu Meab, amounting in all (including the decree for Rs. 58,000) to Rs. 1,16,005, and that in order to secure the repayment of certain advances made by the Bank, amounting to Rs. 1,58,000 (including the said Rs. 1,16,005) the insolvents had on the 18th February 1898 and at Akyab given an equitable mortgage to the Bank, accompanied by the deposit of certain title-deeds. Upon that application the Court passed an order declaring the debts stated in the above application to be scheduled debts secured by mortgage of insolvent's properties.

On the 20th of April, however, the Court modified that order and declared that, subject to future objection, the scheduled debts of the Bank were not secured by any mortgage.

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On the 25th April the Bank applied to have this order set aside on further consideration and on the 26th, having heard Mr. McNair for the Bank, the Court ordered that, subject to future objection, "the Bank of Bengal be declared to have been proved creditors of the insolvents to the extent of the amount stated in their application and that their debt be declared to be secured by mortgage. This order is liable to be modified upon the application of any scheduled creditor applying under sec. 353."

On the 11th and 14th May some of the creditors came in and their debts were entered in the schedule.

On the 21st May the present Appellants, who are some of the creditors of the insolvents, applied to the Court to have the order of the 7th April declaring the judgment-debtors insolvents set aside. In their petitions they submitted that the order of the 7th April was not passed according to law, "that the preliminary proceedings, etc., in that respect had not been taken according to law, and that on that account the said order cannot remain in force;" they alleged that the debts were not contracted in good faith; "that the judgment-debtors have given undue preference to their other creditors; that the judgment-debtors in order to defraud the Petitioners and their other creditors, have alienated and concealed and transferred in *benami* some of the properties; that the application for declaration of insolvency has been made in collusion between the decree-holder and the judgment-debtors;" and that no notice having been issued to the Petitioners, they could not raise any objection before.

Upon those petitions the Court passed the following order on the 21st May:—

"I cannot re-open the insolvency case on the technical objection that notice was not published in Court. The objections of Ram Kamal Saha, Sahanund Chunder Dey, Krishna Kumar Ghosal and Amar Chunder Kundu are therefore rejected."

On the 20th of May 1898, the Receiver issued a notice of sale of a part of the immoveable properties belonging to the insolvents, the date of sale being fixed for the 30th May. On the 29th May the Appellant, Ram Kamal Saha, applied for a postponement of the sale on the ground that the notice of sale not having been published a month before the date of sale and the Court having been closed for the Mohurram holidays, bidders will not attend in sufficient numbers and that the properties to be sold were not fully or sufficiently described in the notice. No order, however, seems to have been passed on this application.

The Receiver subsequently issued another notice for the sale of some other immoveable properties and fixed the 9th and 11th of June as the dates of the sale. Thereupon the Appellants, Ram Kamal Saha and Amar Chunder Kundu, applied to the District Judge for an order staying the sale and for fixing another date after a month's notice with the boundaries and the other necessary particulars correctly described therein. They alleged that the description, boundaries, nature and kind of properties advertised were so indefinite, erroneous and insufficient that intending purchasers will not be in a position to identify them and ascertain their proper price; that notice

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of sale should have been given at least a month beforehand; that the 9th June, the date fixed for the sale, was just a day before the revenue sale under Act XI of 1859 to be held by the Collector and the 11th was the day after and that in consequence the properties would not be sold at their proper value. Upon that the Court passed the following order:—

“This may be sent to the Receiver for report. If in his opinion there is a possibility of getting a more complete description of the property and it is likely that if the sale be held to-morrow there will be no adequate prices bid, it would perhaps be advisable to have a postponement. On the other hand, if this application be merely made for the purpose of harassment and delay, it would be better to hold the sale as advertised.”

On the 13th June the Bank applied for an order that in the schedule of debts, interest should be inserted as part of the debt due from the judgment-debtors, that the Bank's debt should be entered as a debt secured by equitable mortgage and that the properties, the subject of the mortgage, should be described in the schedule. The Court passed an order in accordance with the petition.

It appears that on the 30th May and on the 9th and 11th June the Receiver duly put up to sale the properties advertised for sale on those dates, but the properties not having fetched a proper price, that sale was stayed but not closed.

On the 20th and 22nd June the Appellants, Ram Kamal Saha and Krishna Kumar Ghosal respectively, put in a petition stating the above facts and alleging that they had been informed

that proposals were being made for private sale of those properties, that the properties would not fetch a proper price if they were not sold by public auction after due notice and at the Court house that the notice of a sale on the 28th June did not contain a full description and praying that the Receiver might be ordered to sell by public auction, to select the Court premises as the place for holding the sale, instead of his private residence and that a fresh date be fixed after due notice with full descriptions. The Court passed the following order on the 23rd June:—

“I do not see any reason to pass any order regarding the place at which, or the manner in which the Receiver is to sell the property.”

On the 25th June the Bank applied for and obtained leave under sec. 294, Civ. P. C., to bid at the Receiver's sale, and to set off the purchase money against their equitable mortgage.

On the 29th June the Court made an order permitting the Receiver to purchase Lot No. 6 for Rs. 500 as requested by him.

On the 13th July another order was made permitting the Bank and the Receiver to bid at the sale.

At the sale held on the 28th June the Receiver purchased some of the properties by private sale. The Bank also purchased some of the properties at the sales held on the 28th June and 15th July.

The Appellants had in the meantime filed this appeal. The High Court at the instance of the Appellants issued a rule to stay the sale and all proceedings, and ordered the Receiver to stay the sale and all other proceedings till the hearing of

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the rule. That rule was communicated to the Receiver and the lower Court, and the Appellants at a late hour on the 14th July put in a petition asking for a stay of the sale fixed for the 15th July in accordance therewith. The lower Court however refused to pass any orders on that day, as the petition had been presented late. The sale was duly held early on the 15th and at that sale the Bank purchased one of the properties at a price which the Appellants alleged was inadequate. On the 15th after the sales had taken place, the lower Court stayed all proceedings and directed the Receiver to stay further sales.

On the 13th August the Appellants applied to the Court below to set aside the sales effected on the 15th under the circumstances above stated; the application was ordered to be kept in the file pending orders from the High Court.

The appeal now came on to be heard.

*The Advocate-General (Mr. J. T. Woodroffe), Mr. Hill and Babus Jatra Mohan Sen and Sushil Sekhar Bose for the Appellants.*

*Sir Griffith Evans, Mr. O'Kinealy, and Mr. G. B. McNair, Babus Amarendra Nath Chatterji, Sarada Churn Mitter and Dhirendra Lal Khastgir for the Respondents.*

**THE JUDGMENT OF THE COURT** was as follows:—

This appeal arises out of certain insolvency proceedings taken by the Bank of Bengal against a firm of Mahomedan merchants carrying on business at Chittagong. This firm was composed of four persons whose names are set out in the petition of the 4th April 1898 filed on be-

half of the Bank of Bengal. It appears that these people were indebted for a considerable amount to the Bank, and that some time in the month of January or February 1898 a suit was brought against them by the Bank for the recovery of a sum of Rs. 55,280, which with costs and interest, came up to Rs. 58,000 odd. On the 14th of March 1898 there was a decree in favour of the Bank, but previous to that date, namely, on the 18th February 1898, the Bank obtained an equitable mortgage in respect of the aggregate debts due from this firm, which came up to Rs. 1,58,000 odd. Having obtained that decree on the 14th of March 1898 the Bank proceeded under the provisions of Ch. XX of the Civil Procedure Code and applied on the 4th of April 1898 to have the members of the firm declared insolvents. The application, though it bears date the 4th of April, seems to have been actually presented on the next day, for the order upon it is of the 5th of April. By that order the Bank's petition was directed to be registered and notices were ordered to be issued to the pleaders of the judgment-debtors fixing the 7th of April for the hearing of the case. On the 7th some of the judgment-debtors were examined, and the learned Judge thereupon made the following order:—"The judgment-debtors are declared insolvents. A Receiver will be appointed. Notices to be published as directed by sec. 354. The 21st May is fixed for the filing of schedules" (meaning thereby a list of claims) "by other creditors. Notices to be published at the Court-house and in the local papers. The decree-holder to pay the costs of these notices within

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three days." It is unnecessary to refer to the order of the 14th of April 1898, as no question arises upon it. On the 19th of April, upon an application of the same date by the Bank of Bengal, supported by an affidavit of Mr. Coutts asking that the debts of the Bank of Bengal may be taken as secured by the mortgage of the insolvent's property, the learned Judge declared that the debts be treated as secured. There seems to be some misapprehension regarding the amount respecting which that application was made, for the sum mentioned in the petition is Rs. 1,16,005 and not the entire amount for which the equitable mortgage was obtained on the 18th February 1898. On the 20th of April, however, the learned Judge cancelled the order of the 19th and declared that, subject to future objections, the scheduled debts of the Bank of Bengal were to be treated as not secured by any mortgage. There was a further application by the Bank, on the 25th of April 1898, and upon hearing Mr. McNair on its behalf, the District Judge, on the 26th of April 1898, revoked his order of the 20th April, and directed that, subject to future objections, the Bank's debt be declared to be secured by the mortgage. On the same day notices were directed to be issued to the creditors directing them to prove their claims by the 21st of May. On this date a number of petitions were filed by various persons alleging themselves to be the creditors of the insolvents. To the objections urged in those petitions we shall refer presently. On the 21st of May the learned Judge ordered that a schedule be prepared of the claims proved, and rejected the

present Appellant's prayer for re-opening the insolvency on the technical ground that notice was not published in Court. The present appeal is from the orders of the 7th, 19th and 26th April and 21st May 1898 respectively.

The learned counsel for the Appellant has raised in this Court questions of a somewhat multifarious character which are not really covered by the appeal. The objections other than those directed against the orders from which the appeal is preferred relate to certain proceedings taken subsequent to the 21st May regarding the sale of the judgment-debtor's properties and the set off by the Bank of Bengal of its claim against the purchase-money. These will be dealt with later on.

As regards the orders appealed against it is contended in the first place that the petition of the 4th of April 1898 was not properly verified, and, secondly, that no notice was directed to be posted up in Court as provided for in sec. 347 of the Code of Civil Procedure, or was in fact so posted up, and that therefore on these two preliminary grounds alone the adjudication made on the 7th of May was void *ab initio*. It was also urged that the learned Judge was wrong in not examining on the 7th of April, when he made the adjudication of insolvency, all the debtors, and in not keeping in view the requirements of sec. 351 of the Civil Procedure Code, which alone, if found to be existing, would justify an order of insolvency. It was further contended that inasmuch as it appeared, that the insolvents had incurred debts after their business had come to a stand-still, there was reason to suppose it was not a

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proper case in which the debtor should be declared an insolvent, and consequently the adjudication ought to be set aside. A further argument was raised upon the basis that one Anu Meah, who was the manager of the branch business of the insolvents at Akyab, was not made a party to these proceedings. There were other minor objections to which we shall refer cursorily in the course of our judgment.

We propose to dispose in the first place of the objections as to the verification and the notice not being posted up as provided for in sec. 347 of the Code of Civil Procedure. It is quite clear that the Bank of Bengal is a Corporation, and consequently the procedure laid down in sec. 435 regulating actions instituted by corporations is to be applied to suits or proceedings instituted by or on its behalf. Sec. 435 provides that "in suits by a corporation, or by a company authorised to sue and be sued in the name of an officer the plaint may be subscribed and verified on behalf of the corporation or company by any director, secretary, or other principal officer of the corporation or company, who is able to depose to the facts of the case." In the present case the petition was verified by a gentleman of the name of Henry Gray, Officiating Inspector of Branches, Bank of Bengal, and there is nothing to show that he was not the officer of the Bank authorised to sue or verify the petition on behalf of the Bank at Chittagong, or that he was not able to depose to the facts of the case. Beyond that we are not aware of any authority in which insufficiency of verification has been regarded in the appellate stage as a ground for dismissing

altogether the proceedings had in the first Court. On the contrary the two cases, *Rajit Ram v. Katesar Nath and others* (1) and *Basdeo v. John Smidt and others* (2), lay down in express terms that although, if objection is taken to defective verification at an early stage when the case is on trial in the first Court, the plaint may be returned to the Plaintiff for the purpose of remedying the defect, yet in the appellate stage, if there is no reason to suppose that any body is prejudiced by the defective verification, it will not be taken as a ground either for returning the plaint for amendment or for refusing relief on the basis of the alleged defect in the plaint. In the present case there is nothing to show that any person has been prejudiced by any defect, if defect there is, in the verification of the petition. We accordingly overrule this objection.

We now come to the objection as regards the notice required by sec. 347 of the Civil Procedure Code. That section (leaving out the portions which are not material to the present case) runs as follows:—"The Court shall fix a day for hearing the application, and shall cause a copy thereof, with a notice in writing of the time and place at which it will be heard, to be stuck up in Court and served at the applicant's expense" . . . . . where the applicant is the decree-holder, on the judgment-debtor or his pleader." There is no question that the notice was served upon the judgment-debtors as required under the Act. Admittedly, however, it was not "stuck up" in the Court-house, and Mr. Hill's

(1) I. L. R. 18 All. 396 (1896).

(2) I. L. R. 22 All. 55 (1899).



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contention is that that provision is of a mandatory character, and that therefore all subsequent proceedings based upon it are void. We cannot agree in that view. In our opinion that provision, intended for the purpose of giving notice at an initial stage to persons who may possibly be interested in the adjudication, is merely of a directory character, and its non-compliance does not go to the jurisdiction of the Court to deal with the matter. There is certainly no reason, so far as the application of the decree-holder is concerned, for supposing that it is mandatory, whatever reasons there may be for regarding it to be so in the case of an application by a judgment-debtor. It is unnecessary to refer to authorities in support of the proposition we have just stated. We may refer, however, to the two cases cited at the bar, *Reid v. Croft* (3), *Wright v. Maunder* (4), as abundantly bearing out our view. Besides, having regard to the object with which the notice is required to be posted up, it seems to us that non-compliance with the provision relating to it must be taken as a mere irregularity, which, in the absence of any proof of prejudice, must be considered as cured by the provisions of sec. 578, of the Civil Procedure Code.

Before dealing with the questions which have been raised under secs. 350 and 351 of the C. P. C., and the allegations of fraud and collusion put forward on rather an extensive scale against the Bank, we will address ourselves to the minor objections which relate to Anu Meah not being made a party and other matters of a similar kind.

The decree upon which the Bank of Bengal applied for an order under sec. 344 was a decree, so far as we can gather from these records, against the four insolvents and against the four insolvents only. Anu was not a party to the suit in which the decree was made, and the Bank of Bengal was therefore not in a position to include him in the petition for insolvency. If Anu Meah is in any way interested in the insolvency, or has any part of the assets of the insolvents in his hand the procedure is quite plain. It is not for us to indicate what course should be taken to bring those assets within the provision of these proceedings.

It was urged that it has not been shown what portion of the Bank's debt was secured and further that the bills of exchange did not carry interest. These are matters, which, in the view we take, will be dealt with when the case goes back to the Judge. It was also objected that the Bank was not entitled to claim the benefit of the equitable mortgage executed in its favour at Akyab, inasmuch as equitable mortgages are not valid in any place in which the Transfer of Property Act was in force. There appears to be no doubt that the section in question has been extended by a Government notification to the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon in other words to the town of Rangoon and has not been extended to Akyab. The Bank's contention (as embodied in its petition of the 26th of April), is that "in accordance with the practice of the Burmah Courts, equitable mortgages have uniformly been held to be valid in all parts of British Burmah,"

• (3) 5 Bing. N. C. 68 (1838).  
(4) 4 Beav. 512 (1842)

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and that the extension of the Act referred to above does not affect Akyab. This is a question of fact which will be dealt with by the learned Judge upon evidence.

We now come to the objections relating to the procedure adopted by the District Judge. It has been contended that under sec. 350 of the C. P. C. the Court was bound to examine the judgment-debtor in the presence of the persons on whom notices had been served or their pleaders, and that this was only partially done by the District Judge on the 7th of April. Further that under sec. 351 before the adjudication order could be made the Court must be satisfied that the judgment-debtor had not, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suit in which the decree was passed, in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time: that he had not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property: and that he had not committed any other act of bad faith regarding the matter of the application. In connection with these grounds set forth in sec. 351 it was alleged that upon the evidence of the insolvents who had been examined it appeared that they had contracted debts after the business had come to a close. Reference was made to Mahomed Yakoob's statement that Rahim Baksh had concealed a considerable portion of the assets; and it was accordingly contended in a two-fold way

that the learned Judge was wrong in adjudicating the Appellants as insolvents, because he did not decide whether there was an absence of the circumstances which are set out in sec. 351, and, *secondly*, that he did not consider the evidence of Mahomed Yakoob as to the suppression of property by Rahim Baksh. In considering how far these two objections are applicable to an application by a judgment-creditor one has to go back to the provisions of the previous Act (X of 1877) in order to discover the intention of the Legislature regarding the purport and scope of Chapter XX of the Civil P. Code. The Act of 1877 contained no provision for an application by a judgment-creditor. It merely enabled a person arrested or imprisoned in execution of a decree to apply to the District Court to be declared an insolvent, and the subsequent provisions kept in view that object alone. Sec. 350 of Act X of 1877 ran as follows:—"On the day so fixed or on any subsequent day to which the Court may adjourn the hearing, the Court shall examine the applicant in the presence of the persons on whom such notice has been served or their pleaders as to his then circumstances," and so forth. And sec. 351 was in these terms. "If the Court is satisfied that the statements in the application are absolutely true; that the applicant has not, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned or at any subsequent time that he has not, knowing himself to be unable to pay his debts in

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full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property, that he has not committed any other act of bad faith regarding the matter of the application, the Court may declare him to be an insolvent, &c." By Act XII of 1879, however, an alteration was made in the scope of Chapter XX, and by it a judgment-creditor was enabled to come in and get his judgment-debtor declared an insolvent. That alteration was subsequently embodied in the amended Statute, Act XIV of 1882, and is the law now in force. Sec. 350 of the present Code instead of using the term "applicant" uses the expression "judgment-debtor;" and similarly in sec. 351 instead of "applicant" the term "judgment-debtor" is used. It is obvious from the alterations and from the frame of the statute that the provisions of these two sections relate to an application by the judgment-debtor for relief under Ch. XX of the Civil Procedure Code, and that they cannot be interpreted so as to apply to an application by a judgment-creditor. It is not necessary to refer here to the Debtors' Act of 1869 in England, or to the provision of the Insolvency Act in Presidency-towns. We may mention, however, that under the Debtors' Act of 1869 the judgment-creditor may take out summons either for the commitment of the debtor or for his adjudication in insolvency, and discretion is vested in the Court, if the application is made for the commitment of the debtor, to proceed under the Bankruptcy Act instead of commitment. Nor under the Insolvency Act, which is in force in the Presidency-towns, is the creditor required to show

all those various matters which are set forth in sec. 351, before he can get his debtor adjudicated an insolvent. The reason for the provisions in sec. 351 is obvious. The judgment-debtor comes into Court with the object of showing that he is not in a position to pay his debts and to obtain a discharge from his liabilities, and in the meantime to get protection from the Court regarding any process which may be taken out against him by the creditor and for that reason the Legislature requires him to show that he comes into Court with clean hands, that he has not, with intent to defraud his creditors, concealed, transferred or removed any portion of his properties, that he has not, knowing himself unable to pay his debts, recklessly contracted debts, or given an unfair preference to any of his creditors by any payment or disposition of his property, and that he has not committed any other act of bad faith. If the insolvent is found to have committed any of these acts, he is precluded from obtaining the benefit of Ch. XX of the Code. But these reasons do not, in our opinion, affect in the smallest degree the right of the judgment-creditor to come into Court and ask for the adjudication of the judgment-debtor as an insolvent. On the contrary under the English Bankruptcy law as also under the law in force in the Presidency-towns, among other matters, a fraudulent conveyance of property by a debtor is declared to be an act of bankruptcy. Probably it would have facilitated the working of Ch. XX by the mofussil Courts if the Legislature had proceeded on the lines of the English law and prescribed certain acts on the part of the

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debtor as *indicia* of insolvency. But it has not chosen to do so. And under sec. 344 the judgment-creditor has merely to show that there is a judgment-debt due from the debtor which he has not paid or has not been able to pay and that alone entitles him to obtain the order of insolvency provided for by the subsequent sections. Of course the mere fact that a judgment-debtor has not paid his debt does not show that he is in insolvent circumstances and if on the application of the creditor, such a question was raised by the debtor it would no doubt have to be considered in the light of the principles deducible from cases under the English Bankruptcy law. But it would be absurd to say that the very grounds upon which the judgment-creditor might insist upon the adjudication of the insolvent, if proved, should be taken as disentitling him to get the order of adjudication. The adjudication order is for the benefit of all the creditors of the judgment-debtor, and supposing it appears that the judgment-debtor is trying to dishonestly dispose of his property or otherwise to deal with it for the purpose of defeating his creditors, surely any one of the creditors might come in and ask that the judgment-debtor should be declared an insolvent, and the property placed in the hands of a Receiver for the benefit of the general body of creditors. If that were not so, it would reduce the provisions of Ch. XX of the Code to an absurdity. We hold, therefore, that secs. 350 and 351 do not apply to the case of an application by a judgment-creditor. Unfortunately, however, the Legislature seems by some peculiar oversight not to have made any provisions regarding the

procedure for dealing with the matter when once the application has been made by the judgment-creditor and the notices have been stuck up as provided for in sec. 347 of the Code. There is no doubt a hiatus in the Act; and it is difficult to conceive how the omission occurred but the intention of the Legislature must be taken as perfectly clear both from the preceding section and the general scope of the chapter. We must take it that it was intended that effect should be given to the decree-holder's application in the way in which it is carried out both in England and in Presidency-towns; and we must therefore read in sec. 351 or after it, that in case an application is made under sec. 344 by the judgment-creditor and the requisites of that section and sec. 347 are complied with, the Court will make an order of adjudication in respect of the insolvent or insolvents; and then proceed with the matter as provided for by the subsequent sections. Besides, in the present case no difficulty, in our opinion, arises from the omission of the Legislature referred to above or from the fact that no *indicia* of insolvency are prescribed in the Act, for the persons complaining are not the judgment-debtors. On the 7th of April when the debtors were examined and the receiving order made, they expressed their willingness to be declared insolvents. In England the Court has the power when making a receiving order on the application of the judgment-debtor to adjudge the debtor bankrupt if he appears and applies to that effect. Such an application may be made orally and without notice. We see no reason why the principle of that rule should not apply in this country. That

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being our view with reference to the principal argument, it remains for us to consider the contention that the allegations of fraud and collusion put forward by the Appellants on the 21st May were never taken into consideration by the District Judge.

On that date it appears a number of petitions were presented before the Judge on behalf of various persons who alleged themselves to be the creditors of the insolvents in this case. The petition of Krishna Kumar Ghosal is on page 12, of another creditor on page 13, of Amar Chand Mitter on page 14, and of Ram Kamal Shaha and another on page 15 of the paper-book. None of these petitions are verified, and the allegations of unfair preference, collusion and concealment and transfer of property contained in them are of the vaguest and most general character. Nor does it appear that the District Judge was asked with reference to those allegations to take any evidence or to try those matters. The only question which seems to have been discussed before him on those petitions was the one which related to the non-posting of the notice, under the order of the 5th April; the learned Judge was quite right, in our opinion, in overruling that objection as technical and in refusing to re-open the insolvency, inasmuch as the adjudication order was in favour of all the creditors. It has been held both here and in England that an adjudication order can only be set aside on the ground that it has been obtained by a fraudulent representation of indebtedness in favour of the creditor who has obtained the order when there is no debt whatsoever, or for want of jurisdiction. But in this case, though vague

allegations of collusion and undue preference are made, nothing of a tangible character is suggested in the petition of the 21st May. On both these grounds, *firstly*, that these allegations were not made in any specific form, and, *secondly*, that if they were made in a form which could be entertained, they were not pressed before the District Judge, we think the objections cannot be allowed to be taken at this stage. It has been held repeatedly that when charges of fraud and collusion are made, they must not be launched in a vague or general manner, but must be put in a sufficiently specific shape to enable the other side to combat them. We need only refer to the case of *Wallingford v. The Mutual Society* (5), and the decision of the Judicial Committee in *Gunga Narain Gupta v. Tilukram Chowdhry and others* (6).

Various suggestions have been made by the learned counsel for the Appellants that the Bank acted fraudulently in pushing through the sale and bidding for the property put up for sale and then purchasing it itself and also that it was improper on the part of the Judge to allow the Receiver to buy himself a piece of land belonging to the insolvents. As we have already mentioned, the matters relating to the sale are subsequent to the orders appealed against and we do not think it would be right for us to enter upon a discussion of those subsequent proceedings which do not form the subject-matter of the present appeal. If the other creditors insist upon the Bank proving its debt it will have to do so in the proceedings under sec. 353 of the Civil Procedure Code which are still

(5) 5 App. Cas. 697 (1881).

(6) I. L. R. 15 Cal. 533 (1888).

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pending before the District Judge; and it will then be for the Judge to decide upon the evidence before him how much of the Bank's debt is secured and how much is unsecured. It is difficult as well as inexpedient for us here at this stage to express any opinion upon that part of the case.

It will be open also to the Judge to consider whether the allegations contained in the subsequent petition, of the 23rd August 1898, which apparently is the first petition put in under sec. 353 insisting upon proof of the Bank's claim, are of a sufficiently definite and specific character, or whether they require to be much more precise in order to enable the Bank to meet them.

It was suggested by Mr. Hill for the Appellants that sec. 353 puts his clients in some difficulty as regards the onus of proof. We are afraid that argument proceeds upon some misapprehension. Under sec. 353 when any creditor requires any other creditor to prove his claim, the onus is upon the creditor who has to prove his claim to establish it in the way the Judge may consider advisable and expedient under the circumstances. No question of onus whatsoever arises. It is a matter to be dealt with by the Judge upon the evidence forthcoming in the case. The insolvents have not yet obtained their discharge, and, as we have already said, the District Judge has by an order of the 23rd of August stayed the proceedings "until the High Court have passed definite orders." The insolvents will not obtain their discharge until after the Receiver has certified that they have placed him in possession of all their property, or done every thing in their power for that purpose. The inter-

ests therefore of any creditor in this case are perfectly secure. In our opinion this is a misconceived appeal which has only resulted in delaying the final settlement of the matters in dispute for a considerable length of time. If the matter had not been hung up by the appeal preferred in July 1898 probably the case would have been decided long ago, and the creditors would have received, if there was anything to be distributed, their dividends long ago.

With reference to the question of purchase by the Bank and the set off, we desire to express no opinion at this stage. It will be open to the learned Judge to consider it in connection with the question what portion of the Bank's debt is secured and what is not secured and other cognate matters.

If it is still alleged that the insolvents have concealed any portion of their property, the procedure is perfectly clear; the creditors making the allegation can apply for the examination of the insolvents, or place the Receiver in a position, to discover and realise the alleged concealed property. These are subjects for discussion before the Judge in the Court below.

As regards the purchase by the Receiver it was undoubtedly irregular, and we feel sure that if it had been brought to the notice of the District Judge, he would have cancelled his order permitting the Receiver to purchase the property. That purchase must be set aside.

The appeal is dismissed with costs, and the rule is discharged. We allow as pleader's fee to the Bank of Bengal, Respondent, twenty gold mohurs and to the Respondent, Rajani Kant Pal, 2 g. m.

S. R. D.

*Appeal dismissed.*

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 5 OF 1900.

PRINSEP, J.	{	DENOMONI CHOWDHURANI,
HANDLEY, J.		1st Party, Petitioner,
1900.		v.
7, May.		MOZAFAR ALI KHAN and others, 2nd Party, Opposite Party.

*Code of Criminal Procedure (Act V of 1898), secs. 145, 146—Dispute as to possession of lands—Joint possession—Attachment of land and crops—Jurisdiction*

*Where two rival zemindars claimed to hold certain alluvial lands and where it was admitted that they were joint-proprietors of Mouza G, but the question also in dispute was whether those lands belonged to Mouza G or to Mouza N, one of the parties claiming that if they belonged to N, he had absolute rights in it, and the Magistrate in a proceeding under sec. 145, Cr. P. Code, passed an order under sec. 146, Cr. P. Code, attaching the lands and also the crops grown upon the lands by the tenants of one of the contending parties:*

*Held—That the lands not being in the joint possession of the contending parties the Magistrate had jurisdiction in taking action under sec. 145, Cr. P. Code:*

*Held also—That there being no dispute between the tenants inter se, the order of the Magistrate as to the attachment of the crops on the land, which belonged to the tenants who grew them, was a bad order for want of jurisdiction and must be set aside.*

This was a rule issued on the 28th of March 1900, against the order of the Sub-Divisional Magistrate of Tangail, dated the 30th of November 1899.

The facts of the case material to this report were as follows:—

Four persons filed an application on the 25th February 1900 praying that certain persons named in the application might be bound down to keep the peace as they were preparing to take forcible possession of Nursingpur chur in which they alleged they were living as raiyats of Srimati Janhovi Chaudhuranl of Santose. The Sub-Divisional Magistrate of Tangail, on receipt of a police-report, dated the 1st of March, drew up proceedings under sec. 107, Cr. P. C., which were afterwards cancelled and in their stead proceedings under sec. 145, Cr. P. Code, were drawn up as the dispute related to the possession of lands. The parties filed written statements of their respective claims. The second party, Ayesha Khanum of Karotea, claimed the chur as accretion to Mouza Gopalkanti in Pergunnah Bura Buzu, while the 1st party claimed the land as accretion to Mouza Nursingpur in Pergunnah Kagmari and partly as accretion to Mouza Dhakuabari, in Pergunnah Isapsahi. She also alleged that even if the chur be held to be an accretion to Mouza Gopalkanti, she was an *ijmali* owner of the Mouza with the 2nd party and hence the chur also was in her *ijmali*

The Magistrate, being unable to determine which party was in actual possession of the land in dispute, made an order under sec. 146, Cr. P. Code, attaching the lands as well as the crops standing on them.

The 1st party then moved the High Court and obtained the present rule.

*The Advocate-General (Mr. J. T. Woodroffe) and Babu Dwarka Nath Chuckerbarty for the Petitioner.*

No one appeared to show cause.

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The following JUDGMENT was delivered by the Court :—

The Magistrate, in a matter under sec. 145, C. Cr. P., between two persons claiming to hold certain alluvial lands, has passed an order under sec. 146 attaching the lands and also attaching the crops growing therein. It is admitted by both the contending parties that they are joint-proprietors of Gopalkanti but the question also in dispute between them was whether these lands belonged to Gopalkanti or to Nursingpur, one of the parties claiming that if they belonged to Nursingpur, he had absolute rights in it.

Now, if it had been found that the land was in the joint possession of the contending parties, it would not be a matter with which the Magistrate could properly deal under sec. 145 and we may state that we do not find that the Magistrate has determined to which of these mouzas the lands belong. However, as the matter is now before us, no question of jurisdiction arises which would enable us to act as a Court of revision under the terms of the new Code of Criminal Procedure as between these persons.

But in so far as the Magistrate has attached the crops on the land we think that his order is not maintainable. The crops on the land undoubtedly belonged to the tenants who grew them and the effect of such an order in respect of the landlords would be to deprive the tenants of the crops that they raised. If the tenants had been disputing *inter se*, the matter might be otherwise. The order as to the attachment of the crops on the land was, we think, a bad order for want of jurisdiction and must be set aside.

H. P. C. Rule made absolute in part.

[CRIMINAL REFERENCE.]

No. 116 of 1900.

PRINSEP, J.  
HANDLEY, J.  
1900.  
25, June.

LALJI GOPE, Petitioner,  
Complainant,  
v.  
GIRIDHARI CHAUDHURY,  
Accused, Opposite  
Party.

*Indian Penal Code (Act XLV of 1860), sec. 211—Code of Criminal Procedure (Act V of 1898), secs. 4 (h), 195, 476—Giving false information to Police of an offence, order for prosecution for—"Complaint," meaning of—Judicial proceeding—Jurisdiction of Magistrate—Procedure.*

*Where upon a police-report that a complaint is false, the complainant is called upon to show cause why he should not be prosecuted under sec. 211, I. P. Code, he appears, and the Magistrate examines him and his witnesses, and upon that evidence comes to the conclusion that the charge is false, he can then proceed under sec. 476 of the Code of Criminal Procedure and direct a prosecution.*

MOULI DURZI v. NAURANGI LALL (1) distinguished.

*The Magistrate does not exercise a proper discretion, who on receipt of a police-report that the complaint is false forthwith orders the complainant to be prosecuted under sec. 211, I. P. Code. The complainant should be given a reasonable time and full opportunity to prove his case before sanction is given for his prosecution.*

*The presentation of a petition by the complainant that his complaint should be enquired into is in effect a complaint within the meaning of sec. 4, cl. (h), and the*

(1) 4 C. W. N. 35 (1900).



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*Magistrate is bound to hold a full judicial enquiry into the matter before proceeding further.*

This was a reference under sec. 438, C. Cr. P., made by the Officiating Sessions Judge of Bhagulpore, dated the 14th of June 1900, against the order of the Deputy Magistrate of Madhepura, dated the 8th of May 1900.

The facts of the case material to this report were as follows :—

On the 10th of March last one Lalji Gope complained at the Madhepura Police Station that Giridhari Sahu and others had in consequence of a debt due to Giridhari from the complainant looted away 4 herds of cattle forcibly from his house. The case was enquired into by the Police and a report in C form submitted and a prosecution under sec. 211, I. P. C., against Lalji was asked for. The Deputy Magistrate of Madhepura ordered notice to be issued on Lalji to show cause why he should not be prosecuted and after a preliminary enquiry ordered the prosecution of Lalji under sec. 211, I. P. C., and sec. 476, C. Cr. P., and forwarded the record to the Sub-divisional officer of Supul for trial.

No one appeared on this reference.

The JUDGMENT OF THE COURT was as follows :—

On a police-report that Lalji had laid false information of theft the Sub-divisional Magistrate called upon Lalji to show cause why he should not be prosecuted for an offence under sec. 211, Penal Code. Lalji and his witnesses were examined on oath and the Magistrate then passed an order under sec. 476, C. Cr. P., directing him to be prosecuted under sec. 211, Penal Code. The Sessions Judge has referred the case to this Court in revision recommending that this order be set aside as not one properly under sec. 476.

There have been many reported cases

pointing out the course which should be taken by a Magistrate on receiving a police-report as that now before us and it has been repeatedly held that a Magistrate did not exercise a proper discretion who forthwith on receipt of a police-report that the complaint made to the Police was false, ordered the person who made that complaint to be prosecuted. It has been held that a full opportunity should be given to such person to complain to the Magistrate so as to have a proper judicial enquiry into the truth of his complaint. Ordinarily appearance is made by the presentation of a petition constituting a complaint as defined by sec. 4 (h), C. Cr. P. If after a sufficient time no complaint is made there is no reason why the Magistrate should not prosecute such person under sec. 211, Penal Code. The prosecution would be as provided by sec. 195, C. Cr. P., that is by sanction to some person desirous of making a complaint of that offence or by the Court, that is, by the Magistrate who has received the police-report. If the false complaint has been made in the course of judicial proceedings, a Magistrate can proceed under sec. 476, C. Cr. P., and the sending by him of the case for inquiry or trial to another Magistrate has been held to be a complaint by him within the terms of sec. 195.

In this case the Magistrate on receipt of the police-report no doubt called upon Lalji to show cause why he should not be prosecuted. But when Lalji did appear the Magistrate proceeded as on a complaint made to him and he examined Lalji and his witnesses on oath and in consideration of that evidence the Magistrate has found the complaint to be

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false. He has consequently had a full opportunity to prove that his complaint is true and he has failed. The Magistrate has, accordingly, under sec. 476, passed the order now before us. The proceedings seem to us to be unobjectionable in point of law. The case of *Mouli Duzi v. Naurangi Lall* (1) is not in point.

We see no sufficient reason to interfere on revision.

*Reference discharged.*

H. P. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 371 OF 1900.

PRINSEP, J.	BISSUMBHUR SINGH,
HANDLEY, J.	Petitioner,
1900.	v.
5, July.	THE QUEEN-EMPRESS,
	Opposite Party.

*Bengal Embankment Act (II, B. C. of 1882), secs. 3, 77—"Public embankment," meaning of—"Made or erected"—Sand bank formed naturally between two spurs erected by Government officers, cutting through or destroying—Statute, affecting liberty of subject, construction of.*

*A bank made or erected is something directly caused by some act of construction and not something which may or may not result from the forces of nature.*

*A bank of sand which has artificially formed, by the action of the water between two spurs erected by Government for the protection of an embankment is not an embankment within the definition of that expression, nor is it a public embankment.*

*The cutting through of such a sand bank for the protection of one's own cul-*

*tivation by preventing an accumulation of water is not an offence under sec. 77 of the Bengal Embankment Act.*

*In construing a statute which affects the liberty of the subject, the Courts should not only adopt the natural and ordinary construction, but should construe strictly expressions occurring therein.*

This was a rule issued on the 18th of May 1900, against the order of the Deputy Magistrate of Contal, dated the 20th of December 1899, which order was, on appeal, affirmed by the Officiating District Judge of Midnapur on the 10th of March 1900.

The facts of the case appear from the judgment.

*Babu Kali Kissen Sen* for the Petitioner.  
*Mr. Leith* for the Crown.

The following JUDGMENT was delivered by the Court:—

The Petitioner has been convicted under sec. 77 of the Bengal Embankment Act (II of 1882) of having without authority cut through a public embankment. There is a good deal of confusion in the proceedings in respect to the pleadings of the Petitioner and we think that he should not be strictly regarded as having pleaded guilty, except in so far as he may have admitted that he committed the acts which formed the substance of the offence but we think that he is entitled, nevertheless, to a consideration of the law applicable to those facts and to ask for a finding whether he has been properly convicted of an offence within the terms of sec. 77 of the Bengal Embankment Act.

The question turns upon the definition of the words "embankment" and "public

(1) 4 C. W. N. 351 (1900);

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embankment." The officers of Government erected two spurs outside the sea-dyke for the protection of the public embankment on the Midnapur coast and, in the course of time, from the action of the water, a bank of sand has formed connecting these two spurs. The offence of which the Petitioner has been convicted is the cutting of this bank of sand so as to relieve his lands which lie within that bank from excessive accumulation of water injuring his cultivation.

The matter for determination, therefore, is whether the bank of sand which has artificially formed between the two spurs erected by Government is an "embankment" within the definition of that expression and whether it is also a "public embankment" as defined by the Act.

The portion of the definition of an embankment which, it is contended by Mr. Leith who appears for the Government, is applicable to the present case runs thus—"Embankment includes every bank, dam, dyke, wall, groyen, or spur, made or erected for the protection of any such embankment or of any land from erosion or overflow by or of rivers, tides, waves, or waters."

Now, is the sand bank which has naturally formed in consequence of the erection by the officers of Government of the two spurs "made or erected"? It is contended that inasmuch as the formation of this bank was contemplated when the spurs were set up, the bank was *made* within the terms of the definition. This is, in our opinion, straining the ordinary meaning of that word which in its ordinary acceptation means something directly caused by some act of construc-

tion not something which may or may not result from the forces of nature. The sand bank was not *made* by any work of the officers of Government like the spurs but it was caused by the making of the spurs and, therefore, it seems to us that the construction contended for is rather a forced construction and it is certainly not what would be understood by the public in the exercise of their rights as restricted by the Embankment Act. We think, therefore, that in such a matter which effects the liberty of the subject, the construction that we should adopt should not only be the natural and ordinary construction but that the expression should be strictly construed.

In this view, the sand bank would not be an embankment as defined by the Act. We are further led to hold that the act of the Petitioner is not an offence within the terms of sec. 77 because even supposing for purposes of argument, that this sand bank, naturally formed, would be an embankment within the terms of that definition, it would not be a public embankment, that is, an embankment maintained by the officers of Government. It has not been suggested that the officers of Government have expended any labour in the maintenance of this embankment. The case, as we understand it, is that the sand bank is a natural formation and that it is maintained and strengthened by the forces of nature. In this view we think that the conviction and sentence should be set aside and the fine, if paid, should be refunded.

We regret to find that the District Magistrate as a Court of Appeal did not think it necessary to determine whether

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the acts committed by the accused amounted to an offence under the Embankment Act. In his judgment he says:—"Under these circumstances it is needless to enter in detail into discussing whether the sand hill falls under the definition of an embankment. I merely state that I have considered the point carefully and find that it does." It was, we think, necessary for a proper determination of the appeal to consider this point and to express an opinion in regard to the proper interpretation of the law.

*Rule made absolute :*

*Conviction set aside.*

H. P. C.

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NOS. 710 AND 764 OF 1900.

PRATT, J.

BRETT, J.

1900.

5, November.

In the matter of  
SURJYA NARAIN SINGH  
and others, Petitioners.

*Code of Criminal Procedure (Act V of 1898), secs. 208, 215, 526—Commitment in the absence of accused, whether legal—Witness, examination of, in the absence of accused, if proper—Cross-examination of prosecution witnesses—Postponement, application for, refusal of—Transfer—Credible information of order of stay of proceedings by High Court, procedure on receipt of—Bias—Cancellation of bail and remand to custody on application for time to move for transfer.*

*It is illegal to make a commitment in the absence of the accused.*

*A Magistrate acts injudiciously in proceeding with a case he has been credibly informed by a telegram from one of the accused to his mukhtear that a Rule for the transfer of the case from his file and for stay of further proceedings had been granted by the High Court.*

**RATNESSARI PERSHAD NARAYAN SINGH & ANR. v. EMPRESS (1) referred to.**

*It is illegal to examine an additional witness in the absence of the accused; and a Magistrate, by refusing an application for postponement of a case, further proceedings in which have been stayed by an order of the High Court, to enable the accused to cross-examine the witnesses for the prosecution with a view to obtain before commitment, a cancellation of the charges framed against him, and that the Magistrate might receive the orders of the High Court, and by taking such precipitate action in the matter shows his bias against the accused.*

*It is desirable to transfer a case from the file of a Magistrate who on an application made by the accused under sec. 526, cl. (8), for stay of proceedings pending an application to the High Court for transfer immediately cancelled their bail and committed them to custody.*

These were two rules issued on the 21st of August and the 6th of September 1900, respectively, against the orders of the Deputy Magistrate of Madhepura, dated the 8th and 30th of August 1900, respectively.

Their Lordships (PRINSEP and HANDLEY JJ), in issuing the rule in No. 710 of 1900, made the following order:—

This is an application made for transfer of a trial from the Court of the Sub-divisional Magistrate of Madhepura to some other Court on the ground that the Magistrate has shown prejudice in the course of the proceedings which renders it undesirable that he should proceed further with them.

There are several grounds made in

(1) 2 C. W. N. 498 (1898).

## IN THE MATTER OF SURJYA NARAIN SINGH.

asking us for a rule to show cause why the transfer should not be made and, in our opinion, they are generally untenable.

It appears that, on a Police investigation, a report was made in what is known as the "C" form. The Magistrate apparently was not satisfied with this report and he accordingly directed that the complainant and his witnesses should be sent for examination by him. On completion of this examination, the Magistrate was satisfied that *prima facie* a case was made out against the accused and that the view taken by the Police was erroneous. He accordingly took steps to have judicial proceedings properly conducted before him, and he ordered warrants to be issued for the attendance of the accused and at the same time he bound over those whom he had already examined as witnesses to attend this Court at the hearing of the case. That is made the first ground, which, in our opinion, it is necessary to notice, for imputing prejudice to the Magistrate. It seems to us that this was the natural course which the Magistrate would properly take under the circumstances in which he was placed. It was his object, when the judicial proceedings should have been instituted, that all those whose examination was necessary should be present in order that those proceedings might be prompt.

The next ground taken is that the Sub-divisional Magistrate requested the District Magistrate to instruct some pleader to appear to prosecute the case. It seems to us that, by so proceeding, the Sub-divisional Magistrate has not shown any bias in the case. He has shown rather a desire that the prosecution

should be properly conducted and that he should be relieved from all responsibility for the course already taken by him in holding that the police-report in "C" form was erroneous.

But when the case came on for trial, the Magistrate's procedure was certainly not regular. Some of the offences were what are known as warrant cases, while one and that is an offence under sec. 436, I. P. C., was triable only by the Court of Session. If the Magistrate desired to proceed against the accused in respect of all these offences, he was involved in some difficulty in consequence of the altered state of the law as now expressed in secs. 254 and 256 of the Code of 1898, in regard to the discretion given to him to draw up a charge at any stage of the proceedings in order to enable the cross-examination of the witnesses for the prosecution to take place on their first attendance. In all the previous Codes the procedure in inquiries held in cases triable by the Court of Session (Chap. XVIII) and in trials of warrant cases (Chap. XXI) up to the time of drawing up the charge, was the same and, therefore, there was no difficulty when the accusation was of offences some of which were triable exclusively by the Court of Session while others were triable by a Magistrate.

The Magistrate in the present case has acted under sec. 254 as now enacted and he has at an early stage of the proceedings and before the cross-examination of the witnesses for the prosecution had taken place, drawn up charges, one of which was for an offence under sec. 436, I. P. C., an offence triable exclusively by the Court of Session, the others being other offences triable by a Magistrate.

## IN THE MATTER OF SURJYA NARAIN SINGH.

Now, the Magistrate's proceedings would have been perfectly regular in respect of these minor offences but, in respect of the charge under sec. 436, Penal Code, there was an irregularity because such proceedings would be of the nature of an inquiry under Chap. XVIII, and sec. 208 requires that an opportunity should be given to the accused for cross-examining the witnesses for the prosecution before the stage of the proceedings is reached at which it might be found necessary to draw up a charge. It is contended that, in so proceeding, the Magistrate has acted irregularly so as to prejudice the accused and make it undesirable that these proceedings should be conducted by him. There was no intention on the part of the Magistrate in any way to prejudice the accused in this respect. The error was one which would occur through inadvertence. It was due to the alteration of the law the effect of which, in a case like this, was overlooked. We are not inclined to think that, by this proceeding, the accused have been unduly prejudiced. It is still open to the accused to cross-examine the witnesses, if they so desire it and the Magistrate has not in any way interfered with their right by refusing any application made for this purpose.

It is, however, contended that having drawn up a charge, the Magistrate is bound to commit and that he cannot discharge the accused. We think that he is not bound to commit if after cross-examination of the witnesses for the prosecution he finds that no case is made out. No Court would, we think, so rigidly interpret the law so as to hold that this would be imperative. We may refer to

sec. 213 (2) as showing that the Magistrate can cancel a charge if on taking evidence after the charge he finds that no case for commitment has been made out.

The next objection taken for asking for an order to transfer this case to another Magistrate is that when an application was made to this Magistrate for an adjournment in order to enable the Petitioners to move this Court for the transfer of the case, the Magistrate refused the application and forthwith ordered the accused to be kept in confinement whereas up to that time they had been on bail.

The Magistrate no doubt refused the application for adjournment because he thought that there were no valid grounds for it, but at the same time, he refused to allow the accused to remain on bail and there is some reason to believe that he did so on account of this application. He thus led the accused to believe that he was prejudiced against them and on this ground we think that there is good ground for considering whether the proceedings should not be transferred to some other Magistrate.

A rule will accordingly issue to the District Magistrate to show cause and the record will be sent for. Pending further orders the proceedings will be stayed.

The facts of the case appear from the judgment.

*Mr. P. L. Roy* (with him *Babu Dasarathi Sanyal*) for the Petitioners.

No one appeared to show cause.

THE JUDGMENT OF THE COURT was as follows:—

Two rules come on for disposal together under the following circumstances

IN THE MATTER OF SURJYA NARAIN SINGH.

The Sub-divisional Magistrate of Madhepura when petitioned by the accused, after the framing of charges against them, for an adjournment to enable them to move this Court for the transfer of the case, refused the application and forthwith ordered the accused to be kept in confinement. Whereas up to that time they had been on bail. The accused being thus led to believe that the Magistrate was prejudiced against them, a rule was issued to the District Magistrate of Bhagalpore to show cause why the case should not be transferred to some other Court, and an order was made to stay further proceedings. That was on the 21st August.

The same day one of the accused sent a telegram to his mukhtear at Mudhepura informing him that a rule had been granted. When the case was called on on the 30th the mukhtear showed the Magistrate the telegram and prayed for a postponement. The Magistrate refused the application, and although the accused Surjya Narain Singh was absent, he proceeded to examine another witness and then he committed the case to the sessions for trial.

This action of the Magistrate necessitated a further application to this Court, and a rule was issued to show cause why the commitment should not be quashed.

We have no hesitation in saying that both rules should be made absolute. There is practically no cause shown as regards the first rule. With respect to the second rule, the Deputy Magistrate was clearly wrong to commit Surjya Narain Singh in his absence, and he is deserving of a complete misapprehen-

sion in saying that the Sessions Judge had ordered a commitment.

It was illegal to examine an additional witness in the absence of the accused. A postponement should certainly have been granted on the 30th August in order (1) that the accused might have an opportunity of cross-examining the prosecution witnesses with a view to obtaining, if possible, a cancellation of the charges, and (2) that the Magistrate might receive the orders of this Court respecting the application for transfer. It was most injudicious of the Magistrate to proceed with the case after he had been credibly informed that a rule had been issued by this court. His precipitate action indicates still further his bias against the accused. We would refer him to the observations of the learned Chief Justice in the case of *Ratnessari Pershad Narayan Sing* and another v. *Empress* (1).

We direct that the commitment of the accused to the Court of Session be quashed, and that the case be transferred to the Court of the District Magistrate that he may either deal with it himself, or transfer it to the Magistrate of Supul or to some other Subordinate Magistrate of competent jurisdiction.

The witnesses for the prosecution need not be again examined-in-chief, but the enquiry will be resumed from the point where that examination closed.

H. P. C. *Rules made absolute.*

(1) 2 C. W. N. 498 (1898).

## PRIVY COUNCIL.

[ON APPEAL FROM THE SPECIAL COURT  
OF LOWER BURMA.]

LORD HOBHOUSE.	}	MOUNG THA
LORD MACNAGHTEN.		HNYIN, Defend-
LORD LINDLEY.		ant, Appellant,
SIR RICHARD COUCH.		v.
SIR HENRY DE VILLIERS.		MAH THEIN
1900.		MYAH and
21, July.		another,
		Plaintiffs,
		Respondents.

*Partnership in an undertaking—Abandonment by laches—Refusal to advance money in terms of agreement.*

*That a mere refusal by a partner in an undertaking to advance further sums for the purposes of the undertaking in terms of the partnership agreement, is not an abandonment by him of the undertaking and does not amount to a dissolution of the partnership.*

*Even assuming that the subject-matter of the partnership was as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case whether or no there has been abandonment, or loss of interest by laches.*

NORWAY v. ROWE (1) referred to.

*In taking accounts, it is not possible for a Court of Justice to allow expenses to the accountable party, even though honestly incurred for the partnership, where, by mixing up his private affairs with those of the partnership, and by his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are.*

This was an appeal by the Defendant from a decree and judgment of the

Special Court of Lower Burma. The Respondents were the representatives of the Plaintiff who died in the course of the suit.

On the 20th October 1885 the Plaintiff and Defendant who were residents of Moulmein, made a written agreement to advance Rs. 1,10,000 for obtaining a certain quantity of timber which was lying in the Mhineloongyee forests and which was hypothecated and delivered by the owner MOUNG SHOAY HPAW to the Defendant as security for advances made by him. The parties were to advance the amount and to bear further expenses in the proportion of three shares to the Plaintiff and two to the Defendant and the proceeds were to be shared in the same proportion. The timber said to be delivered to the Defendant was in Siamese territory at a great distance from Moulmein, and it had to be dragged to and launched upon the River Salween, down which it must travel some hundreds of miles before reaching Kado, where the loose logs could be captured for their consignees.

In August 1886 the mortgagor of the timber died and the Defendant was declared his administrator in October 1886.

On two subsequent occasions the partners advanced further sums of Rs. 30,000 and Rs. 20,000 respectively in the stated proportions. In March 1887 the Defendant required Rs. 10,000 more to meet expenses, but the Plaintiff declined to pay the two-fifths demanded of him.

In 1896 the Plaintiff brought this suit to take the accounts and to wind up the partnership.

*Mr. Haldane, Q. C., and Mr. McCarthy* for the Appellant.

*Mr. Cowell* for the Respondents.



## MOUNG THA HNYIN v. MAH THEIN MYAH.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—The Appellant in this case is the Defendant below. The Respondents are the representatives of the original Plaintiff, who has died in the course of the suit. His death has not in any way varied the matters of dispute between the parties, who may for present purposes be conveniently styled Plaintiff and Defendant throughout.

On the 20th October 1885 the Plaintiff and Defendant who resided at Moulmein made a written agreement to advance Rs. 1,10,000 for obtaining 4,445 logs of teak timber which was therein stated to be lying in the Mhineloongyee forests and to have been hypothecated and delivered by the owner Moungh Shoay Hpaw to the Defendant as security for advances made by him. The parties were to advance the amount and to bear further expenses in the proportion of 3 shares to the Plaintiff and 2 to the Defendant and the proceeds were to be shared in the same proportion. In the next year the partners advanced Rs. 30,000 more to the mortgagor in the same proportion. In point of fact the timber said to be delivered was in Siamese territory at a great distance from Moulmein, and it had to be dragged to and launched upon the River Salween, down which it must travel some hundreds of miles before reaching Kado where the loose logs could be captured for their consignees.

In August 1886 the mortgagor of the timber died, and the Defendant was declared his administrator in the following October. After that it was found that more money was wanted to recover the timber, and the partners provided

Rs. 20,000 in the stated proportions. In March 1887 the Defendant required Rs. 10,000 more to meet expenses, and the Plaintiff declined to pay the two-fifths demanded of him. The Defendant alleged in his written statement that the partnership was then dissolved by mutual consent.

In 1896 the Plaintiff brought this suit to take the accounts and to wind up the partnership. The preliminary question was whether it had been dissolved in March 1887; and a separate issue was framed by the Judge of Moulmein to try that question. The Plaintiff denied that there was any dissolution, or any abandonment by him of his interest in the concern, and said that he did not advance the money demanded because the Defendant would not render any account of his dealings with the last advance. The Defendant said that on the Plaintiff's refusal he considered the partnership to be at an end; that the Plaintiff gave no reason for refusal; that he the Defendant made no further demand, and gave no notice to the Plaintiff that the partnership was dissolved. Upon this evidence the Judge of Moulmein found that there had been no dissolution by consent; and on 1st June 1896 he passed an order which declared that the partnership was dissolved as from that date, and ordered the Defendant as managing partner to file accounts.

The Defendant raised the same question again after the accounts were taken, both in the first Court and on appeal in the Special Court of Lower Burma. But he raised it in a different shape; not alleging mutual consent, but relying on the laches of the Plaintiff, and his abandonment of the undertaking. There

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was however no more evidence of express abandonment than of consent, and there was some evidence of the Plaintiff's subsequent intervention in the partnership affairs. "So the Defendant had nothing to support his plea except the fact that the Plaintiff had declined to advance money in March 1887, and had left the management of the business to the Defendant, who filled three characters. He was mortgagee prior to the partnership, he was legal representative of the mortgagor, and he was managing partner.

The special Court held that they could not infer abandonment, and they maintained the judgment of the first Court on what they call this much-laboured and unsubstantial point. It has been laboured again with all the resources of able advocacy at this Bar; but their Lordships have not been induced to doubt the soundness of the view taken by the Courts below. It is not necessary to enter again on an examination of the well-known class of cases exemplified by *Norway v. Rowe* (1). Even assuming in the Defendant's favour that the subject-matter of this partnership is as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case, whether or no there has been abandonment, or loss of interest by laches. And there is no case, or at least none cited, in which the Court has held a partner to have lost his position on grounds so slender as those which exist here.

On coming to take the accounts great difficulties were found. Besides the various characters filled by the Defendant another element of confusion appeared.

He had dealings in timber peculiar to himself in the same quarter as the partnership dealings, and on a larger scale. His agent in the timber district was his brother MOUNG GALAY who had indubitably expended large sums of money, but on what account it was impossible to say. The Defendant says:—

"I instructed my clerk to make an abstract of all my payments to MOUNG GALAY, no matter on what account. I cannot distinguish the account on which the money was spent without MOUNG GALAY's accounts. He never specified in his demands the purpose for which he wanted the money nor rendered accounts of his expenditure although I asked for them. I did not discharge him because he was my brother and I knew he would not cheat me. I carried on the partnership as though it were my own business and kept no separate account for it." (Rec. p. 101).

MOUNG GALAY is dead and no accounts are produced as coming direct from him. Perhaps if there were any they would not make matters any clearer, for the Defendant tells us again:

"I made payments to MOUNG GALAY for my own business besides those for the partnership. MOUNG GALAY never rendered accounts since Wahzo 1252. The account I have filed (Abstract 4) was made up from an account furnished by MOUNG GALAY and returned to him. In his account the expenditure on each business was not shown separately, but MOUNG HPO TSIN and he went through the accounts and ascertained what had been spent on each business." (Rec. p. 100).

The Burmese year 1252 may be

(1) 19 Ves. 144 (1812).

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gathered from the documents to cover parts of the Christian years 1890-91. (See Exhibit 9, Rec. p. 7).

The clerk MOUNG HPO TSIN was examined, and tells us: "I wrote accounts marked 'copy of MOUNG GALAY's accounts A and B.' Some of the entries were taken from MOUNG GALAY's accounts, and some from Defendant's cash books." Further he relates in cross-examination how MOUNG GALAY brought an account book; how he and the clerk picked out items which the clerk copied into a book; how the account so prepared was taken to Mr. Thompson who was advising the Plaintiff with reference to settlement of the partnership affairs; and how Mr. Thompson rejected the account as confused. "The accounts now produced as copies of MOUNG GALAY's accounts were written to make matters clear for the purposes of the dispute between Plaintiff and Defendant." Further, he says that MOUNG GALAY "did some timber business for Defendant at Maihan. He also looked after Defendant's business with PAH TAW and PAN NYO, and others. About two lakhs were sent up altogether to MOUNG GALAY. In his demands he never specified the account for which the money was required. From 1252 when MOUNG GALAY went up the second time it is impossible to distinguish the expenditure on the partnership business from the expenditure on other accounts." (Rec. p. 100).

From these statements it results that the accounts now put in are not those kept by the Defendant nor those kept by MOUNG GALAY. They are a hash of some books or papers belonging to MOUNG GALAY and of others belonging to the

Defendant, and of verbal statements by MOUNG GALAY, put together for submission to Mr. Thompson and rejected by him as confused, and a re-hash of the same with some subsequent items for the purposes of the suit. They are doubtless tendered in good faith, for no attempt is made by the Defendant to conceal their deficiencies or to claim for them more authenticity than they possess.

The accounts were referred to a Commissioner, Mr. Bayly, whose report made in November 1897 shows that he went into the matter with much care. There was little difficulty on the receipt side. On the other side, owing to the lack of accounts, and to the confusion between the Defendant's private business and his executorship business and the partnership business, the Commissioner found himself compelled to disallow nearly all of the claims disputed by the Plaintiff. He expressed an opinion that the Defendant was entitled to some reasonable allowance for the services of his agents and for the expenses of getting the timber and of litigation connected with it, and for interest on money advanced by him; but he thought he had no authority to decide such matters, and so he referred them to the Court. Subject to the Court's decision he found the Plaintiff entitled to Rs. 50,835 1a. 5p. as his two-fifths share of the money received by the Defendant for which he has not accounted.

On receipt of this report the Judge of Moulmein overruled some objections taken by the Defendant, among which were objections founded on the Plaintiff's laches; but as to the Commissioner's recommendations the learned Judge could

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not discover any more materials for guidance than were in the hands of the Commissioner. He found the Plaintiff entitled to Rs. 50,835 1a. 5p., and then sent the case back to the Commissioner for the purpose of ascertaining the value of the assets in items 9 and 10 of "Statement 3. Assets of the partnership;" and also to ascertain from the parties what allowance they agree (as there is no evidence and it is only by mutual agreement any allowance can be made) should be made for the services of the agents employed for the partnership business and for the expenses they (the agents) defrayed in "ounging" out the timber belonging to the estate of the deceased debtor, and in connection with litigation in which the estate was involved; also the value of a set-off claimed by Plaintiff. (Rec. p. 118).

This further reference came to nothing because the parties could not agree. In reporting that result to the Court the Commissioner added "It is possible, I consider, for Defendant to give if he chooses full details of his own private work that was carried on by the partnership agents so as to enable me to allow a proper proportion of remuneration for the services of the agents in the partnership business; but he has not done this although he has had ample opportunity both before me and the Court to do so, nor has he furnished such particulars of the ounging work including the employment of the partnership elephants as would also enable me to ascertain the cost of ounging the partnership timber." (Rec. p. 122).

After some further discussions and evidence, and after making an arrangement

about the lawsuit in Siam, the case was brought again before the Judge of Moulmein who delivered a detailed judgment explaining why he could not vary the prior conclusions. He made a final decree in favour of the Plaintiff for Rs. 50,835 4a. 5p. with interest and costs.

On appeal the Special Court took the same view, confirming the judgment on the same grounds as were indicated by the Commissioner and by the two successive Judges of Moulmein. Their Lordships have nothing to do now except to say that the Appellant's counsel have wholly failed to persuade them that a Court of Justice can properly arrive at any conclusion more favourable to the Appellant. If it be true, as is earnestly alleged on his behalf, that expenses honestly incurred for the partnership have been disallowed to him, the answer is that by his own acts in mixing up his private affairs with those of the partnership, and his omission to keep clear accounts of any kind he has made it impossible even to conjecture what those expenses are. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the Appellant must pay the costs.

Solicitors: *Messrs. A. H. Arnould & Son* for the Appellant.

Solicitors: *Messrs. Richardson & Co.* for the Respondents.

*Appeal dismissed.*

C. W. A.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL JURISDICTION  
No. 12 OF 1900.

MACLEAN, C. J.	}	BHOBONATH LAHIRI,
PRINSEP, J.		Plaintiff, Appellant,
HILL, J.		v.
1900.		RADHAPROSAD LAHIRI,
29, November,		Defendant, Respondent.

*Practice—Security for costs—Delay in applying for security.*

*An application for security for costs already incurred and estimated costs of appeal should be made promptly.*

POOLEY'S TRUSTEE v. WHETHAM (1) referred to.

This was an application on behalf of the Respondent for an order that the Plaintiff-Appellant do furnish security for the costs incurred in the original Court and the probable costs of the appeal. The appeal in respect of which this application was made was on the Board ready for hearing.

*Mr. Garth* for the Respondent.—The Appellant is a person of little or no means. According to his own counsel, when he applied for extension of time to file his paper-book, he had found difficulty in paying for the requisite stamps for depositions. The Judge in the original Court had found that the suit was vexatious and frivolous. He relied upon *Hankin v. Turner* (2) and *Harlock v. Ashberry* (3). The reason why he could not make the application earlier was that his bill of costs had not been taxed until the 26th of November.

*The Advocate-General* (Mr. J. T. Woodroffe, with him Mr. A. Chaudhuri) for

the Plaintiff-Appellant.—Poverty has not been considered as sufficient ground for taking security. He relied upon *Maneckji Limji Manchherji v. Goolbai* (4), *Lakhmi Chand v. Gatto Bai* (5) and *Jiwan Ali Beg v. Basa Mal* (6), in which the cases cited by Mr. Garth were considered. He also relied on *Khajah Assenoo Majoo v. Solomon* (7) and *Hewetson v. Deas* (8). Moreover there has been considerable delay in bringing forward the application and it should not now be granted. The application for extension of time was made as early as the 13th July 1900 and apparently the poverty of the Appellant was urged as one of the grounds why some extension should be allowed. The paper-books were filed in August and the Appellant has undergone all the cost of preparing for the appeal. The appeal was not frivolous, grounds having been certified by counsel who conducted the case in the Court below. Much weight should not be attached to the finding of the Judge, his judgment being under appeal.

*Mr. Garth* in reply.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—This is an application by the Respondent for security for costs already incurred in the lower Court and the estimated costs of the appeal.

Judgment was given against the present Appellant on the 6th April last and on the 14th of May the Appellant filed his memorandum of appeal. On the 13th of July he obtained from this Court one

(4) I. L. R. 3 Bom. 241 (1878).

(5) I. L. R. 7 All. 542 (1885).

(6) I. L. R. 8 All. 203 (1886).

(7) I. L. R. 14 Cal. 533 (1887).

(8) I. L. R. 21 Cal. 526 (1894).

(1) L. R. 33 Ch. Div. 76 (1886).

(2) L. R. 10 Ch. Div. 372 (1878).

(3) L. R. 19 Ch. Div. 84 (1881).

**BHOONATH LAHIRI v. RADHAPROSAD LAHIRI.**

month's further time to file his paper-book and he filed it on the 13th of August last. It was not until the 19th of this month that the present application was made.

The Appellant urged that the applicant has not been sufficiently prompt in making his application and that under the circumstances it should not be granted.

The grounds for the application are based upon the poverty of the Appellant and the fact that the Judge in the Court below has stigmatised the suit as one of a vexatious character and one which ought not to have been brought.

In the view I take of the matter it is unnecessary to express any opinion upon the question whether if the application had been made with more promptitude it would have been granted.

It is clear, upon the authorities in the English Courts, that the application should be made promptly and in this respect the Courts in India may fairly follow those in England.

In the case of *Pooley's Trustee v. Whetham* (1), Lord Justice Cotton laid down the rule in these terms:—"The rule has always been that applications for security for costs must be made promptly, not only on the ground that the Respondent should apply for security for costs before he incurs them, but on the ground that it is unreasonable that security should not be applied for till the applicant has incurred the costs of the appeal, whether they have been paid by himself or by his solicitor." This view has been accepted in many other cases.

In the present case the Appellant had already incurred all the costs of preparing

the paper-book, and it is only at the last moment when the appeal is actually on the Board that the present application is made.

The learned counsel for the applicant says that he could not properly make his application until the costs had been taxed, which was not until the 26th of September. That argument is fallacious, because the application is not based upon the mere non-payment of these costs,—to recover which no attempt has apparently been made,—but upon the alleged general poverty of the Appellant and the vexatious nature of the suit, and both these facts were within the knowledge of the applicant long ago.

In my opinion the application should have been made with much more promptness, and following the rule which obtains in England I do not think that it would be right at this late stage to grant it.

Under these circumstances the application is dismissed with costs, which will be set off against the costs which the Appellant has been ordered to pay by the Court below.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I also am of the same opinion.

*Babu Manik Lal Seal*, Attorney for the Appellant.

*Messrs. Orr, Robertson & Burton*, Attorneys for the Respondent.

*Application refused.*

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 698 of 1898.

MACLEAN, C. J.	}	PIJRADDI NASKAR,
BANERJEE, J.		Defendant, Appellant,
1900.		v.
4, April.		AMBIKA CHURN MITTER, Plaintiff, Respondent.

*Bengal Tenancy Act (VIII of 1885), sec. 148, cl. (b)—Rent suit, issue in—Plaint, whether to contain extent and boundaries of the lands.*

*In a suit for recovery of rent where the allegation was that the Defendant held a tenure consisting of 61 odd bighas of land within certain boundaries as specified in the plaint and the defence was that the area was only 36 bighas within certain boundaries as mentioned in the written statement at a certain rate of rent per bigha, and the lower Appellate Court decreed the suit without deciding the question as to the area of the lands and keeping the question open :*

*Held—That the decision of the Subordinate Judge was correct and did not contravene the provisions of sec. 148, cl. (b) of the Tenancy Act.*

*Per BANERJEE, J.—That in a rent suit it is not absolutely necessary for the Plaintiff to give the extent and boundaries of the lands in respect of which rent is claimed where there is any difficulty in giving those particulars and that in such cases it is enough if a description sufficient for identification is given.*

*That the Court is not bound in every suit for arrears of rent to determine the extent and boundaries of the Defendant's ding or tenure.*

BHAI CHAL NASYA v. SHAIK SHAM-NUYASI MAHOMED (1) and RASH DHARY GOPE v. KHAKON SINGH (2) *distinguished and explained.*

This was an appeal preferred on the 6th of April 1898, against the decree of Babu Rajendra Kumar Bose, Sub-Judge 2nd Court of Zillah 24-Pergunnahs, dated the 22nd December 1897, reversing the decree of Babu Bepin Chandra Chatterji, Munsif, 4th Court, at Diamond Harbour, dated the 30th of June 1897.

The suit out of which the present appeal arose was brought by the Plaintiff for recovery of rent on the allegation that the Defendant held under the Plaintiff in one plot, 61 bighas 16 cottas 15 chittaks of land as per boundaries given at foot of the plaint, standing in the name of Sadan Naskar, at a yearly rent of Rs 129-8 ans. 6 gds. as *gor-mourashi* and *gor-mokurari* tenant. Amongst other matters the following objection was taken in the written statement which will appear from the 5th para. which was as follows :—

“The Plaintiff has not given the actual boundaries of the land in suit. I beg to state herein, in schedule (ka), the boundaries of the land and *jama*, held by me, standing in the name of my father, Sadan Naskar, so that the same may be treated as a part and parcel of this written statement. Save and except the lands comprised in those boundaries, there is no other land standing in the name of Sadan Naskar. The area of the said lands is 35 or 36 bighas. It is not 61 bighas 16 cottas 15 chittaks as alleged by the Plaintiff.”

The Defendant gave boundaries of 5

(1) 1 C. W. N. 152 (1894).

(2) I. L. R. 24 Cal. 438 (1897).

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plots of land comprised of 36 bighas which he said he held under the Plaintiff at a yearly rental of Rs. 2-1 an. 10 gds.

The following was the sixth issue in the case.

Whether the Defendant holds under the Plaintiff the land specified in the plaint at the rate of rent per annum claimed.

The Munsif held that the issue ought to be as was framed above, whether the Defendant held under the Plaintiff the land specified in the plaint at the rate of rent per annum included and that the onus was upon the Plaintiff to prove that the Defendant held such land. Upon discussing the evidence he was of opinion that the Plaintiff had failed to shew that the Defendant held the *jama* for the land specified in the plaint. The Plaintiff preferred an appeal and the Subordinate Judge decreed the suit and appeal and was of opinion that the question as to the quantity of land held by the Defendant ought to be left open. On this point he made the following remarks :—

"Now at the outset, it is to be remarked that there is no satisfactory and reliable proof on either side as to the quantity of land and the number of plots actually comprised in the holding, standing in the name of Sadanand Naskar which is now held occupation of by the Defendant, or what the boundaries of those lands are. For the purposes of the decision of this case, it is not necessary to decide that question which is left open between the parties. That the Defendant is possessed of the holding standing in the name of his father in succession to his father, is admitted on both sides. The main dis-

pute is as regards the amount of rental which the Defendant is liable to pay in respect of that holding. But it is to be observed that it was fixed in the two prior suits for rent brought in respect of this holding, of which the first, No. 318 of 1885, was against the Defendant's father and the second against the Defendant himself, that the rental payable was Rs. 129-8 ans. 16 gds. per annum."

*Babu Boidya Nath Dutt* (for *Babu Ram Kissen Banerjee*) for the Appellant.

*Babu Satoda Churn Mitter* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—I do not think there is any ground for this appeal. All that the Court below has done is to give the Plaintiff a decree for the rent of the holding which formerly stood in the name of the Defendant's father, and in respect of which the rent has been found in two previous suits; one, between the Plaintiff and the Defendant's father, and the other, between the Plaintiff and the Defendant himself. It has also been found by the learned Subordinate Judge that nothing has been shown on the part of the Defendant which would warrant him in holding that a less amount of rent than that decreed to the Plaintiff is payable in respect of the holding in suit.

The question of the number of bighas included in the holding has been left open.

With respect to the argument under sec. 148 of the Bengal Tenancy Act, I do not think there is anything in the judgment of the learned Subordinate Judge which in any degree contravenes



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the provisions of that section. The judgment to my mind is quite right, and this appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The contention of the learned vakil for the Appellant, who was the Defendant in the suit, is, that the lower Appellate Court is wrong in giving the Plaintiff a decree without determining what the area of the Defendant's holding is, when cl. (b) of sec. 148 of the Bengal Tenancy Act requires that the plaint shall contain a statement of the extent and boundary of the land held by the Defendant; and in support of this contention, two cases were relied upon, *Bhai Chal Nasya v. Shaik Shamnuyasi Mahomed* (1) and *Rash Dhury Gope v. Khakon Singh* (2).

No doubt it is true that cl. (b) of sec. 148 of the Bengal Tenancy Act requires that the plaint should ordinarily give a statement of the extent and boundaries of the land held by the Defendant, but cl. (b) further provides, "or where the Plaintiff is unable to give the extent or boundaries, in lieu thereof a description sufficient for identification." That indicates that it is not absolutely necessary for the Plaintiff to give the extent and boundaries of the lands in respect of which rent is claimed where there is any difficulty in giving those particulars; and that in such cases, it would be enough if in lieu of giving the extent or boundaries of the land, a description sufficient for identification is given. It cannot, therefore, be said that the Court is bound in every suit for arrears of rent

to determine the extent and boundaries of the Defendant's holding or tenure.

In the present case, there is a sufficient description given for the identification of the Defendant's holding, the description being that it is the holding that stood in the name of the Defendant's father, Sadan Naskar. The Defendant does not say that he does not hold the land which formed the holding of his father, Sadan Naskar. Nor does he say that, in the present suit, the Plaintiff has included any other holding of his; he merely disputes the correctness of the area given. In that state of things, when the amount of rent was determined in a previous litigation, the Court of Appeal below was quite right in giving the Plaintiff a decree according to the amount previously determined, leaving the question of area open.

As for the two cases cited, the facts of those two cases were very different, and there was a real necessity in those cases for the determination of the extent and boundaries of the Defendant's holding. Thus, in the case of *Bhai Chal Nasya v. Shaik Shamnuyasi Mahomed* (1) this is what is said in the judgment. "Having regard to the pleadings, the Plaintiffs claiming a certain rent as payable in respect of certain lands mentioned in the plaint and the Defendants denying the occupation of these lands at the rents alleged by Plaintiffs and admitting that they held other lands at different rents, the Court of first instance was, we think, quite right in holding that the point for decision was whether the Defendants held the lands set forth in the plaints under the Plaintiffs' vendor at the rent

(1) 1 C. W. N. 152 (1894).

(2) 1 L. R. 24 Cal. 433 (1897).

(1) 1 C. W. N. 152 (1894).

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specified and the lower Appellate Court was wrong in holding that the issue set down by the first Court was not the proper issue to be tried."

So also in the other case it was not merely the extent, but the situation of the Defendants' holding that formed one of the questions raised in the case, and the Court thought that that matter ought to be settled before any decree was made.

S. C. S. *Appeal dismissed.*

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM ORDER

NOS. 22 AND 23 OF 1900.

UMAKANT ROY, Decree-

RAMPINI, J. holder, Appellant,  
PRATT, J. v.

1900. DENO NATH SANYAL,  
26, June. Judgment-debtor,  
Respondent.

*Code of Civil Procedure (Act XIV of 1882), secs. 311, 312, 538, 244 (c)—Allegation of fraud against decree-holder, without any attempt to prove the same—Irregularity in the publishing or conducting of the sale, question of—Second appeal.*

*A mere allegation of fraud in an application under sec. 311 of the Code of Civil Procedure without any attempt in any way to substantiate it cannot give a right of second appeal in a case which would not otherwise have arisen.*

NAVA KUMAR ROY v. GOLAM CHUNDER DEY (1), ABHOYA DASSI v. PUDMO LUCHUN MONDOL (2), DAIVANAYAGAM PILLAI v. RANGASAMI AYAR (3) followed.

ROJONI KANT BAGCHI v. HOSSAIN UDDIN AHMED (6) explained and distinguished.

- (1) I. L. R. 18 Cal. 422 (1891).
- (2) I. L. R. 22 Cal. 802 (1895).
- (3) I. L. R. 19 Mad. 29 (1894).
- (6) 4 C. W. N. 538 (1899)

This was an appeal preferred on the 18th of January 1900, against the order of W. H. Vincent, Esq., District Judge of Burdwan, dated the 5th June of 1899, affirming the order of Babu Basanta Kumar Ghose, Munsif of Katwa, dated the 2nd December 1898.

This appeal arose out of some proceedings in execution in which a sale was held at the instance of the Decree-holder-Appellant at which the decree-holder himself was the purchaser. The judgment-debtor applied under sec. 311 of the Code of Civil Procedure to have the sale set aside on the ground of irregularity in the publishing of the sale proclamation and the conducting of the sale and in that application he also alleged fraud on the part of the decree-holder. No attempt was, however, made to substantiate the allegation of fraud. The sale was set aside by the Munsif on the ground of irregularity in the conducting and publishing of the sale under sec. 312 of the Code of Civil Procedure. On appeal the District Judge upheld the order of the Munsif.

Against these orders the present appeal was preferred.

The arguments addressed to the Court and the cases cited appear from the judgment.

Babu Hara Kumar Mitter for the Appellant.

Dr. Asutosh Mukherjee and Babu Mohendra Nath Roy for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is a second appeal against an order under sec. 312, C. P. C., setting aside a sale,

## UMAKANT ROY v. DENO NATH SANYAL.

A preliminary objection has been taken that no second appeal lies. From the final clause of sec. 588 this would appear to be correct and the cases of *Nava Kumar Roy v. Golam Chunder Dey* (1), *Abhoya Dassi v. Pudmo Luchun Mondol* (2), *Daivanayagam Pillai v. Rangasami Ayar* (3) support this view.

On the other hand, on behalf of the Appellant it has been contended with the view of bringing this case within the rulings of this Court in the cases of *Bhubun Mohun Pal v. Nonda Lal Dey* (4), *Nemai Chand Kanji v. Denonath Kanji* (5) and *Rojoni Kant Bagchi v. Hossain Uddin Ahmed* (6) that the Respondent judgment-debtor made an allegation of fraud against the decree-holder in his petition for the setting aside of the sale, and therefore that the order passed was one under sec. 244, and a decree, and accordingly a second appeal does lie.

It appears that an allegation of fraud was made in the judgment-debtor's application for the setting aside of the sale; but, as the Munsif says, no attempt was made to prove it. The application was therefore dealt with both before the Munsif and the Judge as one under sec. 311. In these circumstances we consider that no second appeal lies. The order of neither of the lower Courts disposes of any other question than questions of irregularity in the publishing or conducting of the sale. Hence it cannot be an order under sec. 244 (c), or a decree, and so there can be no second

(1) I. L. R. 18 Cal. 422 (1891).

(2) I. L. R. 22 Cal. 802 (1895).

(3) I. L. R. 19 Mad. 29 (1894).

(4) I. L. R. 26 Cal. 324 : s. c. 3 C. W. N. 399 (1899).

(5) 2 C. W. N. 691 (1898).

(6) 4 C. W. N. 538 (1899).

appeal. It cannot be, we think, that an applicant under sec. 311 by making a mere allegation of fraud in his petition without attempting in any way to substantiate his allegation can give a right of second appeal in the case which would not otherwise have arisen.

The learned pleader for the Appellant however relies on a passage in the judgment in *Rojoni Kant Bagchi v. Hossain Uddin* (6) in which it is said :—" We think it may be gathered from these decisions that when a judgment-debtor applies to have an execution sale set aside, alleging circumstances which, if found in his favour, would amount to fraud on the part of the decree-holder and the auction-purchaser, the case comes under sec. 244." As to this we would say, *firstly*, that we do not think the learned Judges who decided this case meant to lay down that a mere allegation of fraud without an attempt to prove it would be sufficient to bring the case under sec. 244. They must have meant that allegations of fraud supported by evidence of some sort would do so. *Secondly*, if this be what they meant, then it is not supported by the cases referred to by them, in all of which an endeavour was made to prove the acts of fraud alleged. *Thirdly*, the observation is at the best but an *obiter dictum*, for in the case in which it occurs it was held that the act alleged to be fraudulent did not amount to fraud and that consequently no second appeal lay.

This appeal is accordingly dismissed with costs—2 gold mohurs. The order in this case also governs appeal from order No. 23 of 1900.

H. P. C.

*Appeal dismissed.*

(6) 4 C. W. N. 538 (1899).

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 2321 OF 1898.

PATIT SAHU, Defendant

RAMPINI, J. No. 1, Appellant,

PRATT, J. v.

1900: HARI MAHANTI and

3, July. others, Plaintiffs,

Respondents.

*Landlord and Tenant Act (X of 1859)—  
Sale, setting aside of, by an unregistered tenant  
—Maintainability of suit.*

*A private purchaser of a tenure who has not registered his name in the landlord's sherista (office) and has not been recognized by him, has no locus standi to bring and maintain an action to set aside a sale held in execution of a decree for arrears of rent obtained against the registered tenant.*

*The non-attachment and non-proof of publication of the sale proclamation is no ground for setting aside a sale under Act X of 1859.*

This was an appeal preferred on the 29th of November 1898, against the decree of W. B. Brown, Esq., District Judge of Zillah Cuttack, dated the 29th of August 1898, confirming the decree of Babu Kissori Lal Sen, Munsif of Puri, dated the 29th of March 1898.

The facts of the case are as follows :—

It was alleged that the property in suit originally belonged to Defendant No. 2; he transferred portions of the same to Defendant No. 3 and the father of Defendant No. 4. Defendant No. 2 and his vendees afterwards wanted to sell their interests in the said property; Defendant No. 1 offered to purchase the same but at an insufficient price. It was sold, however, to the Plaintiffs under different deeds of transfer for an agree-

gate price of Rs. 475. The property was situated within *Satis Hazari*, of which Defendant No. 5 was entitled to receive rent, Defendant No. 6 was the *tehsil amin* of Defendant No. 5, and Defendant No. 7 was his *am-mukhtear*; Defendant No. 1 brought the Defendant No. 6 under his influence, caused a suit for rent for Rs. 19-13-3 to be instituted against Defendant No. 2 under Act X of 1859, and obtained an *ex parte* decree; and in execution of that decree the said property was brought to sale without actually publishing any sale proclamation, etc., and was purchased by Defendant No. 1 for Rs. 75 on the 21st of December 1896; that the said rent decree and all subsequent proceedings thereon were the result of collusion amongst Defendants Nos. 1, 2 and 6, and that the sale was null and void as against the Plaintiffs, and that the Plaintiffs were entitled to get the sale set aside on payment, to Defendant No. 5 the arrears of rent due.

Upon these allegations the Plaintiffs brought this suit for (1) declaration of their title by purchase to the said property; (2) for setting aside the sale aforesaid; (3) for confirmation of their possession thereto or for recovery of possession in case Defendant No. 1 obtained possession thereof in the meantime; (4) to get the decree for rent obtained by Defendant No. 5 paid by Plaintiffs; (5) for costs; and (6) for recovery of the purchase-money in case Plaintiffs failed to get the property.

Defendant No. 1 alone contested the suit.

The first Court found (1) that the Plaintiffs were not entitled to a declaration of their right by purchase as they had not registered their names in the

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landlord's *sherista*; (2) that the sale at which the Defendant No. 1 purchased was invalid; (3) that the Plaintiffs were not entitled to a decree for confirmation of possession, and (4) that the Plaintiffs could not be declared entitled to pay the decree for rent which the Defendant No. 5 had obtained against the Defendant No. 2.

The Defendant No 1 appealed to the District Judge and before him it was argued that the sale under Act X of 1859 was a good sale, but the Judge considered it to be null and void (1) because the sale proclamation had not been duly published; (2) and because the decree was not obtained by a co-sharer and should, therefore, have been executed in the mode prescribed by the Civil Procedure Code, and as there was no attachment in this case the sale was invalid on that ground also.

Thereupon this second appeal was preferred by the Defendant No. 1.

*Babu Umakali Mukherjee* for the Appellant.

*Babu Monmohan Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In this suit the Plaintiffs sue to have it declared (1) that a sale under Act X of 1859 of a certain under-tenure at which the Defendant No. 1 purchased it, be declared null and void; (2) that the Plaintiffs have a good title to the tenure, and (3) that their possession of the same be confirmed.

The tenure originally belonged to the Defendant No. 2 who sold portions of it to Defendant No. 3 and the father of

Defendant No. 4. The Plaintiffs subsequently purchased it for Rs. 475 but they never got their names registered in the landlord's *sherista*.

The landlord who is the Raja of Puri then sued the original tenant, Defendant No. 2, got a decree and in execution put the tenure up to sale, at which it was bought by Defendant No. 1. Hence this suit.

The first Court found (1) that the Plaintiffs were not entitled to a declaration of their right by purchase, for they had not registered their names in the landlord's *sherista*; (2) that the sale at which the Defendant No. 1 purchased was invalid; (3) that the Plaintiffs were not entitled to a decree for confirmation of possession, and (4) that the Plaintiffs could not be declared entitled to pay the decree for rent which the Defendant No. 5 had obtained against the Defendant No. 2.

The Defendant No. 1 appealed to the District Judge. Before him it seems to have been argued that the sale under Act X of 1859 was a good sale but the Judge considered it to be null and void (1) because the sale proclamation had not been duly published, (2) because the decree was not obtained by a co-sharer and should therefore have been executed in the mode prescribed by the Civil Procedure Code and as there was no attachment in this case, the sale would seem to be invalid on that ground also.

The Defendant No. 1 appeals and on his behalf it has been contended that the want of attachment and sale proclamation are mere irregularities which do not vitiate the sale. We are inclined to take this view of the matter. The

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non-attachment and the non-proof of publication of the sale proclamation might be very serious matters, if this were an application under sec. 311, C. P. C. But this is not such an application and we do not think that the Plaintiffs can have the sale set aside on the ground of such irregularities. There is no provision in Act X of 1859 which entitled them to have the sale set aside on such grounds.

But there is a more serious objection to the suit and that is that on the Munsif's findings, the Plaintiffs are nobody. The Munsif has refused them the declaration sought for by them as to their title by purchase. The Plaintiffs have been held not to be tenants of the land, for they have not registered their names in the landlord's *sherista*, and have not been recognised by him. They have therefore no *locus standi* and no right to impugn the Defendants' purchase of the *jote*; see *Sham Chand Koondoo v. Brojo Nath Pal Choudhry* (1).

Their suit should therefore be dismissed.

For these reasons we decree this appeal and dismiss the Plaintiffs' suit.

This order carries costs in all Courts.

H. P. C.

*Appeal allowed.*

(1) 21 W. R. 94 (1873).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1419 of 1898.

MACPHERSON, J.

STEVENS, J.

1899.

8, December.

HIRAMONI DASSI, wife of  
Promotha Nath Gupta,  
and Khettarmoni Dassi,  
minor, by her husband  
Kunja Behari Das,  
Defendants, Appellants,  
v.  
RADHA CHURN KAR,  
Plaintiff, Respondent.

*Partition Act (IV of 1893), sec. 2—Preliminary decree—Order for sale—Civil Procedure Code (Act XIV of 1882), sec. 396.*

*Where in a suit for partition a Commissioner appointed under sec. 396, C. P. C., to make a partition after the preliminary decree had been passed, submitted a report and the Court on consideration of the report was of opinion that the property could not be conveniently partitioned, and then passed an order for sale of the property under the provisions of sec. 2 of the Partition Act. (IV of 1893):*

*Held—That the Court could pass an order under sec. 2 of the Act for sale of the property, and the fact that a preliminary decree had been passed was no bar to his proceeding under that section.*

This was an appeal preferred on the 21st of July 1898, against the decree of B. B. Newbould, Esq., Officiating District Judge of Zillah Sylhet, dated the 22nd of April 1898, affirming the decree of Babu Hari Prosad Das, Munsif, 1st Court, at Sylhet, dated the 5th of March 1898.

The suit out of which the present appeal arose was one for partition. After the preliminary decree had been passed the first Court appointed a Commissioner

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under sec. 396, C. P. C., to make a partition. Upon reading the Commissioner's report and after hearing the parties the first Court held that the partition proposed by the Commissioner was not equitable, as the land which was the subject-matter of the suit was very small, and could not be conveniently partitioned; and as neither of the parties lived within the premises, the first Court held that the best course to follow was to sell the property to the highest bidder and divide the proceeds between the parties under sec. 2 of Act IV of 1893; the Court therefore ordered that the property be sold. Upon appeal the lower Appellate Court upheld this order and passed the following judgment:—

The lower Court in a partition suit granted a decree for partition and under sec. 396, C. P. C., appointed an Amin as Commissioner to make a partition. On the Commissioner's report being reviewed the lower Court did not consider it equitable and as it appeared that the land could not conveniently be partitioned it passed an order under sec. 2, Act IV of 1893, ordering the sale of the property. The Appellants' pleader contends that in passing such an order the lower Court exceeded its powers on the ground that sec. 396 only provides two alternatives to the Court issuing the commission, namely, either to quash the report and issue a new commission, or to pass a decree in accordance therewith. With regard to the order under sec. 2, Act IV of 1893, the Plaintiff's pleader contends that that section only provides for an order for the sale of the property as an alternative to a decree for partition and that as a decree for partition has actually been passed the lower Court cannot now cancel that decree and order a sale of the property. In my opinion neither of these objections can be allowed. If Act IV of 1893 does give the lower Court power to do what it has done it is of course immaterial that there should be no mention of such power in the Civil Procedure Code which was passed long previously. I cannot agree with the Appellants' pleader that the

fact that the preliminary decree for partition has been passed is any bar to the lower Court having power to order the property to be sold. The word "whenever" at the commencement of the section seems to me to cover any stage of the proceedings. I cannot agree that the order for sale is an alternative to a decree for partition. It seems to me rather a method by which the decree for partition may be carried into effect. Until the Commissioner's report was received the lower Court was not in a position to know how the partition could best be effected and Act IV of 1893 would lose a great part of its value if the Court could not act on it after obtaining this fuller information. With regard to the merits of the order it seems to me a perfectly reasonable one.

I therefore uphold the order of the lower Court and dismiss the appeal with costs—pleader's fee Rs. 4 only.

From this decision the Defendants appealed to the High Court.

*Babu Harendra Narain Mitter* for the Appellant.—The term "beneficial" in sec. 2, means beneficial in a pecuniary sense—vide *Drinkwater v. Ratcliffe* (1), under sec. 3 of the English Partition Act, 1868 (31 and 32 Vict., c. 40). *Per* Sir G. Jessel, M. R.—The findings are not sufficient to justify an order under the section. The Court was not competent to proceed under sec. 2 at that stage of the case.

*Babu Tara Kishore Chaudhuri* for the Respondent.—The facts as disclosed in the report are sufficient to justify such an order. The fact of a preliminary decree having been passed is no bar to the Court passing an order under sec. 2.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from a decree in which the first Court, under sec. 2 of the Partition Act (IV of 1893), made an order for the sale of the property to be partitioned.

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That decree has been affirmed on appeal by the District Judge; and this second appeal is now preferred.

It is said that sec. 2 of the Act referred to does not apply to this case in which a preliminary decree for partition has been made and that it can only come into operation in those cases in which there has been no such decree. We see no reason, having regard either to the language of the section or to the scope of the Act, to put this limited construction upon it. There is a great difference between a decree directing a partition to be made and a decree confirming a partition which has been made and approved of by the Court. The Court in making a decree for partition merely deals with the rights of the parties and their interests in the properties to be partitioned. It is not then in a position to consider in any way the nature of the partition which could or should be made. That is a matter with which it deals in a later stage of the case when effect is being given to the order for partition.

Then it is said that the Courts below have not strictly complied with the provisions of sec. 2; and that no facts or circumstances have been found which would justify the order for sale. It appears that the Amin who was deputed to make a plan of the land to be partitioned submitted a scheme for the approval of the Court. The Munsif disapproved of the scheme as one which would be very unfair to at least one of the two persons interested. Then he says, referring to the map, and report of the Amin, and having before him the statements of the parties, that the land which is the subject of partition is very

small, that it cannot conveniently be partitioned; and that the best course is, as one proposed by one of the parties, a person who holds a  $\frac{5}{8}$ th share of the land, to sell it to the highest bidder. The size of the land and the nature of it, as disclosed in the Amin's map, might very reasonably have led the Munsif to the conclusion that the land could not be conveniently partitioned. The Munsif certainly did not in terms say that a sale would be more beneficial for all the shareholders; but (assuming that "beneficial" means beneficial in the pecuniary sense), he does say that that is the best course, and we must take this to mean the best course, for all the parties, that could be followed having regard to their pecuniary interests and all the circumstances of the case. We cannot, therefore, say that there was anything defective in the finding of the Munsif. It is not clear to what, if any, extent the Munsif's decision on this part of the case was challenged before the District Judge. The latter sets out the particular grounds that were urged before him, but says nothing as to any exception being taken to the order on its merits. He does, however, say that on the merits the order seemed to him a perfectly reasonable one. There is, therefore, no reason to suppose that any injustice has been done, and we also think that this is not a case in which we are in a position to interfere on second appeal.

The appeal is dismissed with costs.

*Appeal dismissed.*

S. C. S.



## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 331 OF 1900.

PRINSEP, J.  
HANDLEY, J.  
1900.  
15, June.

DURGA DAS RAKHIT and  
another, Petitioners,  
v.  
UMESH CHANDRA SEN,  
Opposite Party.

*Indian Penal Code (Act XLV of 1860), secs. 174, 177—Land Acquisition Act (I of 1894), secs. 9, 10—Code of Criminal Procedure (Act V of 1898), sec. 205—Giving false information to a public servant, whether non-furnishing of correct statements as to names and interests of persons, amounts to—Contempt of Court, whether non-attendance in Court in obedience of summons to attend Court, amounts to—Notice to persons interested in lands of intention of Government to take lands for public purposes—Joint trial.*

*A Deputy Collector made a complaint against the lessor and the lessee of some lands taken up under the Land Acquisition Act that they had given false information in certain written statements that they made to the Collector in response to a call from him under sec. 9 of the Land Acquisition Act (I of 1894), but did not put in either with his written complaint or at the time of his examination by the Magistrate before whom he made the complaint, the written statements upon which he desired to proceed, and the Magistrate issued processes for the attendance of the accused to answer a charge under sec. 177, I. P. Code, and sec. 10 of the Land Acquisition Act; on the day fixed for trial the lessee appeared, and appearance was made on behalf of the lessor by his mukhtear who asked the Magistrate under sec. 205 of the Code of Criminal Procedure to dispense with the personal attendance of that accused, which the Magistrate refused to accede to, and called upon him to show*

*cause why he should not be prosecuted for contempt of Court under sec. 174, I. P. Code :*

*Held -- That in the absence of the written statements on which the proceedings were founded and in the absence of any reference as to the particular statement or statements on which the accusation was made, the Magistrate should not have issued processes against the accused, and that his action in the matter was without proper discretion, and that the complaint is bad and should not be allowed to proceed in its present form.*

*That the lessor accused having made an appearance, though not a personal appearance on service of summons, and his having moved the Superior Courts against the proceedings of the Magistrate should not have been regarded as an offence under sec. 174 of the Penal Code, and that the Magistrate's proceedings were misconceived and that they should cease.*

*That the proceedings in the civil case being still before the High Court in respect of the lessee, no prosecution should be taken before the Magistrate until at least the final orders of the High Court shall have been obtained.*

*That the offence, if any, committed by each of the accused is a distinct and separate offence and should be tried separately.*

This was a rule issued on the 27th of April 1900, against the proceedings taken against the Petitioners by the Deputy Magistrate of Midnapore, dated the 19th April 1900.

The facts of the case, so far as they are material to this report, appear from the judgment.

Mr. W. Jackson and Babu Atulya Charan Bose for the Petitioners.

Babu Sris Chandra Chaudhuri (Assistant Government Pleader) for the Crown.

DURGA DAS RAKHIT v. UMESH CHANDRA SEN.

The JUDGMENT OF THE COURT was as follows :—

This matter has\* already once been before this Court under circumstances somewhat similar to those now before us. The Petitioners were then being prosecuted for perjury and forgery alleged to have been committed in proceedings taken before the Deputy Collector under the Land Acquisition Act and, for reasons stated by the Judges of the Criminal Bench of the Court, on a rule granted, the proceedings were quashed as premature and without jurisdiction. The Collector, finding that the bar has been removed because the Civil Court has, in his opinion, finally decided the matter under the Land Acquisition Act, has renewed his complaint before the Magistrate and he has put the offence under sec. 177, I. P. C., which is declared to be applicable to such proceedings by sec. 10 of the Land Acquisition Act.

The complaint was made against two persons, Durga Das Rakhit, the lessor, and Abhoy Charan Dey, the lessee, claiming to hold a portion of the land taken up under the Act and they have been accused of having given false information within the terms of sec. 177, I. P. C., and sec. 10, Land Acquisition Act, in certain written statements that they made to the Collector in response to a call from him under sec. 9. We may first of all observe that neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate has any reference been made to any particular statement made by either of the accused as being a false statement. The complaint is that the written statements put in were false. It

is clear that those documents contained more than one statement of fact. We also find that the Deputy Collector did not put in the written statements upon which he desired to proceed either with his written complaint or at the time of his examination by the Magistrate.

The Magistrate, therefore, had not before him the facts constituting the offence regarding which he was called upon to act and, notwithstanding this, he issued processes for the attendance of the accused.

Now, in this respect we think that the Magistrate has acted without proper discretion. He was bound to require from the complainant the written statements on which the proceedings were founded and also to ascertain from the complainant the particular statement or statements on which the accusation was made.

On the day fixed for trial, the case being a summons case, Abhoy Charan Dey appeared and appearance was made on behalf of Durga Das Rakhit by his mukhtear who asked the Magistrate under sec. 205 to dispense with the personal attendance of that accused. At the same time Abhoy Charan Dey, who did not personally attend, asked for and obtained an order from the Magistrate to excuse his further personal attendance and to be allowed to appear by a mukhtear. The Magistrate, however, refused to allow the application made on behalf of Durga Das Rakhit and he regarded his non-attendance as a contempt of Court, misapplying that term as it is generally used. He accordingly called upon Durga Das Rakhit to show cause why he should not be prosecuted under sec. 174, I. P. C., for non-attendance on service of summons and the Magistrate has, in his

## DURGA DAS RAKHIT v. UMESH CHANDRA SEN.

explanation, expressed himself strongly regarding the conduct of Durga Das Rakhit in this respect.

We think that the Magistrate has taken an entirely mistaken view of this part of the case. He seems to have been animated by some feeling that Durga Das Rakhit was acting contemptuously towards the Court. There was no reason for this supposition. The Magistrate should rather have told the mukhtear that he required the personal attendance of Durga Das Rakhit on some fixed day or that, if he did not choose to appear, he would issue a warrant of arrest. That, in our opinion, would have answered sufficiently. The Magistrate, however, appears to have regarded as an aggravation of the offence that Durga Das Rakhit should have proceeded to Calcutta, instead of attending his Court, in order to apply to the High Court and that he also applied to the District Magistrate for bail as well as for an order directing the Subordinate Magistrate to dispense with the personal attendance of the accused. He considers that by making this application Durga Das Rakhit was doubly guilty of contempt of Court.

Throughout the Magistrate has failed to appreciate what he was entitled to expect from Durga Das Rakhit. There was no possible reason why he should not proceed to the High Court to make an application regarding this case and he was also within his rights in making his application to the District Magistrate. He did make an appearance though not a personal appearance on service of summons but that he did not personally attend should not under the circumstances have been regarded as an offence under sec. 174.

We think, therefore, that the proceedings under sec. 174, I. P. C., against Durga Das Rakhit were misconceived and that they should cease.

In regard to the prosecution under sec. 177, we are of opinion that, as now taken, the complaint is bad and that the case should not be allowed to proceed in its present form. We are further of opinion that inasmuch as the proceedings are still before the High Court in respect of Abhoy Charan Dey, no prosecution should be taken in the Magistrate's Court until at least the final orders of the High Court shall have been obtained. No doubt there was a reference made by the Deputy Collector to the District Judge in respect of the objection to the award made by Durga Das Rakhit and we understand that, in consequence of his absence, that reference has been summarily dismissed. But the matter still remains in regard to Abhoy Charan Dey whose case the Deputy Collector refused to refer. It is difficult to understand how the cases of these two persons claiming to be lessor and lessee can be distinguished and on this ground and because there are proceedings now before the High Court we think that there should be no proceedings at all against either Abhoy Charan Dey or Durga Das Rakhit until orders of the High Court shall have been obtained. We would again point out that in the Magistrate's Court the complaint was made against these two jointly. But any offence committed by each is a distinct and separate offence and should be tried separately. The rule is, therefore, made absolute.

*Rule made absolute.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 381 AND 382 OF 1900.

PRINSEP, J.  
HANDLEY, J.  
1900.  
6, July.

NOWRANGI SINGH and  
two ors., Petitioners,  
and  
RAMAN SINGH and  
ors., Petitioners,  
v.  
THE QUEEN-EMPRESS,  
Opposite Party.

*Penal Code (Act XLV of 1860), secs. 147, 149, 353—Rioting—Obstructing and assaulting a public servant in the execution of his duty—Police Act (V of 1861), secs. 17, 19—Refusal to accompany a police-officer to police-station to receive appointment and badges of special constables, if refusal to serve as such—Arrest made on such refusal, if lawful.*

*Refusal to accompany a police-officer to the police office situated at some distance not for any purpose of Police duty but simply to obtain the authority of appointment to serve as special constables and the necessary badges and arms does not amount to a refusal to serve as special constables and it does not constitute an offence under sec. 19 of the Police Act.*

*An arrest made by a police-officer on such a refusal is not lawful and any resistance offered to such an arrest does not amount to an offence under sec. 353, I. P. Code. When a large number of men assemble with the common object of assaulting or using criminal force to police-officers and of resisting any action on the part of the Police and an unjustifiable assault takes place in the attempt of the Police to make an arrest which may not be lawful, the persons assembled may all be properly found guilty of rioting.*

QUEEN-EMPRESS v. DALIP (1) referred to.

(1) I. L. R. 18 All. 246 (1896).

CHUNDER COOMAR SEN v. EMPRESS (2) explained and distinguished.

This was a rule issued on the 19th of May 1900, against the order of the Sub-divisional Magistrate of Barh, dated the 26th of March 1900, affirmed on appeal by the Sessions Judge of Patna on the 5th of May 1900.

The facts of the case appear fully from the judgment.

*Mr. Abdur Rahim* (In No. 382), *Mr. C. Gregory* (In No. 381), with *Babus Atulya Charan Bose* and *Mahabir Sahay*, for the Petitioners.

*Mr. Leith* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

These are two rules relating to the same trial and it will be more convenient that they should be disposed of simultaneously.

It appears that, in consequence of some combination amongst about 30 villagers in the district of Patna to resist all measures for the prevention or suppression of the plague and an apprehension that a riot was likely to take place, the District Magistrate appointed a considerable number of the principal inhabitants of the village to serve as special constables. To carry out this order, Mr. Baker, Inspector of Police, accompanied by the Sub-Inspector and two constables, went to the village of the Petitioners for the purpose of informing the 3 Petitioners, Nowrangi, Sewbaran and Gangabissen Singh, that they had been appointed special constables under sec. 17 of the Police Act of 1861. On arriving at their village, the police-officers found a large number of people

(2) 3 C. W. N. 605 (1899).

**NOWRANGI SINGH v. THE QUEEN-EMPRESS.**

assembled. Mr. Baker, the Inspector of Police, gave notice that Nowrangi, Sewbaran and Gangabissen had been appointed special constables. Two of these men were known to the Sub-Inspector and it is said that they were pointed out to the Inspector but there is reason to believe that the Inspector did not understand this. It is in evidence that Nowrangi, when asked his name, gave a false name. Mr. Baker then announced that these men were to go with him to the police-station at Baktearpur, which they refused to do. On this, he ordered a Police constable to arrest Nowrangi and, on making the arrest, Nowrangi shook himself free and the villagers, who were assembled and amongst whom were the other Petitioners before us, tumultuously threatened and used criminal force to the police-officers so as to cause them to leave the place. For these acts, the Petitioners have all been convicted under sec. 353 read with sec. 149, I. P. C., that is, of being members of an unlawful assembly in prosecution of the common object of which some member assaulted, or used criminal force to, a police-officer, a public servant, in execution of his duty as such public servant, with intent to prevent or deter such person from discharging his duty as a public servant. Nowrangi, Sewbaran and Gangabissen have also been convicted under sec. 19 of the Police Act of 1861 in that, being appointed special police-officers, they, without sufficient excuse, refused to serve as such or to obey the lawful order of the Inspector. The Petitioners have all been sentenced to 6 months' rigorous imprisonment for the first offence and the three Petitioners just named have also

been sentenced to a fine under the Police Act.

Now, there can be no doubt that Mr. Baker, Inspector of Police, had no authority to arrest Nowrangi Singh and as the Police when obstructed were not acting in lawful discharge of their duty, therefore the Petitioners can, none of them, be properly convicted of an offence under sec. 353, I. P. C. The refusal of Nowrangi to accompany the Police Inspector to Baktearpur was not an offence for which the arrest could have been made. Nor do we think that any refusal of Nowrangi, Sewbaran and Gangabissen to accompany the Police Inspector to Baktearpur constituted an offence under sec. 19 of the Police Act for which they could be punished. It appears that the order was intended, not for any purpose of Police duty but, simply that they might obtain the authority of their appointment and the necessary arms. It seems to us that to require any one who has been appointed a special constable to leave his own occupation and to proceed to some distance for such a purpose is not a reasonable order or one which can be properly called an order connected with the purposes of his duty. Nor do we regard the conduct of these men as a refusal to serve. We think rather that it was simply a refusal to go to Baktearpur, and that there was an opposition to the arrest of Nowrangi in consequence of such refusal. Under such circumstances we think that the conviction and sentence under sec. 19 of the Police Act is bad. It is accordingly set aside.

It remains, however, to consider the other part of the case against the Petitioners. By reason of the terms of their

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conviction, we understand that they are all found to have been members of an unlawful assembly by which the riot was committed. The question then arises whether the facts found constitute the offence of rioting. Mr. Leith, who appears against the rule, has brought to our notice the case of *Empress v. Dalip* (1) and we think that the facts of that case are, in nearly every respect, similar to those of the present case and we concur generally with the rule laid down in that case. Mr. Abdur Rahim who appears on the other side cites as authority to the contrary the cases of *Chunder Coomar Sen* (2) and *Man Gobind Muchi* (3). The last case clearly has no application. In reference to the case of *Chunder Coomar Sen* (2), we would observe that it was there held, as in the case in the Allahabad Court, that the accused could not be properly convicted under sec. 353 when the resistance was to the action of an officer of the civil Court who was not acting under any legal authority. One of the accused in that case was, however, convicted of rioting, but his acquittal was on other grounds. The question was not considered in that case whether any of these persons could properly be convicted of any other offence. That case is, therefore, not opposed to the case in the Allahabad Court.

(1) I. L. R. 18 All. 246 (1896).

(2) 3 C. W. N. 605 (1899).

(3) 3 C. W. N. 627 (1899).

On the facts found, therefore, we are of opinion that the Petitioners should all be convicted of rioting under sec. 147, I. P. C. Their common object was to commit an offence, that offence being to assault or use criminal force to the police-officers and there was no real justification for such proceeding. It was a very dangerous assembly consisting of a very large number of persons whose object, as was shown by their acts, was clearly to resist any action whatsoever on the part of the Police and it was entirely owing to the forbearance of the Police and their withdrawal that no serious consequences took place.

We think, however, that the sentences of six months' rigorous imprisonment passed are too severe, having regard to the cause of the commission of this offence. Although the accused were in our opinion not justified in what they did, we also think that the action of the Police was injudicious and without legal authority and that there was some provocation for the resistance to the arrest of Nowrangi Singh. Under such circumstances, we think that the sentence should be reduced to a sentence of rigorous imprisonment for two months in respect of each of the Petitioners. The fines, if paid by Nowrangi Lall, Sewbaran and Gangabissen, must be refunded.

*Rule made absolute in part.*

H. P. C.

## PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HOBHOUSE.	MAHARAJAH OF
LORD MACNAGHTEN.	BHARATPUR,
LORD LINDLEY,	Plaintiff, Appellant,
SIR R. COUCH.	v.
*SIR HENRY STRONG.	RANI KANNO DEI,
1900.	Defendant, Re-
10, November.	spondent.

*Mortgage—Decree on mortgage—Interest up to date of payment—Transfer of Property Act (IV of 1882), secs. 88 and 97—Civil Procedure Code (Act XIV of 1882), Sch. IV, Form 109—Construction of decree—Ambiguity.*

*Where there is no ambiguity in a decree the duty of the executing Court is to carry the orders of the decree into effect, as being conclusive between the parties, whether it may or may not be disputable in point of law.*

*It is competent for a Court passing a mortgage decree to give interest beyond the date fixed for payment and up to the date of realization.*

*Having regard to the universality of the long established practice to grant such interest, its continuance for years after the Transfer of Property Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting the practice, the conformity with it of sec. 97 which is pari materia with sec. 88, the presumption that sec. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by form No. 109 of Schedule IV, Civil Procedure Code, sec. 88 of the Transfer of Property Act should not be so construed as to limit the power of the Court to grant*

*interest only up to the date fixed for payment.*

AMOLAK RAM v. LACHMI NARAIN (1) *over-ruled*. ACHALABALA BOSE v. SURENDRA NATH DEY (2), SUBBARAYA v. PONNUSAMI (3), and BAKAR SAJJAD ALI v. UDIT NARAIN SINGH (4) *approved*. RAMESWAR KOER v. SYED MAHOMED MEHDI HOSSEIN KHAN AND ORS. (5) *referred to*.

This was an appeal from a decree of the Allahabad High Court, dated 28th July 1898, confirming that of the Sub-Judge of Agra.

The appeal arose out of an application, dated 17th February 1896, for execution of a decree, obtained by the decree-holder, the Appellant, on 7th January 1886. That decree was made in a suit brought by the present Appellant's predecessor in title against the husband of the present Respondent, to enforce a deed of mortgage, dated the 11th of December 1882, executed by him to secure a loan of Rs. 3,00,000. At the date of the suit, the sum claimed as principal and interest amounted to Rs. 3,47,654-9-4, and the Plaintiff prayed that the Defendant should be directed to pay this sum, together with additional interest which might fall due from the date of suit up to the date of payment, on a date to be fixed by the Court, and that in default of payment, the property hypothecated in the deed should be sold by enforcement of the hypothecation lien.

In the present dispute the judgment-debtor, the Respondent, objected to the

(1) I. L. R. 19 All. 174 (1896).

(2) 1 C. W. N. 550: s. c. I. L. R. 24 Cal. 766 (1897).

(3) I. L. R. 21 Mad. 364 (1897).

(4) I. L. R. 21 All. 361 (1899).

(5) 2 C. W. N. 633: s. c. I. L. R. 26 Cal. 43 (1898).

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application for execution of that decree on the ground that interest claimed by the decree-holder after the 20th July 1886, the date fixed by the Court passing the decree for payment of the amount decreed, was not recoverable under the decree.

The decree-holder, on the other hand, contended that he was entitled to interest up to date of realization of the entire amount decreed, that interest up to that date was awarded by the decree and that the judgment-debtor never objected to the payment of the interest claimed on the occasion of two previous applications made after 20th July 1886 for execution of decree wherein interest up to date of payment had been claimed.

The decree of the 7th January 1886 was as follows :—

“It is ordered and decreed that the Plaintiff's entire claim be decreed with interest *pendente lite* on the principal at the rate claimed and costs of the suit. The Plaintiff will get future interest at 8 annas per cent. on the amount of decree and costs. Defendant No. 1 do pay within six months the sum of Rs. 3,00,000 on account of principal, and Rs. 47,657-9-4 on account of interest included in the claim, Rs. 9,487-4-0 on account of interest *pendente lite* at 12 annas, Rs. 781-14-6 on account of future interest at 8 annas up to 20th January 1886, and Rs. 10,826-6-0 on account of interest for six months up to 20th January 1886 at 8 annas, together with the costs of the suit. In the event of default in payment of the entire decretal amount, the hypothecated property be sold by auction in satisfaction of the decretal amount by enforce-

ment of the lien, and in the event of any portion of the decretal amount remaining unpaid, the balance of the decretal amount be recovered from the other property of the debtor, deceased. The amount of decree and costs shall not be a charge on the person and own property of Defendant No. 1. Defendant No. 2 be exempted from liability for the amount of decree and costs, and do bear his own cost. The Plaintiff's debt be considered to have preference and priority over the debt of Defendant No. 2 if found due.

It is further ordered that the said Plaintiff do recover from the hypothecated property Rs. 3,734-15 on account of costs incurred by him in this Court.”

The Sub-Judge of Agra allowed the Respondent's objections with costs.

That decision was supported by the Allahabad High Court on the judgment-creditor's appeal. Chief Justice Kershaw and Mr. Justice Knox deciding as follows :—

“Thus we have before us a decree upon which the decree-holder places one interpretation and the judgment-debtor another and a totally different interpretation. Each claims that the interpretation for which he or she contends is authorised by the operative words of the decree. We have tried to see if those words are capable of being so read as to leave no room for doubt in the mind of the Court executing it what the intention of the Court was which passed the decree. The words by themselves are not a sufficient guide. In one part they seem to point to an intention of the Court to grant all that the decree-holder asked for in his plaint. In another part



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details are given which cover each portion of the relief asked for with the exception of interest to date of payment, and thus the two parts are at conflict. The decree-holder urges that at the time of passing the decree the Court could not have possibly entered any detailed sum as representing what might eventually be due under this head. True, but we should expect that a Court which went into such details as the Court passing the decree did, would not, if it had intended to grant interest subsequent to the date (20th July 1886) have omitted to say, 'together with future interest at 6 per cent. to date of payment,' or words to similar effect. In the face of this conflict we are in the same position as the learned Judges who had to put an interpretation on the decree in *Lachmi Narain v. Amolak Ram* and another, see *Amolak Ram v. Lachmi Narain* (1). In that case the learned Judges held, *first*, that where it is possible to do so, the construction to be placed upon a decree is that construction which would make the decree one in accordance with the law; and, *secondly*, that if a decree goes beyond what the law allows and leaves no room for doubt as to the construction to be placed upon it, then the Court executing the decree has no option but to execute it for the sum decreed, even though it be a sum beyond what the law allows. Strenuous efforts were made to get us to reconsider the principles of construction laid down in *Amolak v. Lachmi Narain* (1), and we were referred to the case of *Achalabala Bose v. Surendra Nath Dey* (2). We have considered the report

(1) L. L. R. 19 All. 174 (1896).

(2) 1 C. W. N. 550: s. c. I. L. R. 24 Cal. 766 (1897).

of that case, and we must say that we do not find ourselves oppressed with the difficulty which the learned Judge, who decided *Achalabala Bose v. Surendra Nath Dey* (2) found when he attempted to reconcile the provisions of sec. 90 with secs. 86 and 88 of the Transfer of Property Act. The words 'amount due for the time being on the mortgage' may well have been introduced into sec. 90 to meet the contingency of certain sums having been paid by or on behalf of the mortgagor anterior to the sale mentioned in the section, and those sums not sufficient to satisfy the sum which had been found due under sec. 86. In our opinion all the provisions of secs. 89, 90, 94 and 97 are in harmony with the interpretation which has been placed by this Court on secs. 86 and 88 of the Transfer of Property Act. It is true the form 109 in the 4th schedule to the C. P. C. does contemplate that in an action for sale the Defendant may be made personally liable to pay interest until realisation. That form was first introduced by Act No. X of 1877, and has been reproduced in Act No. XIV of 1882 *totidem verbis*. It may be, that the forms in the fourth schedule were not as carefully scrutinized as they might have been. We know not. Whatever the cause, we should need some stronger authority than is to be derived from a form which may be varied to suit the circumstances of each case, to overrule what appears to us to be the clear meaning of secs. 86 and 88 of the Transfer of Property Act. Sec. 209 of the Civil Procedure Code applies only to decrees for the payment of money, and is in our opinion inapplicable to

(2) 1 C. W. N. 550: s. c. I. L. R. 24 Cal. 766 (1897).

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decrees for sale of property. The decree then which would have been a legal decree in this case, would have been one, which contained no provisions for interest after 21st July 1886, and we hold that the word "entire" which alone renders the meaning doubtful, must be read in the light of the details which follow and be governed in its meaning by them."

*Mr. Arthur Cohen, Q. C., and Mr. Ross* for the Appellant.

*Mr. Mayne* for the Respondent.

*Mr. Cohen* contended that the decree of the 7th July 1886 should be construed as awarding interest not merely until 20th July 1886, but until realization, and that construction would make the decree according to law. He referred to secs. 58, 86, 88, 89 and 90 of the Transfer of Property Act. He mentioned that the case of *Amolak Ram v. Lachmi Narain* (1) referred to in the High Court's judgment was dissented from in another and a later case, *Bakar Sajjad Ali v. Udit Narain Singh* (4). See also *Subbaraya v. Ponnusami* (3).

*Mr. Mayne* said the only matter he was going to argue was as to the true construction of the decree; he was not going to support the decision in *Amolak Ram* in the 19th Allahabad Series. \*

**LORD HOBHOUSE** to *Mr. Cohen*.—It seems to me a clear case; a date is fixed for the payment of the money with interest; it is not paid on that day; the interest surely runs on it. Is there any section to show that it ceases?

*Mr. Cohen*.—No, my Lord.

*Mr. Mayne* contended that the C. P. C.

gives a special form for a plaint in such a claim. See form 109. The Plaintiff did not choose to adopt that form; he did not claim any interest beyond date fixed for payment. In the decree no mention is made of interest after that date. The Court followed the plaint giving all that Plaintiff asked for. If Court was wrong, the decree should have been rectified; the Court has no power to do so in execution. Whether the Plaintiff intentionally abandoned any further claim in reliance with the Allahabad decision or for other reason did not matter; he did not ask for more and got only what he sought to secure.

**LORD HOBHOUSE**.—He asked up to date of payment and desired the Court to fix the date of payment. Can you say such a prayer is one abandoning all claim to interest after date of payment fixed?

*Mr. Mayne*.—The Plaintiff has taken the same view the Allahabad High Court has twice taken.

**LORD HOBHOUSE**.—Is there any creditor in India who would consider that the date of payment is the same as the date for order of payment? The High Court in this case has followed a previous decision of that Court which you don't support.

*Mr. Mayne*.—I say you cannot give in execution more than what Plaintiff sought to recover and was awarded.

Their Lordships did not call upon *Mr. Cohen* for a reply, but reserved judgment.

Their LORDSHIPS' JUDGMENT was delivered by

**LORD HOBHOUSE**.—This is an appeal from an order made in execution proceed-

(1) I. L. R. 19 All. 174 (1896).

(3) I. L. R. 21 Mad. 364 (1897).

(4) I. L. R. 21 All. 361 (1899).

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ings. The Plaintiff, now Appellant, is a mortgagee; and the Respondent represents the mortgagor who was Defendant and is dead. The mortgage was made on the 11th December 1882 to secure three lacs of rupees. The mortgagor failed to pay, and the mortgagee filed a plaint which is not in the Record, but which from the Subordinate Judge's recital in his judgment appears to have been of an ordinary nature, praying for payment of principal and interest on a day to be fixed by the Court, and for sale in default of payment. The frame of the suit however, so far as it explains the decree, is most properly taken from the decree itself on the construction of which the whole case turns.

The decree bears date the 7th January 1886. It will make the discussions on it clearer if the material expressions in it are arranged under separate heads. (See Rec. pp. 58, 59).

"(a) The Plaintiff seeks the following reliefs: That the principal and interest due up to this time, together with such further interest as may accrue due from the date of the filing of the plaint up to the date of payment, and also the costs of this suit with interest thereon up to the date which may be fixed by the Court may be ordered to be paid;

"(b) It is ordered and decreed that the Plaintiff's entire claim be decreed;

"(c) With interest *pendente lite* on the principal at the rate claimed and costs of the suit;

"(d) The Plaintiff will get future interest at 8 annas per cent. on the amount of decree and costs;

"(e) Defendant do pay within six

months the sum of Rs. 3,00,000 on account of principal;"

Then follow directions for payment within the six months of specified sums of money under different heads: I. Interest included in the claim, *i.e.*, up to date of suit; II. Interest *pendente lite* at the rate of 9 per cent.; III. Future interest to 20th January 1886 at 6 per cent.; IV. Future interest to 20th July 1886 at 6 per cent.; V. Costs of suit.

"(f) In the event of default in payment of the entire decretal amount, the hypothecated property be sold by auction in satisfaction of the decretal amount by enforcement of the lien, and in the event of any portion of the decretal amount remaining unpaid, the balance of the decretal amount be recovered from the other property of the debtor deceased."

The Plaintiff has made applications for execution from time to time under which he has realised large sums. The last application was made on the 14th April 1896, and on that occasion the Defendant for the first time raised the objection that according to the decree no interest is payable subsequently to the day fixed for payment of the specified sums, *viz.*, the 20th July 1886.

On the 25th September 1897 the Subordinate Judge, who was not the Judge who made the decree of 1886, allowed the objection. His reason is given thus:

"It is an admitted fact that the Plaintiff claims to recover interest even after the 20th of July 1886, which was the date fixed by the Court for the payment of the mortgage money under Sec. 88 of Act 4 of 1862. I have read the judgment and the decree of the original

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suit and they are as clear and specific in awarding interest to the Plaintiff up to the 20th of July 1886 as could be desired. Neither of these documents admit of any doubt, and I hold that according to those documents the decree-holder is entitled to interest up to the 20th of July 1886, but not after that."

The learned Judge does not further examine the language of the decree, but his decision that it excludes interest after the 20th July 1886 can only be supported by holding that the enumeration of sums specified under head (e) to be paid on that day in order to avoid a sale under head (f) has the effect of cutting down the general terms of heads (a) (b) (c) (d) which if not so cut down would give interest to the day of payment.

On appeal the High Court affirmed the decision of the Subordinate Judge. The learned Judges take a different line of reasoning. They do not find the decree so clear against the Plaintiff as it appeared to the Subordinate Judge. Their difficulties, and with them the precise ground of their decision will be best stated in their own words:—

"Thus we have before us a decree upon which the decree-holder places one interpretation and the judgment-debtor another and a totally different interpretation. Each claims that the interpretation for which he or she contends is authorised by the operative words of the decree. We have tried to see if those words are capable of being so read as to leave no room for doubt in the mind of the Court executing it, what the intention of the Court was which passed the decree. The words by themselves are not a sufficient guide. In one part they seem to point to an intention of the Court to grant all that the decree-holder asked for in his plaint. In another part details are given which cover each portion of the relief asked for with the exception of interest to date of payment, and thus the two parts are at conflict. The decree-holder urges that at the time of passing the decree the Court could not have possibly entered any detailed sum as representing what might

eventually be due under this head. True, but we should expect that a Court which went into such details as the Court passing the decree did, would not if it had intended to grant interest subsequent to the date (20th July 1886) have omitted to say, 'together with future interest at 6 per cent. to date of payment,' or words to similar effect. In the face of this conflict we are in the same position as the learned Judges who had to put an interpretation on the decree in *Lachmi Narain v. Amolak Ram* and another [see *Amolak Ram v. Lachmi Narain* (1)]. In that case the learned Judges held, 1st, that where it is possible to do so the construction to be placed upon a decree is that construction which would make the decree one in accordance with the law; and, 2ndly, that if a decree goes beyond what the law allows and leaves no room for doubt as to the construction to be placed upon it, then the Court executing the decree has no option but to execute it for the sum decreed, even though it be a sum beyond what the law allows."

In the case referred to it was laid down that under sec. 88 of the Transfer of Property Act, which prescribes the nature of the decree to be made in a suit by a mortgagee for sale, it is not competent for the Court to give interest beyond the day fixed for payment into Court of the amount declared necessary to effect redemption and to avoid sale. The view of the High Court then is quite clear in its application to the decree in this suit. They think that the specifications under head (e) are inconsistent with the results which would otherwise follow upon heads (a) (b) (c) and (d); there is therefore a serious ambiguity in the decree: and they are bound to incline to that construction which would make it in accordance with law, rather than to the opposite one.

Their Lordships agree that all ambiguous documents should be construed rather to make them accord with law

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than to make them conflict with it. But they are unable to see any such ambiguity in this decree as to call for the application of that principle. In their view the foundation of the decree is contained in head (b). That head decrees the entire claim of the Plaintiff. The claim so decreed is set forth in head (a). It is principal and interest due to the date of the plaint, plus interest to accrue due between the date of the plaint and the date of payment, plus the costs of suit with interest thereon up to the date which may be fixed by the Court. The Plaintiff seeks that all this shall be ordered to be paid. The sentence is not happily constructed, but such is the reasonably clear outcome of it. Then heads (c) and (d) mention "interest subsequent to date of suit. There is a reason for that, because the sums of interest allowed, first, up to date of suit; secondly, between that date and the decree (*pendente lite* as it is called), and, thirdly, after decree, differ in point of rate. All the same these two heads are included in the Plaintiff's entire claim. Then comes head (e). In it the Court calculates beforehand, instead of leaving for subsequent account, the amounts which the mortgagor must pay on 20th July in order to redeem his property and avoid a sale. If he does not pay, the further part of the decree head (f) is to be executed. But there is nothing to say that if the mortgagee is kept out of his money beyond 20th July he is not to have interest upon it; nor any intimation that the Court considered the relief given by the first four heads to be restricted by head (e). As then there is no inconsistency, the duty of the exe-

cuting Court is, as the High Court rightly points out, to carry the orders of the decree into effect, as being conclusive between the parties whether it may or may not be disputable in point of law.

Apart from the question whether the Court could lawfully give interest to the day of payment, the only difficulty of construction suggested by the learned Judges is the omission of words equivalent to "with future interest to the day of payment." But it is not clear what difficulty this omission creates, nor at what point those words should be expected to come in. They could not come into head (e) because that relates only to the period terminated by the 20th July. Head (f) does not specify any particulars but uses the term "decretal amount." It is true that the term is used rather loosely, and has to be applied to subsequent changes of event. On its first appearance it does mean the sums specified under head (e) because it is then referring to the 20th July, the critical moment which is to determine whether there shall be redemption or sale. On its subsequent appearances the Court might with propriety have used the words the omission of which has struck the High Court as strange. But there is no inconsistency or indeed difficulty in supposing that the term "decretal amount" means the amount due whenever the decree is speaking or being called into action under heads (a) (b) (d). It is far more difficult to suppose that the Court though contemplating a sale, and more than one sale, with the inevitable delays, before the debt could be got in, should at each successive time have considered the "decretal amount" to be the amount

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required on 20th July in order to avoid any sale at all.

This view of the decree is sufficient to decide the present appeal. But a question of such great and general importance has been raised by the judgment of the High Court that their Lordships cannot with due regard to public convenience avoid passing an opinion on it. If the effect of the Transfer Act be as alleged, it works a startling abridgment of the remedies of mortgagees as previously understood. So far as appears from reported cases, or from anything known to the counsel who argued this appeal, it was a new discovery in the year 1896 when the case of *Amolak Ram* (1) was decided, and when the execution now under discussion was applied for. It is, therefore, not surprising that other Courts should have felt difficulty in following the Allahabad decision.

Mr. Mayne rather flatly refused to argue his case on the ground that the decree of 1886 would be illegal if construed in favour of the Plaintiff's view. But the authorities cited by Mr. Ross show strong judicial reasons against taking such a ground. To the report of *Achalabala Bose v. Surendra Nath Dey* (2) there is appended a note by the Registrar of the High Court of Calcutta setting forth the rules of that Court and the practice under them, and the effect which the principle of the Allahabad decision would produce on the prevailing views of mortgagee's rights. When the last-named case came to be decided, which was in July 1897, the Calcutta High Court pointed out not only a departure

from received practice in the Allahabad view of sec. 88 of the Transfer Act, but its inconsistency with sec. 97 of that Act and with the form of suit sanctioned by No. 109 in the 4th schedule of the Procedure Code of 1882. And on this more extended view of the law they decided that the prevailing practice is a lawful practice, and that sec. 88 should be construed so as not to interfere with it. The same question came before the High Court of Madras in the case of *Subbaraya v. Ponnusami* (3) when that Court expressed dissent from the Allahabad decision.

In the recent case of *Bakar Sajjad Ali v. Udit Narain Singh* (4) the High Court of Allahabad itself overruled the decision in *Amolak Ram's* case. Perhaps they rested undue weight on a decision of this Board. It is true that in the case of *Rameswar Koer v. Syed Mahomed Mehdi Hossein Khan and others* (5), decided in July 1898, this Board upheld the High Court of Calcutta in awarding interest subsequent to the date fixed for payment by the mortgagor, which would have been wrong if the decision in *Amolak Ram* had been right. But that point was not raised, and probably never was thought of by anybody until *Amolak Ram's* case came to be known, so that the decision of this Board is rather a proof of the prevalence of doctrines contrary to the principle of *Amolak Ram* than a conscious pronouncement against it. Nevertheless the Allahabad Judges in giving their decision add a reason of their own for overruling

(3) I. L. R. 21 Mad. 864 (1897).

(4) I. L. R. 21 All. 361 (1899).

(5) 2 C. W. N. 683: a. c. I. L. R. 26 Cal. 43 (1898).

(1) I. L. R. 19 All. 174 (1896).

(2) 1 C. W. N. 550: s. c. I. L. R. 24 Cal. 766 (1897).

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*Amolak Ram*, which seems to their Lordships of importance, to the effect that the object of fixing a day for payment by the mortgagor is for the purpose of assigning a definite time at which the mortgagor's right of redemption is to cease, and the mortgagee's right to foreclose or sell is to attach, and not for the purpose of staying the payment of interest.

It must be admitted that the language of sec. 88 is calculated to cause difficulty, and a sort of difficulty which is a common cause of conflict in judicial interpretations of new statutes. It looks as if the draftsman of the Transfer of Property Act had overlooked the difference between a foreclosure and a sale, and had forgotten that in the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases is subject to long delays. However that may be, there is the difficulty, and if sec. 88 could be looked at as an isolated enactment quite detached from other legal considerations, it would be hard to construe it otherwise than was done by the Allahabad Court in the case of *Amolak Ram*. But considering the universality of the long established practice, its continuance for years after the Transfer of Property Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting it, the conformity with it of sec. 97 which is in *pari materia* with sec. 88, the presumption that sec. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by the Procedure Code, their

Lordships have no hesitation in expressing their concurrence with the Courts of Calcutta and Madras, and with the ultimate decision of the Court of Allahabad.

Their Lordships are of opinion that the order appealed from and that of the Subordinate Judge should be discharged, and that the case should be remitted to the Subordinate Judge for execution of the original decree with a declaration that, according to the proper construction of that decree, the Plaintiff is entitled to interest at 8 annas per cent. up to the date of payment. The Plaintiff should have his costs in both Courts. Their Lordships will humbly advise Her Majesty to pass an order accordingly, and the Respondent must pay the costs of this appeal.

*Messrs. Barrow Rogers & Nevill*, Solicitors for the Appellant.

*Messrs. Ranken Ford & Co.*, Solicitors for the Respondent.

*Appeal allowed with costs.*

C. W. A.

## [CIVIL REVISIONAL JURISDICTION.]

RULE No. 750 OF 1900.

AMEER ALI, J.	}	SUJAN BIBI, Decree-
BRETT, J.		holder, Petitioner,
1900.		v.
18, April.		SAGAR MANDAL.

*Civil Procedure Code (Act XIV of 1882), sec. 342—Imprisonment for debt—Period of imprisonment—Jurisdiction.*

*The Court cannot fix any term of imprisonment for a debt under sec. 342, Civil Procedure Code, when committing a debtor to jail.*

*SUBUDHI v. SINGI (1) followed.*

(1) I. L. R. 13 Mad. 141 (1889).

SUJAN BIBI v. SAGAR MANDAL.

This was a rule issued on the 26th of March 1900, against the orders of the Munsif, 2nd Court, Maldah, dated respectively the 17th and 19th March 1900

The facts of the case are as follows:—

The decree-holder on the 29th of January 1900 obtained a decree for the sum of Rs. 800-7-3 against the judgment-debtor and applied for execution of the decree in the Court of the 2nd Munsif at Maldah by the arrest and imprisonment of the judgment-debtor. On the 17th March 1900 the judgment-debtor was brought before the Court under arrest and on his not notifying an intention to apply to be declared an insolvent, he was ordered on the said day to be placed in the Civil jail for one month only.

On the 19th March 1900 the decree-holder applied to the Court to enhance the term of imprisonment to six months but the learned Munsif rejected the said application. Thereupon the present rule was obtained.

*Babu Joy Gopal Ghosh* for the Applicant.

No one for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

This rule was issued calling upon the judgment-debtor to show cause why the orders of the Munsif, dated respectively the 17th and 19th March 1900, should not be set aside or such other order passed as to this Court may seem fit.

The circumstances under which the rule was obtained are as follows:—The decree-holder who is the Petitioner before us applied for execution of his decree against the judgment-debtor, and upon his being brought up, the Court directed

that he be committed to jail for one month only. On the 19th the decree-holder applied to the Munsif to enhance the term of imprisonment to six months; and the Munsif recorded this order:—

“Decree-holder's application to enhance the term of imprisonment to six months is rejected. I think under the law the Court has discretion to fix the term of imprisonment so as not to exceed “six months which is only the maximum fixed by law.”

The application of the decree holder was undoubtedly wrong, namely, to enhance the term of imprisonment to six months. But it is also clear that the Munsif was wrong, when committing the judgment-debtor to prison, in fixing any period during which he should remain in jail. No cause has been shown by the judgment-debtor upon whom service of the rule has been proved. We find that the same question came before the Madras High Court in the case of *Subudhi v. Singi* (1), and we agree with the view taken there, that the Court has no authority to fix any term of imprisonment when committing a debtor to jail.

We accordingly direct that the words “for one month only” in the order of commitment be struck out, and that the record be returned to the lower Court.

*Order amended.*

S. C. S.

(1) I. L. R. 13 Mad. 141 (1889).



## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 1284 of 1898.

RAMPINI, J.	}	SRI NARAIN CHOWDHRY,
PRATF, J.		Plaintiff, Appellant,
1900.		v.
3, April.		JODOO NATH CHOWDHRY,
		Defendant, Respondent.

*Right of privacy—Suit to prevent opening of windows—Usage, proof of.*

*In a suit for closing the window on the wall of the Defendant and for the issue of a permanent injunction restraining the Defendant from opening any windows in future in that wall, on the ground that the privacy of the Plaintiff had been interfered with, it was proved that it had not been usual for windows to be opened out in any one house in the village so as to overlook the female apartments of another but not that the villagers had been in the habit of preventing their co-villagers from opening windows in such a manner :*

Held—That the usage as to the right of privacy was not proved.

*That the fact that the Defendant's wall had been standing there over 50 years and during this period no window had been opened was not sufficient to give the Plaintiff a prescriptive right to prevent the Defendant opening a window in that wall.*

This was an appeal preferred on the 29th of June 1898, against the decree of J. Windsor, Esq., Officiating Judge of Zillah Burdwan, dated the 4th of April 1898, reversing the decree of Babu Promotho Nath Chatterji, Munsif, 3rd Court of Burdwan, dated the 11th of March 1897.

Plaintiff and Defendant are distant cousins and owner of adjoining houses.

Defendant opened a window in a wall of his *baitakhana* overlooking the female apartment of the Plaintiff and it was alleged that the Defendant intended to open several other similar windows in the same wall. Plaintiff sued for having the window already opened to be closed and preventing the Defendant from opening any other window. It was admitted that one Gauri Charan Chowdhury was the common ancestor of both parties and that the site of the dwelling-houses of both parties belonged to Gauri Charan and after his death it was divided, one portion falling to the share of Plaintiff's immediate ancestor and another to that of Defendant's ancestor. It was also an admitted fact that no window or any other opening of any sort existed in the wall in question. The first Court was of opinion that on the opening of windows in that wall the privacy of the female members of Plaintiff's family, who were *purdanashin* ladies, would be seriously interfered with. The learned Munsif found that a local usage existed under which one could not open a window in any part of his male apartment so as to interfere with the privacy of the female apartment of the owner of the adjoining house. From the fact that the original house was partitioned into two shares in such a manner that the male apartment of one co-sharer holder adjoined the female apartment of another, the Munsif made a presumption to the effect that there was an undertaking on the part of the former not to open any windows overlooking the female apartment of the other. It was also found that the Plaintiff had enjoyed non-interference with the privacy of his female apartment for over 50 years ; the first Court therefore

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held that the Plaintiff acquired the right of easement he claimed and that a previous grant might be presumed. The Plaintiff's suit was accordingly decreed. Defendant preferred an appeal to the lower Appellate Court. In the opinion of the District Judge the Plaintiff had not proved any grant or special permission. He, after reviewing certain cases, decreed the appeal in the following words:—

I cannot hold that the fact that the building has stood for many years without windows in this wall can give Plaintiff any cause of action, such as would arise, were the right to privacy an inherent right like the right to ancient lights and air. Express local usage then is the sole ground on which this suit can rest. Now there is some evidence that in the village in which the parties reside and in a few neighbouring villages certain persons were prevented from opening doors and windows which would have interfered with the privacy of others; and that it is the custom in these villages for privacy not to be interfered with in the way in which the Defendant has interfered with the Plaintiff's privacy. But having regard to the fact that there is not a single reported case in Bengal of such a local usage being proved since 1865; and having regard to the provisional manner in which the learned Judges Markby and Glover [*Abdur Rahim v. Birju Sahu* (2) and *Sheikh Gulum Ali v. Kazi Mahomed Zuhur Alum* (3)] expressed themselves respecting the supposed right of privacy even were express local usage proved, I cannot hold that the Plaintiff in this case has discharged the burden of proof placed upon him. The mere fact that it is not the custom of the village for windows to be opened overlooking another's *zenana*, cannot in my opinion give Plaintiff a right to prevent the Defendant from opening windows in his wall as he may think fit. The obvious remedy was noticed by the learned Judges of the Calcutta High Court in the cases referred to by me. The Plaintiff may put up any screen or wall on his property to protect himself from annoyance. Following therefore the rulings of the Honourable Calcutta High Court, I am bound to come to the conclusion that the lower Court was wrong in finding that the Plaintiff had any right of privacy acquired

by express local usage or otherwise. I decree the appeal with costs of both Courts.

Plaintiff preferred this second appeal.

*Babu Umakali Mukherjee* for the Appellant.

*Babu Nalini Ranjan Chatterjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the Officiating District Judge of Burdwan, dated the 4th April 1898.

The suit is one in which the Plaintiff seeks to prevent the Defendant from opening a window in his house, which would overlook the Plaintiff's female apartments and so disturb his right of privacy. The Plaintiff maintains that he has acquired this right by prescription, by local custom and by express grant. The Defendant traversed these allegations; and the suit was decreed by the Munsif, who held that the Plaintiff had established the right set up by him by local custom as well as by prescription relying, it would seem to us, very much on the case of *Gopal Prasad v. Rudho* (1).

The Defendant then appealed to the District Judge; and the District Judge reversed the Munsif's decision.

The Plaintiff now appeals to this Court. The learned District Judge has held that the Plaintiff has not proved any grant or special permission in his favour, entitling him to prevent the Defendant from opening a window in the wall of his house. He does not deal with the Plaintiff's claim to this right by prescription; but he finds that the Plaintiff has not established such a right by local usage.

(2) 5 B. L. R. 376 (1870).

(3) 6 B. L. R. App. 76 (1871).

(1) I. L. R. 10 All. 353 (1883).

## SRI NARAIN CHOWDERY v. JODOO NATH CHOWDERY.

The learned pleader for the Appellant in this Court urges, *first*, that the learned Judge, in coming to this finding that the Plaintiff has not established the right claimed by him by local usage, has done so on wrong grounds; and, *secondly*, he has urged (although, perhaps not very strongly) that the Judge should have held that the Plaintiff has acquired the right to the privacy of his female apartments by prescription.

We think, however, that the decision of the learned Judge is right. He begins by reviewing the cases on the subject, both in the Allahabad High Court and in this Court, and he points out that there is a great difference between the law on the subject of privacy, as prevailing in the North-Western Provinces and as prevailing in this province. According to the rulings of this Court, there is in Bengal no inherent right to privacy and it has been laid down in several cases that such a right can arise in this province, if it can arise at all, only by express local usage, by grant, or by special permission. Now, as has been said before, the Judge has clearly and expressly found that the Plaintiff has not proved any grant or special permission, and the pleader for the Appellant does not attempt to impugn this finding. He, however, attacks the finding of the Judge that the Plaintiff has not been able to establish the local usage which he sets up so as to entitle him to prevent the Defendant from opening a window in his wall. And he does so on two grounds, *first*, the Judge states that he cannot believe the evidence adduced by the Plaintiff on this point, having regard to the fact that there is not a single

reported case in Bengal since 1865 of such a local usage being proved; and, *secondly*, because the Judge says:—"The mere fact that it is not the custom of the village for windows to be opened overlooking another's *zenana* cannot, in my opinion, give the Plaintiff the right to prevent the Defendant from opening windows in his wall as he may think fit."

We are of opinion, that when the learned Judge adverted to the fact that there is not a single reported case in Bengal since 1865 of such a local usage being proved he merely meant to say that in consideration of this circumstance it would require strong proof of such custom to satisfy him that such local usage could exist, or did exist in the village in question. And with regard to the passage from his judgment which has been cited above, we think what he means to say is, that the mere fact that it is not the custom in the village for windows to be opened overlooking another's *zenana* cannot, in his opinion, vest in the Plaintiff the right of preventing the Defendant from opening a window in his wall. From this we understand, that the evidence adduced by the Plaintiff is merely that it has not been usual for windows to be opened out in the village so as to overlook the female apartments of any hut but that the evidence does not go so far as to show that the villagers have been in the habit of preventing their co-villagers from opening windows in such a manner. Such in our opinion being the views of the District Judge, we are unable to see that there is any thing incorrect in them or that he has come to the conclusion at which he has arrived by a wrong method.

SRI NARAIN CHOWDHRY v. JODOO NATH CHOWDHRY.

We may deal very shortly with the Plaintiff's claim to the right by prescription, which he certainly set up in the Court of first instance, but which does not seem to have been pressed before the District Judge. In the first place, such a right admittedly cannot be claimed under sec. 26 of the Limitation Act. It further appears to us to be clear that in the circumstances of the case it could not be established by the Plaintiff. What the Plaintiff says is that the Defendant's wall has been standing there over 50 years and during this period no window has been opened in it. But that would not be sufficient to give the Plaintiff a prescriptive right to prevent the Defendant opening a window in that wall. Had the Plaintiff been able to establish (which he does not pretend to be able to do) that for a long period, sufficient to establish a right by prescription, he has been exercising the right of preventing the Defendant from opening such a window, that might establish a prescriptive right, such as he claims. But that is not the case here. He does not set up such a right or pretend to be able to establish it by evidence.

Under these circumstances, we see no grounds for interfering with the decision of the lower Appellate Court and we dismiss this appeal with costs.

*Appeal dismissed.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 119 OF 1900.

PRINSEP, J.

HILL, J.

1900.

5, December.

SHEIK JAFAR, Judgment-debtor, Appellant,

v.

KAMALINI DEBI, Decree-holder, Respondent.

*Civil Procedure Code (Act XIV of 1882), secs. 223, 649—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), secs. 18, 17—Execution of decree—Jurisdiction, transfer of, of Court—Limitation Act (XV of 1877), sec. 14.*

*An execution of a decree of the Court of the Munsif of Nawabgunge having been taken out in the Court of the Munsif of Maldah by reason of transfer of the local jurisdiction of the former by the Local Government under Act XII of 1887, a sum of money was paid in part satisfaction. A second application was objected to on the ground that the Maldah Court had no jurisdiction. A fresh application with a certificate transferring the decree from the Nawabgunge Court was resisted on the ground of limitation :*

*Held—That the Nawabgunge Court did not cease to have jurisdiction but that the decree could also be executed by the Maldah Court.*

LUTCHMAN PANDEH v. MADDAN MOHUN SHYE (2) referred to.

KALIPADO MUKERJEE v. DENO NATH MUKERJEE (1) distinguished.

*Held further—That proceedings to enforce a decree taken bonâ fide before a Court which the party bonâ fide believes to have jurisdiction is a proceeding within*

(1) I. L. R. 25 Cal. 315 (1897).

(2) I. L. R. 6 Cal. 513 (1880).

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*the meaning of sec. 14 of the Limitation Act.*

**HIRA LAL v. RADRI DAS (3) referred to.**

This was an appeal preferred on the 6th of April 1900, against an order of Alfred F. Steinberg, Esq., District Judge of Rajshahye, dated the 15th of December 1899, affirming an order of Babu Jadab Chunder Bhattacharjee, Munsif, 2nd Court, at Maldah, dated the 3rd of July 1899.

The facts of the case appear from the judgment.

*Babu Kali Kishen Sen* for the Appellant.

*Babus Karuna Sindhu Mukerjee and Surendra Nath Ghoshal* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

The decree sought to be executed in this case was made by the Court of the Munsif of Nawabgunge, but the local jurisdiction in respect of the subject-matter of the suit appears to have been subsequently transferred, by order of the Local Government, to the Court of the Munsif of Maldah. Nevertheless the decree-holder took out execution of his decree, within the time fixed by the law of limitation, in the Maldah Court, and in the course of execution, a sum of money was paid towards liquidation of that decree. A second application for execution was made in February 1899 in the same Court, but the decree-holder was referred to the Nawabgunge Court, as being the Court which had passed the decree and which was alone competent to

execute it in order that an application might be made for the transfer of the decree for execution by the Munsif of Maldah. When an application for execution was made to the Munsif of Maldah, on a certificate transferring the decree to him, the judgment-debtor pleaded limitation. The Munsif overruled that plea and gave the decree-holder the benefit of cl. 3 of sec. 14 of the Limitation Act, holding that he was entitled to a deduction of the time during which the application erroneously made to the Munsif of Maldah had been pending as he held that such proceedings had been taken in good faith. The District Judge, on appeal, expressed a contrary opinion, holding that ignorance of the law on the part of the decree-holder would not constitute good faith. The District Judge, however, on other grounds affirmed the order of the Munsif, holding that the proceedings erroneously taken in the Maldah Court were not absolutely void, but voidable, and that the judgment-debtor having condoned the error committed by the decree-holder and having accepted the jurisdiction by making part payment of the decree, the proceedings were saved under sec. 14 of the Limitation Act.

The first question raised before us in this appeal is, what Court was competent to execute this decree and it is contended that the Court of the Munsif of Nawabgunge was alone competent to execute it being the Court which passed it within the terms of sec. 223 of the Code of Civil Procedure; and it was also contended that although the Munsif of Maldah might now alone have jurisdiction to try the suit by reason of the

(3) I. L. R. 2 All. 792 : s. c. L. R. 7 I. A. 167 (1880).

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transfer to his jurisdiction of the locality in which the subject-matter of the suit is situated, he would not be the Court to have jurisdiction to execute the decree passed by the Munsif of Nawabgunge. As authority for this we have been referred to the case of *Kalipado Mukerjee v. Deno Nath Mukerjee* (1). That case, however, is distinguishable from the present for it was held there that the District Judge's order under cl. 2 of sec. 13 of the Bengal Civil Courts Act did not amount to a transfer of jurisdiction but was merely an order for the distribution of business amongst two Courts each having jurisdiction. In the present case, however, the order of transfer was of a different character. It was an order by the Local Government which adjusted the boundaries of two adjoining monzahs, so as to place the lands, the subject-matter of the suit within the jurisdiction of the Munsif of Maldah. There was therefore no mere redistribution of business, as in the case of *Kalipado Mukerjee v. Deno Nath Mukerjee* (1), but a removal of jurisdiction over this locality. The case of *Lutchman Pandeh v. Maddan Mohun Shye* (2) seems to us more appropriate in dealing with the terms of sec. 649 of the Code of Civil Procedure. It was there held that the terms of that law were permissive, and that, applying that judgment to the facts of the present case, the Munsif of Nawabgunge did not cease to have jurisdiction in the matter of the execution of the decree, but that the decree might also be executed by the Munsif of Maldah. This interpretation

seems to us to be in accordance with sec. 17 of the Bengal Civil Courts Act, we think, therefore, that the proceedings in the Court of the Munsif of Maldah were not without jurisdiction so as to have the effect of barring the present application as not made within the period of limitation.

We are also of opinion that the grounds upon which the District Judge has held that the time occupied in the proceedings taken by the decree-holder in the Maldah Court should not be excluded are unsound. He has held that ignorance of law, that is to say, ignorance on the part of the decree-holder to know that his application for execution could only be made in the Court of Nawabgunge in which the decree was passed, and that the Maldah Court had no jurisdiction to execute that decree, prevented his pleading good faith within the terms of sec. 14 of the Limitation Act. The case of *Hira Lal v. Badri Das* (3) is an authority to the contrary. It was there held that proceedings taken erroneously in a Court which had no jurisdiction but which was believed by the decree-holder to have jurisdiction were *bona fide*. Their Lordships of the Privy Council pointed out in that case that the Judge himself believed he had jurisdiction and acted accordingly, so also in the present case.

The appeal is therefore dismissed with costs, two gold mohurs.

*Appeal dismissed with costs.*

C. C. G.

(3) I. L. R. 2 All. 792: s. c. L. R. 7 I. A. 167 (1880).

(1) I. L. R. 25 Cal. 315 (1897).

(2) I. L. R. 8 Cal. 513 (1880).

## PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR R. COUCH.

1900.

8, December.

RAJ. RADHA KISSEN,

Plaintiff, Appellant,

v.

THE COLLECTOR OF

JAUNPORE, Defend-

ant, Respondent.

*Civil Procedure Code (Act XIV of 1882),  
sec. 108, 562, 594, 595 (a)—Ex parte decree  
—Appeal from order refusing application  
under sec. 108, Civ. P. C.—Remand under  
sec. 562, Civ. P. C., appeal from order of—  
Sec. 562, Civ. P. C., what can be remanded  
under—Final order—Interlocutory order.*

*In an appeal from an order refusing  
to set aside a decree under sec. 108, Civ.  
P. C., on the ground that that section did  
not apply, the only case which can be  
remanded by the appeal Court, to be tried  
on its merits, is the application under  
sec. 108, and not the original case, the  
decree in which is sought to be set aside.*

*Such order of remand is merely an  
interlocutory order relating to procedure  
and no appeal lies therefrom.*

*The mere fact that the High Court  
have certified the sufficiency of the amount  
and the value of the suit for an appeal  
to the Privy Council, cannot make appeal-  
able an order which does not fulfil the  
statutory conditions.*

*This was an appeal from a judgment  
of the Allahabad High Court, dated the  
23rd December 1897.*

*The questions raised in this appeal  
were whether the decree complained of  
was an ex parte decree or not and whether  
an appeal to Her Majesty in Council lay  
in this case.*

*The High Court of Allahabad had re-  
versed the decision of the Subordinate  
Judge of Benares and the appeal came*

*on under the usual certificate granted by  
the High Court that the case was a fit  
one for appeal under sec. 596, C. P. C.*

The suit was brought for the recovery  
of a sum of Rs. 65,426 principal and in-  
terest due on two hypothecation bonds,  
dated 17th and 30th June 1890, executed  
by Raja Harihur Dut Dube of whom the  
Defendant in this suit Shankar Dut Dube  
was the legal representative. On the  
death of the latter, the Collector of  
Jaunpore was substituted as a Defendant  
in his place.

The first Court decreed the claim on  
the 19th March 1896. Subsequently on  
the 9th April 1896 Shankar Dut Dube  
applied to the same Court to set aside  
the decree as having been passed *ex parte*  
under the provisions of sec. 108, C. P. C.  
On the 8th October 1896 the Sub-Judge  
disallowed the application, but on the  
Defendant's appeal the High Court (Chief  
Justice Edge and Mr. Justice Blair) set  
aside the order of the Sub-Judge and re-  
manded the case to that Court under sec.  
562, C. P. C.

The amended plaint had been filed on  
the 8th January 1895, written statements  
of the various Defendants, including  
Shankar Dut Dube, were placed on the  
record on the 17th May 1895, and with  
regard to what had followed the Sub-  
Judge stated as under:—

"The 19th March 1896, on which the  
decree in question was passed, was fixed  
to the knowledge of the pleaders for  
both parties, for the purpose of the pro-  
duction of evidence on the issues framed.  
These issues had been framed with re-  
ference to the plaint and the written  
statement filed on Defendant's behalf on  
the 17th May 1895 and 19th March  
1896; but the case was postponed before

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19th March from time to time, either by reason of the application of Defendant's pleader praying for the postponement on account of his being busy elsewhere, or by reason of the record of the suit not having come back from Jaunpore, where it had been sent on requisition. The postponement took place on the 31st January 1896, on which an order was passed that the case should come on for decision on the 19th March 1896, and that the parties with their witnesses should appear on that date; due notice thereof was admittedly given to pleaders. That day having arrived the pleader for the applicant stated that he could not conduct the case and he had received no instructions from his client. Thereupon the Court proceeded to try the case, and tried and decided the issues on the evidence adduced on Plaintiff's behalf and decreed the suit against the applicant. Now, taking these circumstances into consideration, and also the fact that applicant's pleader as well as that of the Plaintiff had in the beginning applied for time to enable him to produce precedents, I hold that the Defendant's pleader, who refused to conduct the case on the 19th March 1896, was not without instructions; and that his appearance in Court, therefore, was an appearance of his client (the applicant). . . . I may also remark that notice to a pleader of the date fixed is as good as a notice to his client *in person*. Hence the decree was not *ex parte*, and no application lies under sec. 108, Civil Procedure Code."

The judgment of the High Court reversing the decision of the Sub-Judge and remanding the case is as follows:—

"It appears to us that the decision of

this Court in *Bhagwan Dai v. Hira* (1) and of the High Court at Calcutta in *Jonar-dan Dubey v. Ramdhone Singh* (2) are authorities in favour of the contention of the Appellant that an application lay in this case under sec. 108 of Act No. XIV of 1882. On the other hand, we have been pressed by the learned counsel for the Plaintiff decree-holder with the decision of their Lordships of the Privy Council in *Sahibzada Zain-ul-abdin Khan v. Sahibzada Ahmad Raza Khan* (3). The procedure which the Subordinate Judge must in our opinion have adopted was that under sec. 157 of Act XIV of 1882. That section makes applicable, so far as may be, to cases coming within the section, the procedure of Chapter VII of the Code. Sec. 157 apparently relates to a later period in the litigation than the sections which are to be found in Chapter VII, but there is no difficulty in ascertaining the rule to be followed in cases under sec. 157 by reference to Chapter VII. It has been contended for the Plaintiff decree-holder that the effect of the decision of their Lordships of the Privy Council in *Sahibzada Zain-ul-abdin Khan v. Sahibzada Ahmad Raza Khan* (3) is, that there can be no decree which can be called a decree *ex parte* against a Defendant who has, at any time and on any occasion before the decree is made, put in an appearance in the suit, although at the hearing he may have been absent and unrepresented, or may have been present merely by a pleader who had no instructions. In our opinion the

(1) I. L. R. 19 All. 855 (1897).

(2) I. L. R. 23 Cal. 738 (1896).

(3) L. R. 5 I. A. 228; s. c. I. L. R. 2 All. 67 (1875).



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decision of their Lordships of the Privy Council merely referred to the opening paragraph of sec. 119 of Act No. VIII of 1859. That section itself shows quite clearly that there can be *ex parte* decrees against Defendants, whether or not they have put in appearances in the suit. The prohibition of an appeal in the earlier part of sec. 119 is limited, to apply the decision of their Lordships of the Privy Council, to a case in which the Defendant had not put in any appearance at all. In our opinion the decision of their Lordships of the Privy Council has no bearing on the case before us here."

*Mr. Uppjohn, Q. C.*, and *Mr. Ross* for the Appellant.

*Mr. Phillips* for the Respondent.

LORD HOBHOUSE.—Is there nothing in the record to show whether Defendant's pleader informed him?

*Mr. Uppjohn.*—No.

LORD DAVEY.—It all depends on that fact.

SIR R. GOUCH.—It may be he was present without proper authority.

*Mr. Uppjohn* contended that the decree of the 19th March 1896 was not an *ex parte* decree within the meaning of sec. 108, C. P. C. Moreover if it was, the High Court was wrong in remanding the case. The Defendant had not complied with the terms of that section, he had to satisfy the Sub Judge that he was prevented from sufficient cause from appearing, &c.

LORD HOBHOUSE.—That appears to be so, the application should have been remanded for the Sub-Judge to find on evidence whether Defendant had satisfied the terms of that section.

After hearing *Mr. Phillips* for the Res-

pondent their Lordships called on *Mr. Ross* to show the appealable nature of the order, and whether the decree of the High Court under appeal was a final one.

*Mr. Ross* referred to among others secs. 594, 588, 566 of the Civil Procedure Code and to *Syed Muzhar Husein v. Bodha Bibi* (4).

THEIR LORDSHIPS JUDGMENT was Delivered by

LORD ROBERTSON.—To this appeal from the High Court of Judicature for the North-Western Provinces, Allahabad, it is objected by the Respondent that no appeal to Her Majesty in Council lies against the order complained of. For the due understanding of the question thus raised it is necessary briefly to trace the procedure in the suit.

The suit was brought on 10th March 1892, before the Subordinate Judge of Benares, for the recovery of money alleged to be due under two bonds, executed by a person of whom the Defendant Shankar Dat Dube was the legal representative. That Defendant is now deceased and is represented by the Respondent. He appeared in the suit and on 17th May 1895 filed a written statement with a list of documents. Into the nature of the questions raised by the plaint and the written statement it is unnecessary to enter, as the questions before their Lordships arise solely out of the part taken by the Defendant at a certain stage of the procedure. It is sufficient to note that the issues settled between the Appellant and Shankar Dat Dube were:—1. Has the plaint been amended according to

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law? 2. Is Defendant No. 1 (Shankar Dat Dube) the heir of Raja Harihar Dat? 3. Is the deed of mortgage legally valid? Could Harihar Dat duly legally hypothecate the property? 4. Is the deed of mortgage genuine? A fifth issue was settled, but it did not affect Shankar Dat Dube but only certain other Defendants.

Prior to 19th March 1896 the case had repeatedly been before the Court but had from time to time been postponed; and on 31st January 1896 an order was passed that the case should come on for decision on 19th March 1896. On each of these occasions the Defendant Shankar Dat Dube was represented by a pleader. \* On 19th March 1896 it is recorded by the presiding Judge that "Defendant No. 1 is to-day absent. No one appears for him. His pleader informs the Court that he has no instructions to proceed with the case." The Court proceeded, as in absence, heard evidence for the Plaintiff and decided the issues, giving decree for the claim with costs.

On the 9th April 1896, Shankar Dat Dube applied to the Court under sec. 108 of the Civil Procedure Code to set aside this decree on the ground that neither the Defendant-Applicant nor his general attorney had notice of the date fixed and that for this reason he could not conduct the suit. The Appellant filed a reply denying that the 108th section applied and asserting that the Defendant had notice. The application came before a different Judge from Nil Madhab Roy, who had presided on 19th March 1896. The new Judge, notwithstanding that his predecessor had recorded that the Defendant in question was

absent, that no one appeared for him and that his pleader informed the Court that he had no instruction to proceed with the case, forthwith disallowed the application with costs. No opportunity was given to the applicant to satisfy the Court in terms of sec. 108, that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the theory of the decision being that the applicant had in fact appeared and that the decree was therefore not *ex parte*.

Against this order an appeal was taken to the High Court at Allahabad, who allowed the appeal and pronounced the order now appealed against. The terms of the order are as follows:—"It is ordered that this appeal be allowed; that the order of the Subordinate Judge of Benares be set aside; and that the case be and it hereby is remanded under sec. 562 of the Code of Civil Procedure to the Court of the said Subordinate Judge to be disposed of on the merits."

The Appellant represents that by this order the High Court have set aside the decree of 19th March 1896 and have remanded the original suit to be disposed of on the merits. The Respondent disclaims for the order any such sweeping effect and hold that what is remanded is merely the application immediately before the Court, to wit the application to set aside the decree, and that it is this application which the Subordinate Judge will, under the remand proceed to dispose of, by allowing the Respondent to endeavour to satisfy him of the conditions specified in sec. 108 and then if this be done by setting aside the decree.

Their Lordships are clearly of opinion

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that the Respondent's is the just construction of the order of the High Court. The application by the Respondent to set aside the decree might be described as "the case," with at least as much accuracy as the original suit in which there was a standing decree; and unless and until that decree had been set aside, there was no means of remanding that suit. The form of the Records is inconsistent with the Appellant's view. The judgment of the High Court (p. 20) is headed "Case 2 of 1897. First appeal from the order of the Subordinate Judge of Benares, dated 8th October 1896," which is the dismissal of the petition under sec. 108 (p. 18). And the decree (p. 22) is headed in similar fashion. That then was the "Case" with which the High Court was dealing. But further, if there be any ambiguity, it is to be presumed that that was done which the law required; and it is allowed by both parties and is clear to their Lordships that, assuming the 108th section to apply at all, the proper course was to remand the application to the Subordinate Judge to dispose of that application with due regard to the conditions of the section. There is, however, a further consideration which is conclusive as to the true intendment of the order, for the learned Judges in their written judgment point out as the error of the Subordinate Judge that he had disposed of the case without considering whether the Defendant was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March 1896. Their Lordships would require very clear language in the order which was intended to effectuate this

opinion to induce them to construe it in a sense which would stultify the Court pronouncing it.

Their Lordships having thus ascertained the true meaning of the order appealed against, the question is whether an appeal lies to Her Majesty in Council, and this depends on whether the order is a final order in the sense of sec. 595 (a) as modified by sec. 594 of the Civil Procedure Code. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit cannot make appealable an order which does not fulfil the statutory conditions. Now it does not in their Lordships' judgment admit of doubt that assuming the order to have the meaning which they ascribe to it, it is in no sense of the term a final order. It is a purely interlocutory order, directing procedure. Accordingly their duty is to advise Her Majesty to dismiss the appeal. Precluded as they would therefore be from proceeding to examine the merits of the order, their Lordships do not regret that in the course of ascertaining its true construction they have necessarily had to consider the law applicable to the case and to pronounce that no other order would have been appropriate save that which they find to have been made. The Appellant must pay the costs of the appeal.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

Solicitors: *Solicitor India Office* for the Respondent.

*Appeal dismissed with costs.*

C. W. A.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 1999 of 1898.

MACLEAN, C. J.	}	KAILASH CHANDRA NEOGI,
BANERJEE, J.		Plaintiff, Appellant,
1900.		v.
25, April.		HARISH CHANDRA BISWAS
		and others,
		Defendants, Respondents.

*Indian Evidence Act (I of 1872), sec. 92—  
Oral evidence to contradict the recital in a deed.*

*When one of the parties to a deed is, under any of the provisions of sec. 92 of the Evidence Act, permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence.*

*Where a deed recited the payment of a certain consideration and the Plaintiff denied the passing of any consideration and adduced evidence in support of his contention under the provisions of sec. 92 of the Evidence Act, it is open to the Defendants to go into oral evidence to show that there was some consideration for the deed though not the same as recited in the deed.*

LALA HIMMAT SAHAI SINGH v. LEWHELLEN (1), HUKUM CHAND v. HIRALAL (2) referred to.

This was an appeal preferred on the 4th of October 1898, against the decree of Babu Mohim Chandra Ghosh, Subordinate Judge, 3rd Court of Zillah Hughly, dated the 2nd of September 1898, reversing the decree of Babu Khagendra Nath Bose, Munsif, 2nd Court at Serampore, in that district, dated the 23rd of March.

This was a suit to set aside a deed on the ground that it was an illegal sale,

that no consideration passed, and that the deed was executed without the grantor being told "what was going about" and that in fact the sale was not genuine. The third issue raised was, "whether the deed of sale executed by Madhub Chunder Neogi is void as fraudulent and for want of consideration, or that the same was a *bona fide* transaction for valuable consideration." The deed recited that Rs. 500 had been paid as purchase money and at the trial the Plaintiff adduced oral evidence to show that that was not the case. Thereupon the Defendants went into oral evidence to show that there was some consideration for the deed. The District Judge found on the evidence that Rs. 500 had not been paid as cash as recited in the deed, but that there was ample consideration for it. The Plaintiff appealed and contended that the lower Court should not have admitted oral evidence to show that there was consideration for the deed and that such admission of evidence contravened the provisions of sec. 92 of the Evidence Act.

Dr. Rash Behary Ghose and Babu Sib Chandra Palit for the Appellant.

Dr. Asutosh Mukherjee (for Babu Sarada Churn Mitter) for the Respondents.

The JUDGMENTS OF THE COURT were as follows :—

MACLEAN, C. J.—This is a suit to set aside a *kobala*, dated the 30th Kartic 1302, on the ground that it was an illegal sale, that no consideration passed, and that the deed was executed without the grantor being told "what was going about," that in the *kobala* false words were artfully and fraudulently inserted, that at the time of the transaction, Madhub Chandra Neogi, the executant was "quite unable to consider all the

(1) I L. R. 11 Cal. 486 (1885).

(2) I L. R. 3 Bom. 159 (1876).

## KAILASH CHANDRA NEOGI v. HARISH CHANDRA BISWAS.

circumstances," that in fact the sale was not genuine, and that it was under these circumstances that the *kobala* was got registered.

The Defendants generally denied that case; and the third issue was, "whether the deed of sale executed by Madhub Chunder Neogi is void as fraudulent and for want of consideration," or that the same was a *bona fide* transaction for valuable consideration." It is quite clear, therefore, that what the parties went to trial on was as to whether or not the deed was void as being fraudulent, and whether there was any consideration for the deed. The first Court decided against the deed; the lower Appellate Court upheld the deed and found that it was not fraudulent, and that there was ample consideration for it. This is clear from the terms of the judgment. The point of law sought to be raised on second appeal is that, inasmuch as the Court of Appeal below found that nothing was paid in cash at the time of the execution of the deed, it was wrong in admitting oral evidence to show that there was consideration for the deed and that the admission of that evidence contravened the provisions of sec. 92 of the Evidence Act. I do not think it did. What occurred was this; the Plaintiff challenged the *kobala*. The Defendants put it in evidence, and when it was put in, the Plaintiff raised the issue that the Defendants who were supporting the deed, did not pay the Rs. 500 which was stated in the deed to be the purchase money, and that consequently, the deed was a voluntary one. The Defendants who were supporting the deed and relying upon it, did not

seek to put in any evidence of any oral agreement or statement either to contradict, vary, add to or subtract from the terms of the deed, it was the Plaintiff who wished to show that there was, in point of fact, no consideration for the deed. That, under the first proviso to sec. 92, he was entitled to do; he was entitled to prove the deed was invalidated for want of consideration. But if it were open to him to take this course, it was equally open to the parties relying upon the deed to show, by evidence, seeing what the issue was, that there was valuable consideration for the deed, even if that consideration was not identical with that stated in the deed itself.

This view seems to me to be consistent with the principle laid down in the cases of *Lala Himmat Sahai Singh v. Llewellyn* (1), and *Hukum Chand v. Hiralal* (2). The principle of those cases seems to apply though the circumstances no doubt were different.

The second point is of an extremely shadowy nature. It is said that the lower Appellate Court did not try the issue of undue influence. In point of fact, the case of undue influence was never raised as a separate and distinct issue. I have stated what the issues were and I think those issues were fairly tried out. There is no reasonable ground for supposing that the issue of undue influence, as opposed to, and separate from, the other issues was ever intended to be tried by the Court.

The case to my mind, is really one of fact rather than of law; and in my opinion, upon the findings of the Court

(1) I. L. R. 11 Cal. 486 (1885).

(2) I. L. R. 8 Bom. 159 (1876).

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below, the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I only wish to add one word with reference to the first contention urged on behalf of the Appellant, namely, that the Court of Appeal below was wrong in allowing the Defendants to go into oral evidence relating to the consideration for the deed in contravention of the provisions of sec. 92 of the Evidence Act. I think that when one of the parties to a deed, or his representative in interest, is, under any of the provisos to sec. 92, permitted to go into oral evidence, it must be open to the other party to rebut that evidence by oral evidence; and that is all that the Defendants in this case have been allowed to do. The deed recites the payment of a certain consideration; the Plaintiff denied the passing of any consideration, and adduced evidence in support of his contention under the proviso of sec. 92; and that being the case, it was also open to the Defendants to go into oral evidence to show that there was some consideration for the deed. The view I take is in accordance with that taken in the case of *Lala Himmat v. Llerhellen*, (1).

*Appeal dismissed.*

S. C. S.

(1) I. L. R. 11 Cal. 486 (1885).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1881 of 1898.

GHOSH, J.  
HARRINGTON, J.  
• 1900.  
19, June.

DEW NARAIN CHOW-  
DHURY and ORS.,  
Plaintiffs, Appellants,  
v.  
C. R. H. WEBB and  
anr, Defendants,  
Respondents.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Limitation Act (XV of 1877), Sch. II, Art. 4—Criminal Procedure Code (Act V of 1898), sec. 146.*

*The limitation as prescribed by Art. 3, Sch. III of the Bengal Tenancy Act begins to run from the date of the actual ouster, and if subsequent to the ouster some dispute arises between the parties and an order is passed under sec. 146, Cr. P. C., attaching the land, the limitation which has already begun to run does not cease, and the Plaintiff does not get a fresh start of limitation from the date when the order under sec. 146, Cr. P. C., is made.*

*Quere.—Whether Art. 47, Sch. II of the Indian Limitation Act applies to an order under sec. 146, Cr. P. C.*

This was an appeal preferred on the 8th of September 1898, against the decree of Babu Bhagwan Chandra Chatterjee, Additional Subordinate Judge of Zillah Tirhoot, dated the 11th of August 1898, reversing the decree of Babu Jaya Prosad Pande, Munsif of Samastipore, dated the 17th of December 1897.

This was a suit for declaration of title to and possession of certain land. It appeared upon the evidence that the Plaintiffs had been ousted from the land on the 9th February 1895. Subsequently, there having been some dispute between

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the Plaintiffs and the Defendants, the Magistrate, on the 31st May 1895, passed an order under sec. 146, Cr. P. C., attaching the land. The Subordinate Judge held that the Plaintiffs were barred by limitation under Art. 3, Sch. III of the Bengal Tenancy Act.

*Moulvie Mustafa Khan and Babu Buldeo Narain Singh* for the Appellants.

*Babu Umakali Mukerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

Two points have been raised before us in this appeal on behalf of the Plaintiff-Appellant, one being that, so far as the plots Nos. 1 and 2, covering an area of 5 cottas of land, are concerned, the Plaintiff is not barred by the limitation prescribed by Art. 3, Sch. III of the Bengal Tenancy Act, because there was an order by the Magistrate under the provisions of sec. 146 of the Code of Criminal Procedure attaching the lands in question, and the limitation prescribed by Art. 47 of the Indian Limitation Act for setting aside such an order is three years from the date when the order is made; and the other point raised is that, the Defendant not having raised the plea of limitation, and the Munsif not having raised an issue as to limitation, the Subordinate Judge in appeal ought not to have dismissed the case upon the ground of limitation, without, at any rate, allowing the Plaintiff an opportunity of adducing evidence upon the matter.

As to the first point raised before us, it seems to us that the ouster of the Plaintiff, as found by the Subordinate

Judge—and that finding is based mainly upon the evidence coming from the side of the Plaintiff himself—having taken place on the 9th of February 1895, antecedent to the date on which the Magistrate made his order under sec. 146 (which was on the 31st May 1895) the limitation as prescribed by Art. 3, Sch. III of the Bengal Tenancy Act, began to run against the Plaintiff from the date of the actual ouster; and it would not be reasonable to hold that, because subsequent to this ouster some dispute arose between the parties and the interference of the Magistrate was invoked, and because that officer attached the land, being unable to find which party was in possession, the limitation which had already begun to run against the Plaintiff ceased to run on, and that the Plaintiff would have a fresh start of limitation from the date when the Magistrate made his order under sec. 146 of the Code of Criminal Procedure. Moreover, as pointed out by the learned vakil for the Respondent, it is not altogether free from doubt whether Art. 47, Sch. III of the Indian Limitation Act which relates to a “person bound by an order respecting the possession of property, made under the Code of Criminal Procedure,” is applicable to a case of an order made under sec. 146, which does not maintain the possession of any party. We accordingly overrule the point raised before us.

As regards the other question raised, all that we need do is to refer to sec. 4 of the Indian Limitation Act, and sec. 184 of the Bengal Tenancy Act, which empowered the Subordinate Judge to take cognizance of the question of

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limitation, though it might not have been raised by the Defendant in the Court of first instance, if upon the proceedings in the case it appeared to him to be clear that the suit of the Plaintiff was barred by limitation. He has come to a definite conclusion upon this matter. He has held that the allegation of the Plaintiff as to dispossession, and to his previous possession within two years before the institution of the suit is not true; but rather, the evidence on the other side tends to show that the Defendants were in possession for more than two years. All that the Plaintiff in view of these facts could do was to ask the Subordinate Judge to allow him an opportunity of adducing other evidence upon the matter of possession, if he thought such other evidence was available and forthcoming. He apparently did not do so, nor does it appear that in his petition of appeal to this Court, he makes any complaint, that by reason of the omission of the Munsif to raise any issue as to limitation, he did not adduce such evidence which he might have adduced if the Munsif had raised the issue.

Upon these grounds we think that the contention raised as to limitation fails.

There is one other matter involved in this suit, and that is with regard to the plot No. 4. As to this plot, the Plaintiff has been found to have no cause of action against the present Defendants; and it is therefore obvious that he is not entitled to any relief as to that plot in this case.

For all these grounds the appeal is dismissed with costs.

S. C. S.

*Appeal dismissed.*

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 759 of 1897.

SM. KUSUM KUMARI RAY,

Plaintiff,

SALE, J.

1900.

v.

13, June.

SATYA RANJAN DAS and  
others, Defendants.

*Practice—Pleadings—Adoption—Administration, suit for—Will, construction of—Administration, prayer for, without asking for declaration with regard to an alleged adoption—Amendment—Adoption, preliminary trial of the question of.*

*Suit for administration and construction of a Will, under which Plaintiff's interest was restricted in case a son was adopted to the testator. Plaintiff, inter alia, stated that Plaintiff was informed that in Jaisto 1297 the widow of the testator purported to take an adoption a son, whose natural father was at the time and is now a Brahmo and had renounced the Hindu religion. She submitted that such adoption was absolutely invalid and did not operate to pass any title to the adopted son. There was, however, no prayer asking for any declaration with regard thereto:*

*Held—That upon the suit as at present constituted, the question of adoption was not in issue, and upon the pleadings the fact and validity of the adoption must be taken to be admitted.*

*That if a declaration with regard to the adoption is sought, the plaintiff must dispute the fact or validity of the adoption and should contain a prayer for a declaration as to the fact or validity thereof.*

*The whole substance in the claim for administration being dependent on the*



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*adoption being out of the way, the questions raised in the suit cannot be gone into till the question of adoption is determined once for all.*

Ordered—*That on the plaint being amended, the issue as to the adoption to be tried as a preliminary issue between the Plaintiff and the adopted son.*

This was a suit for the construction of the Will of Kally Mohun Das, for declaration of the rights of the parties, for administration, for the appointment of fresh trustees, for a Receiver and other reliefs.

In her plaint, as originally filed, the Plaintiff set out, *inter alia*, that Kally Mohun Das died on the 16th February 1887, leaving a widow, Chandramoni Debi, the Defendant Durga Sundari Debi who is the widow of a predeceased son Mono Ranjan Das, and the Plaintiff, his only grandchild, the daughter of his son Mono Ranjan Das, and having on the 8th August 1884 executed a Will, whereby he appointed his widow Chandramoni Debi and his two brothers Durga Mohun Das and Bhuban Mohun Das his executrix and Executors and trustees; that the executrix and executors duly took out Probate of the said Will; that Chandramoni Debi died on the 5th May 1891 and Bhuban Mohun Das obtained Letters of Administration to her estate. Under the said Will she claimed certain Government Promissory Notes of the nominal value of Rs. 30,000, certain Municipal Debentures, and large interests in the immoveable properties left by the testator.

Subsequently, on an application being made by the Plaintiff before Jenkins, J., for the appointment of a Receiver *pendente*

*lite*, it was brought to the notice of the Court that Chandramoni Debi, under a power given to her by the Will, had adopted a son to her deceased husband Kally Mohun Das. It was thereupon pointed out to the Plaintiff that a great difficulty stood in her way and no Receiver could be appointed unless the adopted son was made a party. She then elected to amend her plaint and in accordance therewith made the adopted son a party Defendant and stated by para. 13A:—

“That the Plaintiff is informed that in or about the month of Jaisto in the Bengali year 1297 corresponding with parts of the months of May and June 1890 the said Chandramoni Debi purported to take in adoption the Defendant Basanta Kumar Das, a natural son of the Defendant Bhuban Mohun Das, but the Plaintiff is advised and believes and submits that inasmuch as the said Bhuban Mohun Das was at the date of the said alleged adoption and also at the date of the birth of the said Defendant Basanta Kumar Das and is now a member of the Sadharan Brahmo Samaj and inasmuch as he had many years prior to the dates abovementioned renounced the Hindu religion the said alleged adoption of the said Basanta Kumar Das by the said Srimutty Chandramoni Debi was absolutely invalid under the Hindu law and did not operate to pass any title whatever to the said Defendant Basanta Kumar Das under the provisions of the said Will in and to the estate of the said testator.”

By the next paragraph 13B the Plaintiff stated:—

“That on the hearing of an application

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made by the Plaintiff herein for the appointment of a Receiver of the estate of the said testator, it having been intimated by the Court that the said Defendant Basanta Kumar Das was a necessary and proper party to this suit and should be joined as a Defendant hereto before any such order could be made, the Plaintiff through his counsel undertook, though without in any way waiving his contention as to the invalidity of the said adoption, to have the said Defendant added as such Defendant."

The Plaintiff, however, did not amend her prayers in the plaint and did not ask for any declaration as to the *factum* or validity of the said adoption.

On an application being made before Sale, J., on behalf of the guardian *ad litem* of Basanta Kumar Das for a commission to examine witnesses on his behalf as to the *factum* and validity of the adoption, the Court was of opinion that the issues sought to be raised in this suit presented some difficulty and embarrassment and he accordingly directed the suit to be set down for settlement of issues in order to ascertain what issues were raised by the pleadings.

This matter now came on for settlement of issues as aforesaid.

*Messrs. Pugh and Hyde* for the Plaintiff.

*Messrs. W. C. Bonnerjee, O'Kinealy, A. Chaudhuri and S. K. Mullick* for the Defendants Satya Ranjan Das and Jyotis Ranjan Das.

*The Hon'ble Advocate-General (Mr. J. T. Woodroffe)* and *Messrs. Dunne, J. G. Woodroffe and P. Chaudhuri* for the Defendant Basanta Kumar Das.

*Messrs. Sinha and H. D. Bose* for the Defendant Bhuvan Mohun Das.

*Messrs. Chakravarti and S. C. Mookerjee* for the Defendant Durga Sundari Debi.

*Mr. Pugh.*—There is an issue of fact as to whether the adoption is valid. Our contention is that in either case, whether the adoption is valid or not, the Plaintiff has ample present interest to maintain the present suit. We dispute the adoption of a son to Kally Mohun. I submit the 8th clause of the Will, which devises the moveable properties to us subject to the life estate of Chandramoni Debi and Durga Sundari includes all his moveable properties excepting the Government Promissory Notes. The main question is with regard to the Municipal Debentures whether they pass or do not pass under this clause.

The Rs. 30,000 mentioned in cl. 9 of the Will has now been deposited in Court. What she takes under this clause is independently of the question whether the adoption is valid or not.

Cl. 13 is the only para. which deals with the Municipal Debentures. I submit they pass by the 8th clause. [SALE, J.—Is there no gift of the residue?] Yes, but I don't raise the point if there is adoption. If the adoption is valid it would go to the adopted son. If not it would go to me as the heiress of Kally Mohun.

It is not necessary for me for the settlement of issues to go into the acts of misfeasance alleged against the executrix and executors.

Cls. 10, 11 and 12 of the Will mention the gifts made to me subject to the life interest of my mother, Durga Sundari.

Fresh trustees have been appointed in place of Bhuvan Mohun Das. Durga Mohun Das, the other original trustee,

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died soon after the institution of this suit.

With regard to the statements in the written statement that some of the properties mentioned by us did not belong to the estate of the testator, but was the *stridhan* property of Chandramoni Debī, that would properly arise on your Lordship's making a decree for administration.

I contest the adoption and have brought a suit for administration. [SALE, J.—Unless you ask for a declaration that the adoption is invalid how can I declare anything with regard to it. I think you have to recognise that there is an adopted son.] I shew that Chandramoni purported to adopt him, but she could not adopt him. [SALE, J.—I take it that would be his status unless there be a decree of Court depriving him of his status. I could not declare in this suit that he was not the adopted son.] The Court ordered Basanta Kumar to be added as a party and to make such amendment in the body of the plaint as might be necessary in consequence of so adding him. The body of the plaint is different from the title and the prayers of the plaint.

*Mr. O'Kinealy*.—The question of adoption ought to be tried first. It is impossible to construe the Will without deciding one way or the other about the adoption. (He then read from the minute-book as to what took place on the application for a Receiver). It was admitted that the application must fail in the absence of the adopted son. What did they do? They treated the order almost as a nullity. By paragraph 13(A) of the plaint they seem to admit the ceremony of adoption and seem to contend that it is invalid on account of the religious persuasion

of the father. If the Will cannot be construed without trying the question of adoption, then the suit as framed should be dismissed. If the adoption is taken as admitted then the Court has to see what interest she has in the estate of the testator; whether she is entitled to an administration. (He then commented on the different clauses of the Will). I submit, if the adoption is valid, she has not sufficient interest to entitle her to an administration. See *Smith v. Armitage* (1). I adopt the successive issues raised by Mr. Pugh.

*Mr. Sinha*.—I support Mr. O'Kinealy in his contention that the question of adoption has to be gone into first. Until then your Lordship does not know who are the proper parties entitled under the Will. Then in construing the Will and in declaring the interests of the parties, the Court will have to judge whether the Plaintiff's interest is such as to entitle her to an administration. I contend that the adoption was valid and the Plaintiff is not entitled to have the estate administered.

*Mr. Chakravarti*.—On the pleadings the Plaintiff is not entitled to an administration. The books and furniture mentioned in the Will she has already got. It is doubtful whether there can be successive life estates in moveable properties such as cows and horses. The Rs. 30,000 has already been paid into Court and her marriage cost Rs. 7,000. The sale of Chetla *haut*, in which she has an interest subject to her mother's life estate, is valid under the power given in the Will. If the adoption is valid, she has no interest sufficient to entitle her to an

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administration. The question of adoption must be decided first.

*Mr. Dunne.*—The suit could not be decided without the presence of the infant Defendant. On the plaint as it stands the adoption must be taken to be admitted. It is now before the Court for settlement of issues. We have been brought before the Court. The Court refused to grant a Receiver and thereupon we are joined as Defendant. They say this (reads paragraph 13(A) of the plaint). They do not say that no such adoption ever took place. They say that owing to circumstances the adoption is invalid. The factum of adoption is not disputed. The adopted son is now before the Court and the Court has to consider whether the allegations in paragraph 13(A) does not amount to an admission of the adoption. The suit as framed (assuming that I am right in saying that the adoption is admitted) is good. If not then the question of adoption would have to be tried first. We are at any rate entitled to get an admission from the Plaintiff as to whether she disputes the *factum* of adoption or whether she challenges only the legality of it. So long as the Plaintiff was a minor, her next friend made statements for her. After coming of age, she has not committed herself either way. If we do not get such an admission it would be difficult for us to prepare ourselves.

If the Court holds the view that there is no dispute as to the adoption, then the suit is properly framed. Otherwise the Plaintiff must pray for a declaration with regard to the adoption and that issue would have to be tried separately.

*Mr. Pugh* in reply.—I dispute both

the *factum* and the validity. Bhuban Mohun says he was not present at the ceremony. I challenge the *factum* and the legality. I don't know how far the fact of Bhuban giving away the child vicariously is correct. The smallest substantial interest would entitle one to an administration. If a creditor comes in with a strong case of malversation, etc., the Court would not allow him to go out, if he wanted to, after getting his money. If a Court is satisfied that there has been malversation, etc., and a Plaintiff comes with a strong case, the Court will administer the estate. Here it is something more than that because the trustees have been removed.

*Mr. O'Kinealy.*—By consent.

*Mr. Pugh.*—Durga Sundari who was the certificated guardian has not been allowed to represent the Plaintiff in this suit. [SALE, J.—Because under the Will her interest and the Plaintiff's are conflicting to a certain extent.] There is no substance in the issue of misjoinder. With regard to jurisdiction, money, *i.e.*, Rs. 30,000, has been paid into Court.

*Mr. Sinha.*—It was paid under protest.

*Mr. Pugh.*—The questions raised are (1) whether the Plaintiff is entitled to administration, (2) whether the account ought to be taken on the footing of wilful neglect and default, (3) adoption.

The JUDGMENT OF THE COURT was as follows :—

SALE, J.—It seems to me that the issues sought to be raised in this suit present some difficulties and embarrassment, and accordingly I thought it desirable that the case should be set down for settlement of issues for the purpose of

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ascertaining the right course of procedure.

It is clear that the Plaintiff's rights which are sought to be ascertained and declared in this suit, must depend largely on, whether or not, there is now in fact in existence a validly adopted son of Kally Mohun Das, and having now heard counsel for the various parties, I think it is reasonably clear what the proper course to be pursued is.

The Plaintiff sues for administration of the estate of Kally Mohun Das and for construction of his Will and she also incidentally asks for the appointment of a Receiver.

An application was made for the *interim* appointment of a Receiver, and thereupon it was pointed out to the Plaintiff that a great difficulty stood in her way by reason of the allegation of one of the Defendants that there was in existence an adopted son of Kally Mohun Das and that by reason of this fact it was doubtful whether she had any right to obtain administration of the estate of Kally Mohun Das or the construction of his Will.

The Plaintiff then elected to amend her plaint with the object of making the alleged adopted son a party to this suit. I cannot but suppose that what the learned Judge thought, and intended by the order made on that occasion, was that the Plaintiff in making the alleged adopted son a party, would proceed either on the basis of admitting the adoption, or alleging that it was invalid, and asking that it should be set aside.

But the Plaintiff does not take that course. A paragraph is inserted, in which the Plaintiff submits that the

alleged adoption is invalid, but she omits to ask for any declaration in regard thereto.

Now I think it is clear that if the adoption is to be accepted there is very little of substance in her claim for administration or construction of the Will.

I do not say that technically there might not be some sort of right on the Plaintiff's part for construction of the Will or for administration, but, if so, it must necessarily be of a very shadowy and unsubstantial character.

The whole substance in the claim for administration depends on the adoption of this son being out of the way, and it seems to me it would be pure waste of time and money to proceed with the suit without in the first instance dealing one way or the other with the question of adoption which is raised.

That being the situation what course ought to be adopted? I am not disposed to consider the question of adoption as an issue in this suit so long as there is no proceeding instituted for the express purpose of enquiring into and determining its validity, and I am of opinion that it is impossible to regard the suit as at present constituted a proceeding of that character. As the pleadings now stand, I should take it that the fact of adoption was admitted and that it was outside the scope of the suit to enquire into its validity or to make any declaration in respect thereof.

It is said on behalf of the Plaintiff that there is no admission as to the fact of the adoption and that it was not intended that there should be any such admission by the terms of paragraph 13(A) of the plaint. If that be so, all I can

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say is that it is a most unfortunately worded paragraph.

I have hesitated as to whether under the circumstances I should not decline to go into the question of the fact or validity of the adoption, and whether I ought not for the purposes of this suit to take it as an admitted fact that there was and is an adopted son of Kally Mohun Das in existence, such as Kally Mohun Das by his Will intended there should be.

But as there have been considerable costs already incurred in the suit, and bearing in mind that if I took the course proposed, it would not, in all probability, put an end to the litigation on the subject of the adoption, I think I ought perhaps to give the Plaintiff another opportunity of raising the issue as to the adoption.

In my opinion before any of the questions raised in the suit, can be gone into, the question of the adoption must be determined once for all, and for that purpose I give the Plaintiff three weeks for the purpose of putting in such further statement on the subject of the adoption as she may be advised, and for making such amendment in the prayer of the plaint as may be necessary for the purpose of obtaining a declaration as to the fact or validity of the adoption, with liberty to the adopted son to put in such further written statement on the subject of the adoption as he may be advised, and I direct that the issue as to the adoption, such as the Plaintiff may desire to raise, be regarded as a preliminary issue in the case to be tried between the Plaintiff on the one side and the adopted son on the other.

As regards the question of jurisdiction and non-joinder of parties there has been but little argument,—and the question do not seem to be pressed.

As at present advised, I think that the Court has jurisdiction, and I do not see any reason for making any order with the object of altering the parties on the record.

*Mr. Sinha.*—We are all agreed not to press those issues.

THE COURT.—All costs incurred by reason of this amendment to be paid by the Plaintiff, and as regards the other costs, that is the costs of to-day, it is not by an act of the parties that the case was set down, so I think that the best course will be to reserve those costs.

*Babu Hirendra Nath Dutt*, Attorney for the Plaintiff.

*Messrs. Rutter & Co.*, Attorneys for the Defendants S. R. Das and J. R. Das.

*Babu Ukhoy Chunder Dutt*, Attorney for the Defendant Bhuban Mohun Das.

*Babu Bhupendra Nath Bose*, Attorney for the infant Defendant.

*Messrs. Ghose & Kar*, Attorneys for the Defendant Durga Sundari.

J. C.

[ORDINARY ORIGINAL CRIMINAL  
JURISDICTION.]

(FIFTH CRIMINAL SESSIONS).

MACLEAN, C. J.	}	EMPRESS
1900.		v.
14, December.		DOLEGOBIND DASS.

*Power of a Presidency Magistrate to commit accused previously discharged by another Presidency Magistrate—Order of discharge not set aside—Criminal Procedure Code (Act V 1898), secs. 252, 253, 403, 435, 436, 437, 439—Reference to Full Bench upon a point raised before prisoner called to plead—Charter Act.*

*There is nothing in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed. Hence a commitment by a Presidency Magistrate on fresh evidence is legal although the accused may have been previously discharged by another Presidency Magistrate and the order of discharge was not set aside.*

OPOORBA. KUMAR SETT v. SRIMUTTY PROBOD KUMARY DASSI (6) referred to and followed. GIRISH CHUNDER ROY v. DWARKA NATH AGARWALLA (7) referred to and dissented from. NILRATAN SEN v. JOGESH CHUNDER BHUTTACHARJEE (1) distinguished.

Held also—*That the Judge presiding at the Sessions has no power to refer to a Full Bench a point of law raised before the accused was called upon to plead.*

The accused was arrested on the 23rd July on the charge of having stolen a registered letter from the Post Office, and on the 25th July was brought up before a Bench of Presidency Magistrates, charged with offences under sec. 381 of the Indian Penal Code and sec. 52 of the Indian Post Office Act. He was dis-

charged on the same day. On the 6th September the accused was re-arrested on substantially the same charge and on the 17th October he was committed for trial upon further and fresh evidence by the Chief Presidency Magistrate.

Mr. M. R. Mehta, instructed by Babu A. K. Mitter for the prisoner, raised a preliminary objection to the trial proceeding and contended that the Chief Presidency Magistrate had no jurisdiction whatever to try this case without the order of discharge being set aside, and that the order of discharge of a Presidency Magistrate could only be set aside by the High Court. The case of *Girish Chunder Roy v. Dwarka Nath Agarwalla* (7) is entirely in my favour. Assuming for the sake of argument, that the Chief Presidency Magistrate has the power to set aside an order of discharge made by another Presidency Magistrate, even then the commitment is bad because the Chief Presidency Magistrate did not set aside the order of discharge, nor did he give the accused any notice to show cause why the order of discharge should not be set aside. That an order of discharge should be first set aside before fresh proceedings can be taken, is clearly laid down by Banerjee, J., at p. 988 in the case of *Nilratan Sen v. Jogesh Chunder Bhattacharjee* (1).

*The Standing Counsel (Mr. P. O'Kinealy)*, instructed by the Government solicitor, for the prosecution.—Under the circumstances of the case, the rulings quoted by Mr. Mehta do not apply. This is a warrant case and was retried upon further additional evidence, which satisfied the Magistrate that the accused should be

(1) I. L. R. 23 Cal. 983 (1896).

(6) 1 C. W. N. 49 (1893).

(7) 1 C. W. N. 370 (1897).

(1) I. L. R. 23 Cal. 983 (1896).

(7) 1 C. W. N. 370 (1897).

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committed. There was nothing wrong in this commitment as is shown from several cases, viz., *Hari Singh v. Danesh Mahomed and others* (2), *Empress v. Donnelly* (3), *Empress v. Puran* (4), *Virankutti v. Chiyamu* (5), *Opoorba Kumar Sett v. Srimutty Probod Kumary Dassi* (6).

*Mr. M. R. Mehta* in reply.—The cases cited by *Mr. O'Kinealy*, with the exception of *Opoorba Kumar Sett v. Sreemutty Probod Kumary Dassi* (6) are not in point, they relate to District Magistrates who are expressly empowered under the Code to institute fresh proceedings.

The CHIEF JUSTICE.—Do you, *Mr. Mehta*, lay down the broad proposition as a proposition of law that, if a Presidency Magistrate discharged an accused person, and then upon fresh evidence an application was made for a retrial the accused person could not be retried unless the previous order of discharge were set aside?

*Mr. Mehta*.—Whether there is fresh evidence or not is I submit immaterial because, the question is whether a Presidency Magistrate has jurisdiction to retry a person, already discharged by another Presidency Magistrate unless that order of discharge is first set aside. My submission is that no Presidency Magistrate, not even the Chief Presidency Magistrate, has such jurisdiction.

The CHIEF JUSTICE.—What is there in the Code to warrant that view?

*Mr. Mehta*.—There is nothing in the Code, expressly prohibiting the Magistrate from so acting, but at the same time I submit there is nothing in the Code

(2) 20 W. R. Cr. Rulings 46 (1873).

(3) I. L. R. 2 Cal. 405 (1877).

(4) I. L. R. 9 All. 85 (1886).

(5) I. L. R. 7 Mad. 557 (1884).

(6) 1 C. W. N. 49 (1893).

authorising Presidency Magistrates and my submission is that if the Legislature intended to give Presidency Magistrates such a jurisdiction there would have been express provisions in the Code; secs. 435 to 439 of the Code will show that such a jurisdiction is expressly given to the High Court and District Magistrates and if the Legislature intended to give a similar power to Presidency Magistrates the words "Presidency Magistrate" would have been inserted. The case of *Opoorba Kumar Sett v. Srimutty Probod Kumary Dassi* (6) was distinguished in the case of *Girish Chunder Roy v. Duarka Nath Agarwalla* (7) and is distinguishable from the present case. This point is of considerable importance and if your Lordship entertains any doubt I respectfully ask your Lordship to refer it to a Full Bench.

*The Standing Counsel*.—Under the Charter, your Lordship has no power to refer the point to a Full Bench, as the point was raised before the prisoner was called upon to plead and could not be said to have arisen in the trial.

The CHIEF JUSTICE.—If this objection had been taken during the course of the trial I might have referred the matter to a Full Bench, but as the objection has been taken before the trial commenced I apparently have no power to do so, even if I so desired.

The JUDGMENT OF THE COURT was as follows :—

The CHIEF JUSTICE.—This is an application by the accused to have the order of commitment of the Chief Presidency Magistrate, *Mr. Pearson*, discharged, on

(6) 1 C. W. N. 49 (1893).

(7) 1 C. W. N. 370 (1897).



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the ground that he had no jurisdiction to make the commitment, as a previous order of discharge has not been set aside by any authority. The facts are as follows:—On the 23rd of July last, the accused was arrested on the charge of having stolen a registered letter from the Post Office, and, on the 25th July, was brought up before a Bench of Presidency Magistrates, charged with offences under sec. 381 of the Indian Penal Code and sec. 52 of the Indian Post Office Act, 1898. He was discharged on the same day, the Bench considering that the evidence was insufficient to warrant “a conviction,” by which I presume they meant a commitment. On the 6th September the accused was re-arrested on substantially the same charge, and on the 17th October he was committed for trial upon further and fresh evidence—a very salient feature in the case—to the present sessions. The point for determination is, whether the commitment is valid, and I shall confine my remark to the case immediately before me, viz., the case of commitment by a Presidency Magistrate. It is clear that the discharge of the 25th July could in no sense operate as an acquittal of the accused, the case being a warrant-case. This has not been disputed, consequently, when the case was brought before Mr. Pearson, he was bound to hear it under sec. 252 of the Code, unless it can be shown that he has no jurisdiction to hear it, until, as is contended, the order of the 25th July had been set aside by the High Court. “There is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertain-

ed so long as the order of dismissal remains unreversed” [see per Banerjee, J., *Nilratan Sen v. Jogesh Chundra Bhattacharjee* (1)]. I agree in that. If then there be no express provision in the Code, what is there to warrant us in implying or in effect introducing into the Code, a provision of such serious import, a provision which, in certain cases, would render sec. 252 of the Code almost nugatory. In the absence of any other provision in the Code to justify such an implication—and my attention has not been directed to any such provision except secs. 436 and 437 which do not apply to Presidency Magistrates—I can appreciate no sound ground for the Court so acting; were it to do so it would go perilously near to legislating instead of confining itself to construing the acts of the Legislature. Moreover, it seems contradictory to say that whilst the order of discharge in a case such as the present does not amount to an acquittal, it is yet necessary to have it discharged by the High Court before either the same or another Magistrate of co-ordinate jurisdiction can hear the complaint under sec. 252. Neither necessity nor convenience warrants such a conclusion: there is nothing in the Code which compels it: and the balance of the decided cases appears to be against it. The cases of *Hari Singh v. Danesh Mahomed* (2) [decided so far back as 1873], the clear dictum of Markby, J., concurred in by Prinsep, J., in *Empress v. Donnelly* (3); *Queen-Empress v. Pura* (4);

- (1) I. L. R. 23 Cal. 983 at p. 988 (1896).
- (2) 20 W. R. Cr. Rulings 46 (1878).
- (3) I. L. R. 2 Cal. 495 at p. 411 (1877).
- (4) I. L. R. 9 All. 85 (1886).

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*Virankutti v. Chiyamu* (5) support the view of the Crown. These were not cases relating to Presidency Magistrates but in the case of *Opoorba Kumar Sett v. Srimutty Probod Kumary Dassi* (6) the precise point now under discussion was decided by Prinsep and Trevelyan, JJ., against the contention of the present accused.

On the other side reliance is placed upon the cases of *Nilratan Sen v. Jogesh Chundra Bhuttacharjee* (1) and *Girish Chunder Roy v. Dwarka Nath Agarwalla* (7). The former was not concerned with the case of a fresh commitment by a Presidency Magistrate, and the argument therefore based upon secs. 436 and 437 of the Criminal Procedure Code, which do not apply to Presidency Magistrates and which argument as I read the case was the foundation of that judgment (see *Nilratan Sen v. Jogesh Chundra Bhuttacharjee* (1) per Banerjee, J.) can have no application to the case now before the Court. I notice that O'Kinealy, J., in that case rests his decision upon "the constant practice of this Court," as to which one might feel some doubt, having regard to the cases I have referred to. The case, however, in *Girish Chunder Roy v. Dwarka Nath Agarwalla* (7) is distinctly in point, and I respectfully dissent both from its reasoning and its conclusion. It is fallacious to treat the second hearing as an appeal from the decision on the first hearing, and to say there is no provision in the Code for such an appeal. This argument overlooks the fact that the Magistrate is bound to

hear the case under sec. 252, unless the Code precludes him from ~~so~~ doing until the previous order of discharge has been set aside. But, as I have already pointed out, the Code does not do that either expressly or by necessary implication. Again, the learned Judges distinguish the case in *Opoorba Kumar Sett v. Srimutty Probod Kumary Dassi* (6) on the ground that there the order for the issue of fresh process was made by the same Magistrate, who had discharged the accused. But what difference can that make if the real principle be that no fresh process can be issued unless, and until the previous order of discharge has been set aside by the High Court. If the principle be that the previous order of discharge must be set aside by the High Court—and that is the principle contended for—before fresh process can issue, it would amount to an absurdity to say that the same Magistrate can issue such process, though the order has not been set aside, but that another Magistrate of co-ordinate jurisdiction cannot do so, but must wait till the order has been set aside. There is one feature in the last two cases I have mentioned which, *qua* the facts, but not the principle distinguishes them from the present: in both these cases the order for issue of fresh process was made on the same evidence. That is not the case here: and, upon this point, I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been

(1) I. L. R. 23 Cal. 983 at p. 988 (1896).

(5) I. L. R. 7 Mad. 557 (1884).

(6) 1 C. W. N. 49 (1893).

(7) 1 C. W. N. 370 (1897).

(6) 1 C. W. N. 49 (1893).

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some manifest error or manifest miscarriage of justice. Whilst fully recognising that we must follow the law and practice as laid down in the Indian Codes, it is perhaps not wholly immaterial to mention, looking to the source from which these Codes have in a great measure originated, that the view I have laid down above is consistent with that which holds in criminal Courts in England.

For these reasons I refuse the application to quash the commitment.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 354 OF 1900.

PRINSEP, J.	}	ISHAN CHANDRA CHAKRA-
HANDLEY, J.		VARTI and others, Petitioners,
1900.		v.
15, June.		PRASANNA KUMAR RAI,
		Opposite Party.

*Code of Criminal Procedure. (Act V of 1898), sec. 133—Nuisance, removal of—Proceeding, previous, dropping of, effect of—Magistrate, jurisdiction of, to take fresh proceedings regarding the same matter.*

*There is no bar in law to the revival of a proceeding under sec. 133, Cr. P. Code, with regard to the same matter which had been previously dropped, provided there are materials before the Magistrate upon which prima facie he could act.*

*The question whether the matter with regard to which proceeding has been instituted does or does not properly come within the purview of sec. 133, Cr. P. Code, must be raised and decided at the trial.*

This was a rule issued on the 4th May 1900, against the orders of J. T. Rankin, Esq., District Magistrate of Dacca, dated the 1st February 1900, and the 23rd March 1900.

The facts of the case are shortly as follows:—

Prasanua Kumar Rai, the opposite party in the proceeding, applied to S. F. Hosan, Esq., Sub-divisional Magistrate of Munshigunge, for the removal of a nuisance caused by Ishan Chandra Chakravarti and others by the flow of the discharges of a privy into a tank. The Sub-divisional Magistrate took proceedings under sec. 133 of the Code of Criminal Procedure; in the course of that proceeding the muktair of the complainant having admitted that the tank was not a public tank, the proceedings were allowed to drop. Prasanua Kumar Rai some time after applied to the District Magistrate of Dacca for the removal of the said nuisance and the District Magistrate on the 1st of February 1900 made an order directing proceedings to be taken under sec. 133, Cr. P. Code, and transferred the proceedings to the Sub-divisional officer of Munshigunge for disposal. Ishan Chandra Chakravarti and others, the Petitioners, then applied to the District Magistrate for cancellation of the order and the proceedings under sec. 133, Cr. P. Code.

Against these two orders of the District Magistrate the Petitioners moved the High Court and obtained the present rule.

Babus Atulya Charan Bose and Sarat Chandra Bysack for the Petitioners,

Mr. P. L. Roy and Babu Dasarathi Sanyal for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is an order under sec 133, Cr. P. Code, directing the Petitioner to remove a

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privy which discharges into a tank, thus causing nuisance to the neighbourhood. It appears that the Sub-divisional Magistrate of Munshigunge, some months ago took similar proceedings on the application of the same person who has originated the case now before us and, in the course of that proceeding, we find that as the muktear of the complainant admitted that the tank was not a public tank, the proceedings were allowed to drop. The same person has now obtained from the District Magistrate an order under sec. 133 regarding the very same matter. It is objected that this matter, having been once disposed of by the Sub-divisional Magistrate, cannot be reconsidered by the District Magistrate or by any other Magistrate. We can find no bar in law to any such proceeding. It seems to us that the only question involved is one of fact depending upon the circumstances of each case. In this case the muktear's representation stopped the former proceeding. Whether he acted upon the instructions of his clients or not does not appear but we think that, with the case before him, the Sub-divisional Magistrate was bound to proceed with it unless, upon the evidence before him, he found that the matter was not one falling within sec. 133. In the present case the District Magistrate had before him materials upon which *prima facie* he could act. If this is a matter which cannot properly come within sec. 133, the Petitioner will have an opportunity of showing this when he appears before the Magistrate and shows cause against the order under sec. 133 or he can obtain a jury to have the matter properly considered by such jury. We

see no sufficient reason to interfere at the present stage of the proceedings. The rule is discharged.

*Rule discharged.*

H. P. C.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 367 OF 1900.

PRINSEP, J.	}	HARA KUMARI CHAUDHURY
HANDLEY, J.		RANI and others,
1900.		Petitioners,
5, July.		<i>v.</i>
		MR. SAVI,
		Opposite Party.

*Penal Code (Act XLV of 1860), secs. 422, 511—Dishonestly or fraudulently preventing debt being available for creditors—Application to withdraw money paid into Court—Breach of civil contract—Security for payment of debt not endamaged—Fraudulent or dishonest intention.*

*Petitioners' estate was under mortgage and in the management of certain persons under certain conditions as to payment of moneys realised by them. In execution of a decree obtained by the managers in a suit brought by them in the name of the Petitioners, a certain under-tenure was sold for Rs. 3,000. The judgment-debtor arranged with the Petitioners that on payment of Rs. 1,000, the sale should be set aside and he accordingly paid that sum into Court, and an application was made by the Petitioners to draw out the money upon which no order was made. They were thereupon convicted, at the instance of the managers, of an attempt to commit an offence under sec. 422, I. P. C.*

*Held—That the application to obtain the money paid into Court might have been a breach of their contract with the mortgagors but such conduct cannot neces-*

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*sarily be regarded as dishonest or fraudulent so as to render the Petitioners liable to punishment, their attempt to get the money being more to put an end to the management than to prevent the money from being available to the payment of their debt under the mortgage.*

NOBIN CHUNDER MUDDUCK (1) *referred to.*

This was a rule issued on the 17th of May 1900, against the order of the District Magistrate of Backergunge, dated the 26th of March 1900, which order was, on appeal, affirmed by the Sessions Judge of Backergunge on the 8th of May 1900.

The facts appear from the judgment.

*Mr. Jackson, Mr. P. L. Roy and Babu Dwarka Nath Mitter* for the Petitioners.

*Mr. Hill, Babus Basunta Kumar Bose and Jnanendra Mohan Dass* for Messrs. Garth and Weatherall.

The JUDGMENT OF THE COURT was as follows:—

The three Petitioners have been convicted of an attempt to commit an offence under sec. 422, I. P. C. It appears that their property is now under mortgage to the Land Mortgage Bank and that under the terms of the agreement Messrs. Garth and Weatherall are managers of that estate under certain conditions in regard to payment of the moneys realised by them. The Petitioners have shown a disposition to be dissatisfied with that management and are endeavouring to get rid of it, if possible. In execution of a decree obtained by Messrs. Garth and Weatherall as managers of their estate in

a suit brought in the names of the mortgagors a certain taluk was sold for Rs. 3,000 and arrangements were made to enable the debtor to release his property from the sale on payment of certain money within a certain time. He was unable to fulfil the terms of that agreement, so he appears to have gone to the Petitioners and it was settled with them that on payment of Rs. 1,000, the sale was to be set aside. The money was paid into Court and, on the 15th September, a petition was presented on behalf of the mortgagors who are the persons now before us to obtain this money. The Court made no order on this petition and on the 22nd of the same month, the present proceedings were taken before the Magistrate. The Petitioners have been convicted and their appeals to the Sessions Judge have been dismissed.

We have now to consider whether, on these facts, the Petitioners have been properly convicted of an attempt to commit an offence under sec. 422, I. P. C. We think that, having regard to the relation between the Petitioners and Messrs. Garth and Weatherall at whose instance the proceedings were taken before the Magistrate, it cannot properly be said that an attempt to commit an offence under sec. 422 has been made. The application to obtain payment of this money was publicly made. If the money had been paid to them it would no doubt have been a breach of the terms on which their mortgage had been renewed for they then agreed that Messrs. Garth and Weatherall as managers were to have entire control of all moneys due from the mortgaged properties and this money represented the rent of an

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under-tenure. But still there was ample security for repayment of the debt and a breach of this agreement would probably have enabled the mortgagor to take steps to realise at once the full amount of the debt. The action of the Petitioners seems to have been prompted by their desire to put an end to the management rather than to act dishonestly or fraudulently so as to be liable to punishment under sec. 422, Penal Code. Any breach of their contract would not in our opinion render them liable to penal consequence. This is not a case in which the creditors would really suffer, though no doubt the means of obtaining this money and applying it towards liquidation of the debt or the expenses of the management might be postponed or hindered. The conduct of the Petitioners was in our opinion neither dishonest nor fraudulent within the meaning of these terms in the Penal Code. We also think that the agreement that they made with the under-tenure holder did not endamage the estate, for, as represented on their behalf, as matters then stood, it was a bargain that was likely to be beneficial. The superior tenure belonging to the estate had been sold for arrears of rent and if that sale was a valid sale the under-tenure would become void and it would therefore be without value so as to realize anything by its sale. The validity of the sale of the superior tenure

had been given against the Petitioners and it was doubtful whether the High Court before which this matter was on appeal would set aside this order. Consequently to obtain one thousand rupees for what might turn out to be of no value and to leave the under-tenure holder to run the risk of the decision of the High Court being in his favour would certainly be a good bargain. The interference of the Petitioners and their application to obtain the money paid into Court by the under-tenure holder might have been breaches of their contract with the mortgagors but such conduct cannot necessarily be regarded as dishonest or fraudulent so as to render them liable to punishment. Their attempt to get this money was more to put an end to the management than to prevent the money from being available to the payment of their debt under the mortgagor. In this respect the case does not seem dissimilar to that of *Nobin Chunder Mudduck* (1). For these reasons we think that the Petitioners have not been properly convicted. We accordingly set aside the conviction and sentence and direct that the Petitioners be released. The fines, if paid, will be refunded.

*Rule made absolute :*

*Conviction set aside.*

H. P. C.

(1) 22 W. R. 46 (1874).

## PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HORHOUSE.	}	MSR MUJIB UN-NISA
LORD DAVEY.		& ors, Plaintiffs,
LORD ROBERTSON.		Appellants,
LORD LINDLEY.		v
SIR R. COUCH.		ABDUL RAHIM & anr.,
SIR FORD NORTH.		Defendants,
1900.		Respondents.
8, December.		

*Registration Act (III of 1877), secs 21, 32, 34 and 87—Registration after death of executant—Registrar, jurisdiction of—Procedure, defect in—Wakf-namah—Wakf, validity of—Mutawali, amount to be expended in charitable uses at the discretion of the—Endowment, family—Charitable uses, gift to*

*A Registrar has no power or jurisdiction to register a deed unless he is moved by some person entitled to present it for registration under sec. 32 of Act III of 1877, i.e., "by some person having a direct relationship to the deed."*

*The absence of any party legally entitled to present a deed for registration is not merely a defect in procedure falling under sec. 87 of Act III of 1877 but goes to the jurisdiction of the Registrar and renders the deed invalid.*

*To be a valid deed of wakf, a deed must have the effect of granting the property in substance to charitable uses.*

*Where its effect is to give the property in substance to the family or leaves the amount to be expended in charitable uses in the absolute and uncontrollable discretion of the mutawali and no one has a right to demand an account, the deed is not a valid deed of wakf:*

*Held—On a consideration of the terms of the deed in question that it did not constitute a valid trust.*

This was an appeal from a decision of the N.-W. P. High Court, reversing the decree of the Sub-Judge of Meerut.

The question in dispute is as to the validity of a *wakf-namah*, dated 16th October 1889, executed by Munshi Sayed Mehrban Ali a few days previous to his death.

The said Munshi, a wealthy Mahomedan gentleman of Bulandshar, left him surviving three widows and two daughters who are the Appellants, and two sisters who would all be entitled to share in the property of the said Munshi under the Mahomedan law. Upon the death of the Munshi the Appellants set up the *wakf* by virtue of which one of them Murad-un-nisa claimed to be the *mutawali*.

The plaint contained the following among other statements:—

That the Munshi being the owner of property valued at Rs. 4,00,000, did on the 16th October 1889, execute "a deed of *wakf*," dedicating all his said property to charitable and religious uses, and sent the same to the Registrar's office for registration, where registration was refused on the ground that the said document did not contain a description of the property it purported to deal with sufficient to identify the same, and was, therefore, under the provisions of sec. 21 of Act III of 1877 (the Indian Registration Act 1877), not admissible to registration.

That on the 26th October 1889, before the deficiency could be supplied the said Munshi died.

That on the 4th November 1889, after the death of the said Munshi the said document was registered by one Syed Habibullah, described as "the general attorney and trustee of the said Munshi."

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The sisters resisted this claim and their main objections were that there was no intention to constitute a valid dedication, but that it was only a settlement of the property for the aggrandisement of the family of the Munshi, and that the deed was not legally registered so as to affect the property therein dealt with.

The deed first sets out the said Munshi's parentage and his possession of property, and then proceeds: "As I have no male issue up to this time, and it is incumbent on every one not to neglect to secure benefit of his soul in the next world, I wish to establish a perpetual, lasting and continuing charity, so that the charitable expenses may in future be defrayed without any difficulty or obstacle in my lifetime, and also after my death. Hence in order to seek nearness to God and to secure benefit and honour in the next world, I have, while in a sound state of body and mind, and of my free will and accord, without coercion or compulsion, made a family endowment (*wakf khandaani*) of my property detailed below."

And again, "Having withdrawn my proprietary possession from the property, the subject of the endowment, I have brought it in my possession as superintendent (*mutawali*) which I can hold during my life under the terms of this document. Its income and profit shall, after defraying its necessary expenses according to the provisions hereafter made in this document, be applied to charitable purposes. No one shall by reason of his getting any stipend or maintenance allowance from the income of the property, have a right to exercise proprietary acts or power to make a transfer, &c., nor shall this endowed property be liable to

be attached or sold in satisfaction of the personal debt of any superintendent or recipient of allowance; because it being an endowed property, all the rights of the superintendent and those for whom maintenance allowances have been fixed, shall exist only for their personal maintenance."

Then follows a list of the property, and then certain clauses of which cl. 1 appointed the Munshi himself "*mutawali*" or superintendent of the endowed property for his life, with power to use the income as he should think proper according to the provisions of the Mahomedan law and the conditions set forth in the document itself.

Cl. 2 provided for his successors as "*mutawalis*," who were to be chosen, as he then had no son, first from his wives, then from his daughters, and then from their descendants.

Cls. 3 and 4 fixed the allowances for himself, his successors, his wives and daughters.

Cl. 5 was as follows:—"Whatever are the necessary expenses such as the salaries of the servants for the endowed property, the expenses of visitors, marriages, deaths, presents, offerings and other charitable purposes, like those of schools, etc., at this time, they shall during the term of my superintendence be defrayed by me during the term of my superintendence and afterwards by every *mutawali*, subject to the provisions of this deed, of his own authority and according to his own wishes.

Cl. 6:—"The surplus income of the endowed property remaining after the payment of Government Revenue, the village expenses, the expenses of the *mutawali*,



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the salaries of the servants and stipend-holders and others, etc., shall accumulate and the money accumulated shall be invested in the purchase of other properties which shall also appertain to the endowed property and shall themselves be *wakf* property. The income of that also shall in conformity to the 5th paragraph be spent along with the income of the endowed property.

Cl. 7 stipulated that no one should have the right call upon any "*mutawali*" for an account.

Cl. 8 prohibited the alienation of the endowed property, except for the purposes of exchange or for the purchase of other property in place of that sold, and gave a power to raise money, but only with the consent of the Collector of the district.

Cl. 9 provided for the event of a son being born to him, in which case such son was virtually to take his place, and was not to be accountable to any one; its effect will be found more fully given in the judgment; the said deed concluded as follows:—

"10. If, God forbid! none of my male or female heirs be in existence at any time, the authority for the time being shall have power to take the endowed property into and under his own possession and superintendence, use its income remaining after the payment of its necessary expenses, for my spiritual benefit in such matters as may, according to the Mahomedan faith and the Hanafi sect to which I belong, be valid and be for the benefit of the Mahomedans.

I have therefore executed this deed of family endowment that it may serve as evidence and be of use."

The Subordinate Judge decided in favour of the validity of the *wakf*.

On the sisters' appeal to the High Court that Court following a previous decision of that Court in *Hardei v. Ram Lal* (1) admitted the document in evidence and held that the idea of the Munshi was simply to make a permanent provision for his descendants and provide for the increase of the estate. They pointed out that a very similar dedication had been held by the Lords of the Judicial Committee to be illusory on account of its remoteness in *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (2). They therefore decided against its validity and decreed the appeal.

Mr. Mayne and Mr. Raikes for the Appellants.

Mr. Branson for the Respondents.

By desire of their Lordships the first day's argument was confined to the question of whether the document was properly registered.

Mr. Mayne referred to secs. 32, 17, 49 and 60 of Act III of 1877. He also referred to *Sah Makhun Lall Panday v. Sah Koondun Lall* (3) where Act XX of 1860, sec. 36 is dealt with; *Mohammed Ewar v. Birj Lall* (4) where the decision in the last case is noticed and where sec. 35, Act VIII of 1871, was under consideration.

LORD DAVEY.—There it was found that there was a defect in procedure.

Mr. Mayne also referred to *Hardei v. Ram Lal* (1).

Mr. Branson referred to sec. 21 and said that in this case when the document

(1) I. L. R. 11 All. 319 (1889).

(2) L. R. 22 I. A. 75 (1894).

(3) L. R. 2 I. A. 210 (1875).

(4) L. R. 4 I. A. 366 at p. 175 (1877).

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was presented it was in such a condition that the Registrar could not have accepted it; that differentiates it from the cases relied on by the other side.\*

**LORD HOBHOUSE.**—The deed was defective in a most material part.

**Mr. Branson.**—And therefore it could not be registered.

On the 23rd the case was argued on the merits.

**Mr. Mayne** referred to the following authorities :—*Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (5) and *Abdul Gafur v. Nizamudin* (6).

**LORD HOBHOUSE.**—The use of the word wakf will not make a settlement good if there is merely an illusory trust for the poor.

**Mr. Mayne** referred to *Runchordas Vandrawandas v. Parvatibhai* (7), as to the use of the word Dharm; Hamilton's Hedaya, Vol. II, p. 334, Book XV, p. 345.

**Mr. Raikes** referred to Baillies' Digest, Book 9, Chapter 1, p. 549, and note 3. *In re Sutton, Stone v. Attorney-General* (8) and *Lewis v. Allenby* (9).

**LORD HOBHOUSE**—There is no statute of Elizabeth in India.

**Mr. Branson** was not called on.

Their LORDSHIPS' RESERVED JUDGMENT was delivered by

**LORD ROBERTSON.**—The Appellants were the Plaintiffs in a suit before the Subordinate Judge of Meerut, and by their plaint they prayed that it should be declared that a deed executed in October 1889 by Munshi Syed Mehrban

Ali, deceased, is a valid deed of wakf. The property affected by this instrument is said to be worth Rs. 400,000. The Plaintiffs are, respectively, wives and daughters of the deceased, for whom certain provisions are made in the deed. The Defendants were two of his sisters, for whom no provision was made in the deed. Both sisters are now dead, and only one of them, Ulfat-un-nisa, is now represented on the Record in pursuance of an Order in Council of the 7th August 1900 which struck off the representatives of the other sister, Sharif-un-nisa, under circumstances set out in that Order.

Of the several issues settled by the Subordinate Judge two only have been argued in this appeal. The first question is raised by the Defendants' plea that the deed founded on not having been legally registered cannot be admitted in evidence and cannot affect the property. The second question is raised by the Defendants' contention that having regard to the terms of the deed itself, the property did not become a wakf property. Both questions have been considered by their Lordships.

The question about registration turns on the Act III of 1877. The deed in dispute being an instrument of gift of immoveable property, it came under sec. 17 of the Act, and registration under the Act was accordingly, by sec. 49, indispensable in order to render it receivable as evidence of the transaction which it purported to record, and to enable it to affect the immoveable property comprised therein. The question is, was it lawfully registered? It was *de facto* registered, but the history of that registration requires to be examined.

(5) L. R. 17 I. A. 28 at p. 38 (1889).

(6) L. R. 19 I. A. 170 (1892).

(7) L. R. 26 I. A. 71 (1899).

(8) L. R. 28 Ch. D. 464 (1885).

(9) L. R. 10 Eq. Cas. 668 (1870).

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The deed as ultimately presented for registration and registered consists of two parts, of which the former part is dated 16th October 1889 and contains the deed of endowment and conditions, while the latter part is headed "Supplement or Detail of the Endowed Property," and consists of these particulars. It appears that at first the Munshi who executed the deed, or his advisers, had not adverted to the requirements of sec. 21 of the Registration Act: and as the deed as at first presented for registration did not contain "a description of" the "property sufficient to identify the same," the Registrar, on 16th October 1889, declined to register, but returned the deed "for correction and compliance with" those statutory provisions. The deed had been presented on behalf of the Munshi by Syed Habib-ul-lah, who held his power-of-attorney. On 24th October 1889 the supplement or detail of the endowed property was added, so as to render the deed registrable, and on that day the deed so completed was executed by the Munshi. On 4th November 1889, that deed of endowment (i.e., the completed deed) was presented for registration by the same Syed Habib-ul-lah. In the interval between the execution of the completed deed and its presentation to the Registrar the Munshi died. The legal question now to be considered turns on this last fact. The narrative however may be completed by mentioning that the Registrar accepted the deed and registered it, recording in writing that the man who had executed it and whose attorney presented it for registration was dead. The minute of this proceeding is on p. 142 of the Record.

It was not attempted on the part of the Appellant to justify the registration of the deed, as regularly done in accordance with the Act. The departure from the Act is indeed palpable, and the only question is whether it invalidates the registration. The Act by sec. 32 enacts that every document to be registered under it, whether such registration be compulsory (as in the present case) or optional (as in the case of other classes of instruments), shall be presented by some person executing or claiming under the same, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorised by power-of-attorney. Now the case in hand is that of a person who when he presented the deed for registration (as he says he did) on 4th November 1889 stood in no other relation to the deed than that, before the death of the person executing it, he had held his power-of-attorney. It is perfectly plain not merely from the general law but from the terms of this sec. 32 itself that, after the man's death, the only attorney who would have had any *locus standi* would have been the attorney of the representative or assign of the deceased. It has been suggested however, that the error of the Registrar was a defect in his procedure only and accordingly under sec. 87 does not invalidate the act of registration. To their Lordships the error appears to be of a more radical nature. When the terms of sec. 32 are considered with due regard to the nature of registration of deeds it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some

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person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The Registrar could not be held to exercise the jurisdiction conferred on him, if, hearing of the execution of a deed, he got possession of it and registered it; and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody. Now it seems to their Lordships that when the deed was presented on 4th November 1889 it was presented by a volunteer, and the Registrar's minute shows that he proceeded to register at the request of one whom he knew to derive his power-of-attorney from a dead man. Nor is it possible to treat this action of the Registrar as compliance with the request made on 16th October 1889, when the principal was alive. Not only had the deed in fact been executed afresh on 24th October but it was presented afresh on 4th November, as the minute itself bears; and even assuming the continuity of the proceeding, the death of the applicant brought it to an end. The Registrar indeed did not merely disregard sec. 32, for he proceeded to accept the admission of the alleged attorney as a good admission of the execution of the deed, although sec. 34 requires in the case of a decease the admission of the representative or assign.

Their Lordships were referred to two decisions of this Committee in support of the Appellants' contention. Neither case gives any countenance to the view that the absence of any party legally entitled to present a deed for registration is a defect in procedure falling under sec.

87. In both those cases the Registrar was throughout moved by a person having title and was exercising his jurisdiction. The difference is in their Lordships' judgment vital. They therefore hold the registration of this deed to have been illegal.

Their Lordships have, however, considered the question, whether, even assuming it to have been registered, the deed is, according to its terms, a valid deed of wakf. It will be so, if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family.

The deed begins with a statement that the grantor has always devoted a portion of his income to religious and charitable purposes as seemed proper and expedient to him at the time. He goes on to say that, as he has no male issue and it is incumbent on every one not to neglect to secure benefit of his soul in the next world, he wishes to establish a perpetual, lasting and continuing charity, so that the charitable expenses may in future be defrayed without any difficulty or obstacle in his lifetime and also after his death. Hence "in order to secure benefit and honour in the next world I have of my free will and accord, without coercion or compulsion and while in a sound state of body and mind, made a family endowment (*wakf khandani*) to seek nearness to God." He goes on to say that he has withdrawn his proprietary possession from the property the subject of endowment and has brought it into his possession as mutawali, "which I can hold during my life under the terms of this document. Its income and profit

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shall after defraying its necessary expenses according to the provisions hereafter made in this document be applied to charitable purposes." No one was by reason of his getting any maintenance to have right to exercise proprietary acts nor should the endowed property be liable to be attached or sold in satisfaction of personal debts of any mutawali or recipient of allowance, because it being an endowed property all the rights of the mutawali and those for whom maintenance allowances have been fixed are to exist only for their personal maintenance. A detail of the property (*wakf khandani*) which was "the subject of the family endowment under this deed and the conditions attached thereto" was then given.

The conditions follow the detail of the property and are ten in number.

The 1st appoints the donor himself to act as mutawali and he is to use the income of the endowed property "in the way I shall think proper, according to the provisions of the Mahomedan law and the conditions of this document."

No. 2 provides for one of his wives and thereafter one of his daughters, and after their deaths some direct descendant, being successively mutawali.

No. 3 fixes Rs. 300 a month as the allowance of the mutawali for his or her own expenses and those of his or her children.

No. 4 gives maintenance allowances to the wives and daughters of the donor.

The 5th and 6th purposes are as follows:—"Whatever are the necessary expenses such as the salaries of the servants for the endowed property the expenses of visitors, marriages, deaths, presents,

offerings and other charitable purposes, like those of schools, &c., at this time, they shall during the time of my superintendence be defrayed by me during the term of my superintendence and afterwards by every mutawali, subject to the provisions of this deed, of his own authority and according to his own wishes."

6. "The surplus income of the endowed property remaining after the payment of the Government revenue, the village expenses, the expenses of the mutawali, the salaries of the servants and stipend holders and others, &c., shall accumulate and the money accumulated shall be invested in the purchase of other properties which shall also appertain to the endowed property and shall themselves be wakf property. The income of that also shall in conformity with the 5th paragraph be spent along with the income of the endowed property."

By the 7th condition the mutawali is to have a discretionary power, with reference to the increase or decrease in the income of the endowed property, to increase or decrease the fixed allowances or fix a new allowance. No one was to have a right on the ground of relationship, &c., to prefer a claim for increase or decrease or for a new allowance, or a claim against the mutawali for the time being for rendition of accounts.

The 8th condition forbids sale and mortgage except in certain specified cases.

The 9th condition relates to the contingency of a son being born to the donor after the execution of the deed. He is to be the mutawali, with the aid of a *munsarim* during minority. He is to have Rs. 300 a month for his expenses, "and shall be authorized to spend all

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the net profits of the endowed property according to his discretion in purchasing property and making addition to the endowed property, in the erection of houses, in performing *shadioghammi*, joyous and mourning ceremonies and in other necessary and charitable matters." It was to be optional to him to create new allowances, to reduce, enhance or put a stop to the allowances of the persons receiving allowances. No other recipient of allowances or relatives was to have power to take account from the mutawali.

The 10th (and last) condition declares that "if (which God forbid!)" none of the donor's male or female heirs be in existence at any time, the authority for the time being shall have power to take the endowed property into and under his own possession and superintendence, use its income remaining after the payment of its cost of maintenance for the donor's spiritual benefit in such matters as might according to Muhammadan faith and Hanafi sect, to which the donor belonged, be valid and for the benefit of the Mahomedans. "I have therefore executed this deed of family endowment in order that the same may serve as evidence and be of use."

The deed thus closes, as it began, by describing itself as a deed of family endowment. The donor contemplates, it is true, that his own liberality to religious and charitable purposes shall continue in future generations, but this is only (as it turns out) to an uncertain and discretionary amount, and as an incident of the family endowment. When the deed is examined and collated, and its professions tested by its effective

provisions, it proves to be what it calls itself, a "family endowment," pure and simple. Indeed the theory of the deed seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable purpose. It is superfluous in the present day to say that this is not the law.

The part of the deed which was most relied on by the Appellants is the general statement or declaration with which it opens. The words particularly founded on are those in which the testator declares that "the income and profit of the endowment shall, after defraying its necessary expenses according to the provisions hereafter made in this document, be applied to charitable purposes." The reference to the subsequent part of the document carries us forward to the conditions where those general intentions are put into concrete and effective shape. Now the 5th and 6th conditions express in clear and definite language the manner in which the testator works out the ideas adumbrated in the words which have been quoted, and they place beyond dispute the relative positions of charity and family endowment in the testator's scheme. The 5th condition provides for the payment of what it calls necessary expenses and among those it expressly enumerates "offerings and other charitable purposes, like those of schools, &c., at this time." The 6th condition deals with the surplus income after these "expenses" are paid, and dedicates that income to the purchase of other properties; and the income of the new

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properties is to follow the same course as the income of the original estate. The amount to be applied under the 5th head is in the absolute and uncontrolled discretion of the mutawali and no one has a right to demand an account.

On the terms of the deed itself, therefore, their Lordships hold that the property is not in substance dedicated to charitable purposes but on the contrary is dedicated substantially to the maintenance and aggrandisement of the family estates for family purposes. The deed therefore could not be supported as constituting a wakf.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed and the Appellants must pay the costs of the appeal.

Solicitors: *Mr. T. C. Summerhays* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Respondents.

*Appeal dismissed with costs.*

C. W. A.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 345 OF 1898.

<p>GRACE, J. FRATT, J. 1900. 28 November.</p>	}	<p>DOMAN PANDEY, Plaintiff, " Appellant, v. PANCHU KOLE and ORS, Defendants, Respondents.</p>
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*Regulation III of 1872—Partition of mal raiyat land in Chota Nagpur—Partition of open and land—Ghatwal.*

*Between two mal raiyats with whom a settlement has been made under Regulation III of 1872 there may be a partition of the waste and jungle lands, though such partition cannot be binding upon the*

*superior landlord, the ghatwal, and will only subsist during the currency of the settlement.*

*So far as the trees to which the superior landlord is exclusively entitled, they cannot be the subject of partition, but as to the trees which belong to the mal raiyats there may be a partition.*

This was an appeal preferred on the 22nd of February 1898, against the decision of R. Carstairs, Esq., Deputy Commissioner of Dumka, District Sonthal Pergunnahs, preferred on appeal from a decision of H. H. Heard, Esq., Sub Judge of Deoghur, dated the 1st of September 1897.

The suit out of which the present appeal arose was brought by the Plaintiff for partition of 'mal raiyati' interest in a village in the Sub-division of Deoghur. The Plaintiff sued to have his interest separated from that of Defendant as between themselves, and to have the whole area of the village accordingly divided into their respective shares—the Plaintiff having 14 annas and the Defendant 2 annas share. The suit was dismissed by both the lower Courts on the ground that there could be no partition of the mal raiyati interest. On appeal the High Court held that there could be such partition and in remanding the case, their Lordships observed as follows:—

We are unable to find what authority the Courts below had in coming to this conclusion. If they meant to hold that under Regulation III of 1872 (the Sonthal Pergunnahs Regulation) a suit like this would not lie in a civil Court, that would clearly be wrong, for the Plaintiff in this case does not seek to set aside, or question the propriety of any entry

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in the Record of Rights; but accepting the Record of Rights as correct, they seek to have a partition between themselves and their co-sharers and such a suit is in no way forbidden by that Regulation.

The lower Courts again dismissed the suit on the ground that there could be no partition of the *jungle* and waste lands in which the villagers had an interest. The material portion of the judgment of the lower Appellate Court was as follows:—

This is a suit for partition of "*mal raiyati*" interest in a village in the Sub-division of Deoghur.

The village has been settled under Regulation III of 1872, and there is no issue in this case as to the amount of the interest of each or as to its nature. It is agreed by the parties that they hold, the Appellant 14 annas and the Respondent 2 annas interest as "*mal raiyats*" of the village.

The Plaintiff sues to have his interest separated from that of Defendant as between themselves, and to have the whole area of the village accordingly divided into one and seven eighth shares.

The case was originally dismissed summarily but was returned for trial on the merits by the Honourable High Court. It has again been dismissed on the merits and this appeal has been filed. The question is one of considerable importance from an administrative point of view and I think it right to note here one or two leading facts as regards the "*mal raiyati*" interest that being a question not likely to be done by the parties. It appears to me that one of the main objects in vesting the Deputy Commissioner and his subordinates with powers of civil Courts was to enable cognizance to be taken of important facts connected with the settlement. At the same time, the questions touched on not being in issue I cannot claim for my remarks here the finality of an exhaustive enquiry.

The question of *status* of village settlement-holders in the Deoghur Sub-division of this district was raised during the carrying out of the first settlement under Regulation III of 1872, and certain persons claimed as settlement-holders of certain village to be *raiya*ts of those

villages, the original intention of making this claim being to enable them to deprive all persons holding under them of the benefits of the settlement in the shape of fixed rates of rent and other benefits which the settlement gives to *raiya*ts. They made no attempt to have themselves called tenure-holders, because no "*ghatwal*" under Regulation 29 of 1814 (by which title nearly the whole property in land in the Deoghur Sub-division is held) can create a tenure binding on his successor. It was tenant right only that they claimed with a right of transfer.

The title of *mal raiyat* was invented for the purpose of this settlement, the original clearer and his descendants being admitted to hold the title and as being supposed to have invested their property in improvements were permitted to recoup themselves in case they wanted to give up the *mal raiyati* by sale of their interest. This right does not extend to the sale of a part. It is held by Government as the highest settlement authority that they cannot split up the interest by selling a part.

The "*mal raiyat*" in occupancy is not proprietor. The *ghatwal* is. The *mal raiyat* is entitled as such to occupy and till land in the same way as other *raiya*ts in the village but other *raiya*ts have the same right to do so as he has. He cannot sublet his land, any land sublet to a village *raiya*t becoming thereby part of that *raiya*t's *jote*.

Coming now to the case before me, I find four issues of which the important ones connected with this appeal being issues 2 and 3.

Issue No. 2 relates to the division of waste lands and *jungle* and issue No. 3 to that of fruit trees. On both these issues the Subordinate Judge has decided that a partition cannot be made of waste lands and *jungle* or of fruit trees.

It will be convenient to take the two issues separately. \*

I wish to remark before going further, that the land in this suit is described as *jungle* and waste, and the trees on that land are also described as those standing on that land. The history of the settlement of the Sonthal Pergunnahs is shortly as follows:—

Political disturbance was feared by Government owing to the difficulty of adjusting by ordinary means (civil suits and the like) the rights of landlords and tenants, and Regulation III of 1872 was passed to enable this to be effected by the method of settlement. The rights to be adjusted were those of *clor* land



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and tenant and the unit of settlement was the village. Each village had a record of right belonging to itself, in which were recorded all the customary rights of those connected with it, both landlords and tenants, and a lease was given to the person, in this case the *mal raiyat*, who was to produce to the landlord the village rents, and generally to guard the rights recorded in the village record and perform the duties described in the lease. The lease is an official document granted by the Settlement Officer, and is not a contract with either landlords or tenants but is with the record binding on both.

Now the property in all village land is vested in the *raiya*s and the landlord. Whatever rights the *raiya*s have not, belong to the landlord. The *raiya*s are entitled to occupy for cultivation the village land, and to hold what they occupy at rates fixed at the settlement. The *mal raiyat*'s benefit is that he may collect rent at half rates on all new land occupied from one settlement to the next, and may also reclaim waste land for his own occupancy while the landlord can claim no rent for this land till there is a revision of settlement. Beyond this, the *raiya*s have an exclusive right to reclaim waste land within the village, outsiders not being entitled to come in and take it.

They have also certain easements, as grazing, taking wood for fuel and the like. But all the tenant's rights are vested in him by virtue of his position as cultivating tenant.

In this case no partition of land under cultivation has been asked for. The Plaintiff is applying for a partition of the land for which the landlord is being paid nothing, and which is the landlord's. It is unoccupied, because it is reserve land for the benefit of the village *raiya*s, but it is not yet the property of the *raiya*s, and cannot become so until it is occupied by them. A *raiya*'s right is essentially an occupancy right and neither the *raiya* nor the *mal raiyat* can claim any part of it as his until he has occupied the land for cultivation. When he does so, he becomes liable for rent. Till he does so, the land is the landlord's, not any one else's. The Plaintiff claims to occupy exclusively seven eighths of the existing village waste, because the right to partition is an incident to property. It seems to me that he can only claim the right over his own property and not over that of another man's. His right is limited to the land he occupies as tenant, to collecting the landlord's rent from the village

and drawing commission for doing so; and to the easements and right of reclamation which he in common with other *raiya*s of the village is entitled to and that is all. He has not such property in waste and jungle land as would entitle him to enjoy it separately.

Taking another point I note that, if the object of the Plaintiff is a separate enjoyment by reclamation of the waste, that cannot be conveniently done.

In the first place the partition is not asked for of the occupied land. This new partition would therefore create two new classes of *raiya* *jote* land, *viz.*, undivided, and that belonging to the 14 annas and that belonging to the two annas share.

If there is no partition, then all occupied land will be of one class.

Another objection is that the parties are not proprietors of the village, and cannot divide their liabilities. They are liable for the whole rent, and for the whole duties. If there is a default of rent or a failure of duty, the person whose it is may be dismissed, and his successor is not bound by any partition now made.

Again the rents due from the parties are the village rents as a whole—should the present waste land not be cleared *pari passu* in both shares, the rental of one share must increase faster than that of the other, and the whole arrangement (which is a private one only) must be upset at the next revision of settlement to enable the parties to occupy their proper interests. No private agreement to transfer a share of the interest of a *mal raiyat* can be considered valid and any such agreement would have to be set aside.

\* \* \* \* \*

I think the Plaintiff is not entitled to a partition of the jungle and waste lands of the village.

As regards the third issue—a partition of fruit trees.

I find that in the Village Record of Rights which is an exhibit in this case, paragraph 9 gives the rights over trees.

The trees are not included in what is held under the village rents. The two provisions are as follows :—

"The *raiya*s will enjoy without rent trees planted by them or their ancestors."

The *Khas* mango and jack fruit bearing trees not included in the village rent are to be paid rent for by those who enjoy them.

It seems clear from this that the *raiya*s

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are to enjoy trees planted by them and their ancestors, and that the other trees belong to the *ghatwal* and are to be paid rent for by those who enjoy them. The inference is that the right to let such trees, belongs to the *ghatwal*. The issue in this case may possibly be somewhat different from that of the land, for, as the fruit trees are in bearing, and there is a necessity for some arrangement who is to occupy which trees, if a breach of the peace is to be avoided.

Nevertheless the difficulty of ordering a partition is great. The trees are on the *ghatwal's* ground, and are his property. He is entitled to let them to the tenants, and the proposal of the Plaintiff is that the Court should practically exclude the *ghatwal* from the management of his trees, and hand them over to the parties.

I have asked the parties whether either of them pays the *ghatwal* any rent for the trees, and they say no. There is no mention of *mahwa* trees in the Record of Right. In the *pottu* or lease filed by Doman Pandey, the Plaintiff-Appellant, the relevant passages about fruit trees are (paragraph 5) as follows:—

Except trees planted by the *mal raiyat* or *raiya* or their ancestors all trees are the property of the *ghatwal*.

Such trees, when enjoyed will be paid rent for to the *ghatwal*.

*Mahwa* trees long enjoyed by the *mal raiyat* or *raiya*s will continue to be enjoyed by them without payment of rent. There are thus three classes of trees.

*First*.—Those to which the *raiya's* title is created by the fact that he or his ancestors planted them. \*

*Second*.—Those belonging to the *ghatwal* and rented from him.

*Third*.—*Mahwa* trees which *raiya*s have acquired the right to occupy by long possession free of rent, but they are the *ghatwal's*. I do not quite agree with the Subordinate Judge that the mere fact of a *raiya* reclaiming a little land round a tree would give him the right to occupy it, and to oust from its occupation another who had previously done so.

I do not, however, see that there is any class of fruit trees in the village which can be fairly made subject to partition.

I consider though not for precisely the same reasons as the Subordinate Judge that the claim for partition of these has not been established. The appeal is dismissed.

\* \* \* \* \*

The Plaintiff preferred this second appeal.

*Babu Karuna Sindhu Mukerjee* for the Appellant.

*Babu Sib Chandra Palit* for the Respondents. \*

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for partition of a certain village in the Sonthal Pergunnahs, the said village having been settled with two persons under Regulation III of 1872, the Plaintiff being entitled under such settlement to a 14 annas share, and the Defendant to the remaining 2 annas share of the village. The parties are described as *mal raiyats*; and the Plaintiff asks that his share in the village may be divided from the share of his co-sharer.

The suit had been dismissed by the Courts below upon the ground that no partition could be effected of the *jungle* and waste lands, as also of the fruit trees; but this Court, in second appeal, was of opinion that the view adopted by the lower Courts was erroneous; and upon that ground the case was remanded to the Court of first instance for trial upon the merits. The suit has again been dismissed by the Courts below, and apparently upon two grounds, *first*, that so far as the *jungle* and waste lands are concerned, they being lands reserved for the benefit of the village *raiya*s, they cannot become the property of the *mal raiya*s until they have been cleared or occupied by them; and, *secondly*, that there being two classes of trees upon this property, one class belonging to the

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superior landlord, the *ghatwal*, and the other class belonging to the *mal raiyats*, no partition of the trees generally could be made.

Now, so far as the first-mentioned ground is concerned, the settlement record with reference to the *purti* and *jungle* lands, provides as follows:—"The *raiayats* (meaning, the under-*raiayats*) will pay rent to the *mal raiyats* for all new lands cultivated by them at half the rate fixed for the mouzah at the time of settlement, and the lands that will be cultivated by the *mal raiyats* themselves will be enjoyed by them during the currency of their lease without payment of rent." So that taking this provision with the fact that the entire village was settled (including, as we take it, the *purti* and *jungle* lands) with the *mal raiyats*, *prima facie* the right to occupy the said lands is in the *mal raiyats* themselves, though, if any portion of the lands be cleared by the *under-raiyats*, such *raiayats* would be entitled to remain in possession thereof upon payment of rent to the *mal raiyats*. And there is the provision that if the *mal raiyats* cleared any portion of the lands they would be entitled to occupy the same without payment of rent to the superior landlord, the *ghatwal*. It follows from this that as between the two *mal raiyats*, themselves, there can be no difficulty as to partition of such lands, though no doubt, such partition cannot be binding upon the superior landlord, the *ghatwal*, and will only subsist during the currency of the settlement.

Then as regards the fruit trees, if, as the learned Deputy Commissioner says, there are two classes of fruit trees, one belonging to the superior landlord, the

*ghatwal*, and the other to the *mal raiyats*, it is obvious that so far as the trees to which the superior landlord is exclusively entitled, they cannot be the subject of partition, but as to the trees which belong to the *mal raiyats*, there is no reason why they should not be partitioned.

Some discussion was raised before us as to whether the suit was a suit claiming partition of the entire village, or only of the *jungle* and waste lands and fruit trees. Looking, however, at the plaint itself, it appears that the suit was for partition of the entire village. However that may be, as the suit has been dismissed upon the two grounds already indicated, and as neither of these two grounds is in our judgment valid, we think it right and proper to set aside the decree of the Court below and remand the case to that Court for the purpose of effecting such partition as the Plaintiff may be entitled to, and as he has asked for.

Costs will abide the result.

*Appeal allowed :*

S. C. S.

*Case remanded.*

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2351 of 1898.

MOAZAM HASSAIN

AMEER ALI, J.

CHOWDHURI, Plaintiff,

BRETT, J.

Appellant,

1900.

*v.*

13, July.

BHOUDIN and another,  
Defendants, Respondents.

*Inheritance, partial acceptance or renunciation of—Liability of heirs for rent.*

*There cannot be a partial acceptance or renunciation of an inheritance, nor*

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*can one of several heirs accept a part only of an inheritance to the prejudice of the other heirs and of the creditors of the deceased. An acceptance in part has the effect of an acceptance of the whole and carries with it the same liability.*

*If a person accepts the inheritance in whole or in part he is bound to discharge the liabilities which attach to the late tenants from whom he inherits unless he can prove that he has since made a formal surrender of the holding to the landlord.*

This was an appeal against the decree of Syed Nurul Huda, Esq., Officiating District Judge of Zillah Noakhaly, dated the 17th December 1897, reversing the decree of Babu Ashu Tosh Mitter, Munsif, dated the 22nd March 1898.

The suit out of which the present appeal arose was brought by the Plaintiff for recovery of rent of a *howla*.

One Fuzal Rahman Chowdry was the tenant of the *howla*. He was murdered in Sraban 1300. Defendants Nos. 1 and 2 are his brothers, Defendant No. 3 is his widow. Plaintiff's case was that the Defendants were in possession of this *howla* as heirs of the deceased tenant. Defendants Nos. 1 and 2 contested the suit. The defence was that they never obtained possession of the holding; that they were not liable for its arrears of rent; that the relation of landlord and tenant did not exist between them and Plaintiff, and that they had no objection, if the decree was passed against the tenure only. The points for determination were; first, does the relation of landlord and tenant exist between Plaintiff and the Defendants? Second, are the arrears due and unpaid? The first Court decreed the

suit and decided the above points in favour of the Plaintiff. He found that the Defendants had accepted the inheritance of their brother, though there was no sufficient evidence to shew that they were in possession of this particular *howla*.

Upon appeal by Defendants Nos. 1 and 2 the District Judge held that the Appellants could not be made liable for the payment of the rent as they were not in possession of the *howla* in arrears.

The Plaintiff preferred this second appeal.

*Babus Dwarka Nath Chuckerbarti and Joy Gopal Ghosha* for the Appellants.

*Babu Sarat Chandra Dutt* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought by the Plaintiff to recover from the principal Defendants certain arrears of rent in respect of a *howla* which he alleged in his plaint they owned and held within his property. It appears that the *howla* in respect of which the suit was brought belonged to one Fuzal Rahman who was murdered in Sraban 1300 or July 1897. The Defendant No. 3 is the widow of Fuzal Rahman and the Defendants Nos. 1 and 2 are his brothers. The three Defendants are the heirs of the deceased Fuzal Rahman and the Plaintiff sued to recover from them the rent due from the *howla* up to and since the death of Fuzal Rahman on the ground that as his heirs they succeeded him as tenants of the holding and were in possession, and they had not since surrendered the holding. The Defendants

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Nos. 1 and 2 denied that they had ever entered into possession of the holding or that the relationship of landlord and tenant existed between them and Plaintiff, and disclaimed all liability for the rent claimed.

The Defendants as heirs of their deceased brother would ordinarily have inherited with his widow the property left by him including the holding and if they accepted the inheritance they would be liable to the Plaintiff for the rent which accrued up to the death of their brother and subsequently of the holding unless they surrendered the same to him. The question then on which the decision of the suit chiefly turned was whether or not the Defendants accepted the inheritance from their brother.

The Munsif appears to have found that the Defendants accepted the inheritance at least in part and holding that a renunciation pleaded in defence to an action of this sort could not be less than a complete renunciation of the inheritance he has found that the Defendants accepted the inheritance subject to all the liabilities. And one of these is the liability to pay rent for the holding in suit unless the holding be surrendered. There is no suggestion that there was any formal surrender of the holding to the landlord and therefore the Munsif has held that the two Defendants equally with the widow are liable to the Plaintiff for the rent of the holding.

The District Judge in reversing the judgment of the Munsif on appeal has only considered the question of Defendants' possession of the holding in suit and has disregarded entirely the question whether they accepted or renounced the

inheritance. As we are aware of no authority for the proposition that there can be a partial acceptance or renunciation or that one of several heirs can accept a part only of an inheritance to the prejudice possibly of the other heirs and of the creditors of the deceased, an acceptance in part would have the effect of an acceptance of the whole, and would carry with it the same liabilities. There can be no doubt that if the Defendants accepted the inheritance in whole or in part they are bound to discharge the liabilities which attached to the late tenant from whom they inherited unless they can prove that they have since made a formal surrender of the holding to the landlord. As already noticed there is no suggestion in this case that there was such a surrender. The question of possession on which the District Judge has decided the case does not cover the whole points in issue in the suit, but is of importance only as indicative of acceptance or renunciation of the inheritance.

The appeal is accordingly remanded to the District Judge to decide on the evidence the question whether the Defendants accepted or renounced the inheritance devolving on them on the death of their brother so as to render them liable to the landlord for the rent of the holding in suit accruing before and after the death of their brother.

The District Judge will re-submit the appeal with his finding on this issue within a month after the arrival of the records in his Court.\*

*Appeal allowed :*

*Case remanded,*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2549 of 1898.

RAGHU NATH GHOSHAL,  
 Plaintiff, Appellant,  
 v.  
 1900. MAFAKBEAR HOSSAIN CHOW-  
 DHURY, and others,  
 8, August. Defendants, Respondents.

*Civil Procedure Code (Act XIV of 1882),  
 secs. 206, 622, 623—Order amending decree—  
 Appeal—Second appeal—Review.*

*An order under sec. 206, C. P. C., amend-  
 ing a decree is not a decree and no appeal  
 lies against such an order and the proper  
 remedy is by an application under sec. 622,  
 Civ. P. C.*

SURTA v. GANGA (3) referred to and fol-  
 lowed; JOY KISHEN MOOKERJEE v. ATAOR  
 ROHMAN (2) referred to; KALI PROSUNNO  
 BASU v. LAL MOHUN GUHA (1) distinguished;  
 ABDUL HAYAT KHAN v. CHUIA KUAR  
 (4); MUHAMMAD SULAIMAN KHAN v.  
 FATIMA (5) explained.

This was an appeal preferred on the  
 15th of December 1898, against the  
 decree of Babu Kedar Nath Mozumdar,  
 Subordinate Judge of Burdwan, dated the  
 7th of September 1898, preferred on  
 appeal from the decision of Babu Basanta  
 Kumar Ghosh, Munsif of Kalna, dated  
 7th of February 1898.

The question for determination in this  
 appeal was whether an order under sec.  
 206, C. P. C., for the amendment of decree  
 is appealable or not and whether a second  
 appeal lay in this case against the decree  
 of the lower Appellate Court passed on

appeal against such an order. The facts  
 will appear from the judgment.

*Babu Jogesh Chandra Roy for the Ap-  
 pellant.*

*Moulvie Mahomed Yusuf and Mahomed  
 Mahomed Tahir for the Respondents.*

The JUDGMENT OF THE COURT was as  
 follows:—

This is an appeal against the decision  
 of the Subordinate Judge of Burdwan  
 dated the 7th September 1898. This  
 decision disallows an appeal to him  
 against an order of the Munsif of Kalna  
 dated 7th February 1898, under sec. 206  
 amending a decree of the Additional  
 Munsif of Kalna, dated the 17th Septem-  
 ber 1891, which, in his opinion, was not  
 in conformity with the judgment. The  
 Subordinate Judge dismissed the appeal  
 preferred to him on the ground that the  
 Munsif's order amending the decree was  
 right.

Against this dismissal of his appeal the  
 Plaintiff now prefers this second appeal.

We are of opinion that no second  
 appeal lies to us against an order under  
 sec. 206. An order under sec. 206 is  
 not a decree. No provision for an appeal  
 from such an order is made in sec. 588.  
 Hence, it would seem that no appeal lay  
 to the Subordinate Judge and no second  
 appeal lies to us. The Plaintiff's remedy,  
 if any, would seem to be by an applica-  
 tion under sec. 622.

The learned pleader for the Appellant,  
 however, cites the case of *Kali Prosunno  
 Basu v. Lal Mohun Guha* (1), and contends  
 that it is therein decided that an order  
 amending a decree is the same thing as  
 a review of judgment. This does not  
 appear to us to have been laid down in  
 that judgment. The learned Judges who

(1) I. L. R. 25 Cal. 258 (1897).

(1) I. L. R. 25 Cal. 258 (1897).

(2) I. L. R. 6 Cal. 22 (1880).

(3) I. L. R. 7 All. 875 (1885).

(4) I. L. R. 8 All. 377 (1886).

(5) I. L. R. 11 All. 314 (1889).

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decided that case held that a certain order might be treated as a review of judgment within the meaning of Art. 179 of the Limitation Act, so that a decree-holder might execute his decree within 3 years of the date of its amendment. That appears to be all that was decided in that case.

On the other hand, in *Joy Kishen Mookerjee v. Atanor Rohoman* (2), a clear distinction appears to be drawn between an order under sec. 206 and a review of judgment. In *Surta v. Ganga* (3), it was expressly held that no appeal lies from an order under sec. 206. In *Abdul Hayai Khan v. Chua Kuar* (4) and *Muhammad Sulaiman Khan v. Fatima* (5), appeals were allowed, because the orders appealed against were orders passed in execution and were therefore orders passed under sec. 214 and appealable. In both these cases it appears to be implied that there is no appeal against an order under sec. 206.

In this case there is this further reason for holding that the order of the Munsif was not a review of judgment, that the Munsif who amended the decree was not the Munsif who passed the original decree which was subsequently amended, and there does not seem to have been any clerical error apparent on the face of the decree so as to make the second Munsif competent to review his predecessor's decree under sec. 624, C. P. C.

We must therefore dismiss this appeal with costs, and this order will govern Special Appeal No. 2550 of 1898 which is of a similar character.

S. C. S.

*Appeal dismissed.*

(2) I. L. R. 6 Cal. 22 (1880).

(3) I. L. R. 7 All. 875 (1885).

(4) I. L. R. 8 All. 877 (1886).

(5) I. L. R. 11 All. 314 (1889).

## PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD HOBHOUSE.

LORD DAVEY.

BANARASI PARSHAD

LORD ROBERTSON.

*v.*

SIR R. COUCH.

KASHI KRISHN

1900.

NARAIN and

Heard, 21, Nov.

another.

Judgment, 8, Dec.,

*Civil Procedure Code (Act XIV of secs. 595, 596 and 600—Appeal to Privy Council—Substantial point of law—Certificate of High Court—Assent of Respondent to the appeal.*

*Under sec. 596, Civ. P. C., there is no right of appeal to the Privy Council simply on the ground that a substantial point of law is involved. The presence of such a question does not give a right of appeal when the value is below the mark; the requirement of it restricts the right when the higher Court affirms the lower and the dispute either directly or indirectly relates to an amount of Rs. 10,000.*

*Under secs. 595 and 600, Civ. P. C. there is a right of appeal if the High Court certifies that the case is "otherwise" a fit one for appeal. The word "otherwise" refers to special cases, such as, where the point in dispute is not measurable by money, though it may be of great public or private importance. But in all such cases a special certificate to that effect must be granted by the High Court.*

*The mere assent of the Respondent to an appeal, does not give the Appellant a right of appeal, which the Code does not allow, or sustain a certificate which is obviously erroneous.*

\* This was an appeal from a decision of the Allahabad High Court reversing that of the Sub-Judge of Bareilly.

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The suit was brought to recover from the Respondents the sum of Rs. 14,332 as due on account of mesne profits and interest thereon. The Sub-Judge gave the Plaintiff a decree for Rs. 13,975-1-9. On appeal by the Respondents to the High Court the decree was varied reducing the amount of mesne profits awarded to Plaintiff from Rs. 13,975-1-9 to Rs. 10,066-15-2. So that the matter involved in the appeal to Her Majesty in Council was entirely limited to a sum under Rs. 4,000.

The questions raised involved the interpretation of secs. 43 and 44 of the Civil Procedure Code.

Mr. Ross for the Appellant contended that those sections had been erroneously construed by the High Court. That the cause of action for the suit decided on 1st December 1890, was not the same as the cause of action for the present suit. That the cause of action for mesne profits was different from the cause of action for recovery of the land. A separate suit for the recovery of mesne profits lies. Mr. Ross referred to secs. 43 and 44, C. P. C., relying on *Lalessor Babui v. Junki Bibi* (1); he also referred to *Ven Koba v. Subbanna* (2) those being the cases mentioned in the judgment of the High Court, also to secs. 8, 9 and 10 of Act VIII of 1859.

SIR RICHARD COUCH.—If you sue for mesne profits must you not sue for the whole amount due.

Mr. Ross.—I did not sue for *Wasilat* but for 2 years rent.

SIR RICHARD COUCH referred to secs. 211 and 219, C. P. C.

THE COURT.—The appeal is for a sum much under the appealable amount, what power had the High Court to grant leave to appeal.

Mr. Ross.—It involves a substantial question of law and it has come up in the usual way. It was not objected to.

No one appeared for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—It will be remembered that the argument on the merits of the case was broken off because the property at stake is not such as to give a right of appeal. The amount in question is little more than Rs. 4,000. When this was called to Mr. Ross's attention, he relied on the allegation that a substantial point of law is involved. Their Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of appeal in the ordinary course of procedure under the Code. That is a mistake. Sec. 596 of the Code requires that in order to give such a right there must be in dispute either directly or indirectly an amount of Rs. 10,000. If the decree affirms the Court below, another condition is affixed, viz., that the appeal must involve some substantial question of law. The presence of such a question does not give a right when the value is below the mark; the requirement of it restricts the right when the higher decree affirms the lower.

It is true that by secs. 595 and 600 an appeal may be granted if the High Court certifies that the case is fit for appeal "otherwise," i.e., when not meeting the conditions of sec. 596. That is clearly

(1) 1. L. R. 19 Cal. 615 (1891).

1. L. R. 11 Mad. 151 (1887).



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intended to meet special cases; such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate.

No such certificate has been given in this case. The certificate runs, "That as regards the nature of the case, it fulfils the requirements of sec. 596 of Act No. XIV of 1882." But it does not fulfil them on account of its small value.

Mr. Ross says that the Defendant was served with notice, and, not appearing, must be taken to have assented. It is quite possible that owing to the Defendant's non-appearance the defect in value was overlooked; but even if non-appearance could be taken to signify assent, it cannot give to the Plaintiff a right of appeal which the Code does not allow, or sustain a certificate which from some oversight or other is obviously erroneous. Whether, if the learned Judges had been asked to say that notwithstanding its small value the case was a fit one for appeal to the Queen in Council, they would have said so, may well be doubted, seeing that Mr. Ross, whose argument had advanced to some length before the point of value was observed, had not in impressing their Lordships with the importance of his legal objection to the decree. What is certain is that the learned Judges were not asked by the Plaintiff to do, and have not

done, anything of the kind. And as it is of great importance not to allow litigants who have succeeded in the High Courts to be harassed by further appeals, when there is nothing at stake but amounts of money which the Indian Legislature has decided to be too small to give a right of appeal, their Lordships will humbly advise Her Majesty to dismiss this appeal.

Solicitors: Messrs. Barrow, Rogers & Nevill for the Appellant.

*Appeal dismissed.*

C. W. A.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2527 of 1899,

AND

RULE No. 287 of 1899.

AMEER ALI, J.	SURJAMONI DASSEE
BRETT, J.	and others,
1900.	v.
25, June.	KALI KANTA DAS
	and others.

*Hindu Law—Marriage—Restitution of conjugal rights—Minor wife—Decree—Restoration to caste and position as wife—Adjournment—Practice—Limitation Act (XV of 1877), Sch. II, Art. 35.*

*A suit for restitution of conjugal rights between Hindus is maintainable.*

BAZLOOR RUHEEM v. SHUMSOONNISSA BEGUM (1), CHOTUN BIBEE v. AMEER CHAND (2), KOOBUR KHANSAMA v. JAN KHANSAMA (3), MELARAM NUDIAL v. THANOORAM BAMUN (4), KOROONAMOYEE DABEE v. GANGADHUR SURMAH (5), LALL

(1) 11 M. I. A. 551 (1867).

(2) 6 W. R. 105 (1866).

(3) 8 W. R. 467 (1867).

(4) 9 W. R. 552 (1868).

\* (5) 20 W. R. 50 (1873).

**SURJAMONI DASSEE v. KALI KANTA DAS.**

**NATH MISSEER v. SHEOBURN PANDEY (6), GATHA RAM v. MOOHITA KOCHIN (7), JOGENDRANANDINI DOSSEE v. HURRY DOSS GHOSE (8), XAMUNABAI v. NARAYAN MORESHVAR (9), DADAJI BHIKAJI v. RUKMA-BAI (10), BAI SARI v. SANKLA HIRA CHAND (12), FAKIRGAUDA v. GANGI (13), PAIGI v. SHEONARAIN (14) and BINDA v. KAUNSLIA (15) referred to.**

*Such a suit would lie against a minor wife, if she is of sufficient age to perform her conjugal duties.*

**SUNTOSH RAM DOSS v. GERA PATTUCK (16), KALEERAM DOKANEE v. MUSST. GENDHANEE (17), BINDA v. KAUNSLIA (15), FAKIRGAUDA v. GANGI (13) and BOZLOOR RUHEEM v. SHUMSOONNISSA BEGUM (1) referred to.**

*Art. 35, Sch. II of the Limitation Act does not apply to suits for restitution of conjugal rights between Hindus.*

*Where the minor wife, under the influence of her relatives, has lost caste by living with another person as his wife, a decree for restitution of conjugal rights should not be passed, except upon the condition, that the husband should make all the arrangements necessary for the restoration of the wife to caste and to her position as his wife in his household.*

**BUZLOOR RUHEEM v. SHUMSOONNISSA**

(1) 11 M. I. A. 551 (1867).

(6) 20 W. R. 92 (1873).

(7) 23 W. R. 179 (1875).

(8) I. L. R. 5 Cal. 500 (1879).

(9) I. L. R. 1 Bom. 164 (1876).

(10) I. L. R. 10 Bom. 301 (1886).

(12) I. L. R. 16 Bom. 714 (1892).

(13) I. L. R. 23 Bom. 307 (1893).

(14) I. L. R. 8 All. 78 (1885).

(15) I. L. R. 13 All. 126 (1890).

(16) 23 W. R. 22 (1874).

(17) 23 W. R. 178 (1875).

**BEGUM (1), PAIGI v. SHEONARAIN (14) and JOGENDRANANDINI DOSSEE v. HURRY DOSS GHOSE (8) referred to.**

*In a suit for restitution of conjugal rights, where the validity and legality of the marriage is one of the most essential points in issue, no presumption arises from the mere fact that the marriage was celebrated, that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed.*

**INDERUN v. RAMA SWAMY (20), BRINDABUN CHANDRA v. CHANDRA KURMOKAR (21) and ADMINISTRATOR GENERAL OF MADRAS v. ANANDACHARI (22) referred to.**

*If such a marriage was actually and properly celebrated the absence of the consent of the person whose consent ought to have been obtained would not make it illegal or invalid.*

**BAEE RULYUT v. JEYCHAND (19) referred to.**

*Where the Defendants' failure to have all their witnesses in attendance was due to a belief, induced in them by the previous procedure of the Court in the case, that there was no chance of all their witnesses who were present being examined on that day, and such belief was not unreasonable, the Court would exercise a sound and wise discretion in granting an adjournment.*

**AKIKUNNISSA BIBI v. RUP LAL DAS (23) distinguished.**

(1) 11 M. I. A. 551 (1867).

(8) I. L. R. 5 Cal. 500 (1879).

(14) I. L. R. 8 All. 78 (1885).

(19) Bellais 43 : s. c. 1 Mor. N. S. 181 (1843).

(20) 12 W. R. 41 P. C. (1869).

(21) I. L. R. 12 Cal. 140 (1885).

(22) I. L. R. 9 Mad. 466 (1886).

(23) I. L. R. 25 Cal. 807 (1898).

## SURJAMONI DASSEE v. KALI KANTA DAS.

This was an appeal preferred on the 14th of December 1899, against the decree of Babu Upendra Narain Ghosh, Subordinate Judge of Jalpaiguri, in Zillah Rungpore, dated the 20th November 1899, affirming the decree of Babu Kanti Chander Mukerji, Munsif of Jalpaiguri, dated the 11th October 1898.

The facts of the case and the arguments addressed to the Court appear very fully from the judgment.

*Babu Pramatha Nath Sen* for the Appellants.

*Babu Nalini Ranjan Chatterji* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

The Plaintiff in this case is a Hindu of the Rajbungsi caste. He has brought this suit for restitution of conjugal rights against Defendant No. 1 (who is described in the plaint as a minor) through her next friend and guardian, her paternal grandmother. He has joined as Defendants in the suit the paternal grandmother as Defendant No. 2, Bishumbhur Das as Defendant No. 3, who is alleged by the defence to have contracted a marriage with Defendant No. 1, and Amir Chand Das and Gobind Das as Defendants Nos. 4 and 5 who are described as uncles of Defendant No. 1 and her nearest male agnates.

The allegations in the plaint are that Defendant No. 1 was given in marriage to the Plaintiff in Joista 1303 by Defendant No. 2 her paternal grandmother and next of kin and guardian : that the marriage was performed with all the customary rites, as required by the Shastras and the caste to which the parties belong,

and that from the time of the marriage to Joista 1304 Plaintiff lived in the house of Defendant No. 2 with Defendant No. 1 and cohabited with her as his wife. It is stated that in Joista 1304 the Defendant No. 2 at the instigation of Defendants Nos. 4 and 5 drove Plaintiff out of her house, denied the marriage of Defendant No. 1 with him, and refused to let Defendant No. 1 go and live with him. Defendant No. 1 also refused to go and live with the Plaintiff. The motive of the Defendants Nos. 4 and 5 is suggested to be to appropriate some *jote jama* land belonging to Defendant No. 1 and in order to carry out their object they are said to have caused Defendant No. 3 to be introduced into the house of Defendant No. 2 with the object of marrying him to Defendant No. 1. Plaintiff therefore alleged that Defendant No. 1 being his legal wife was legally liable to come under his protection and to live in cohabitation with him and the other Defendants have no right or power to dissuade the Defendant No. 1 or keep her back therefrom. He accordingly prayed for a decree declaring his marriage to be valid and directing Defendant No. 1 to go and live with him.

A written statement was put in by Defendants Nos. 1, 2, and 3 alleging :—

1. That Defendant No. 1 was not the legally married wife of Plaintiff ; 2. That the suit was not legally maintainable against the Defendant No. 1 ; 3. That Defendant No. 1 had been married to Bishumbhur Das, Defendant No. 3 ; and 4. That the suit was brought in order to get possession of the property of Defendant No. 1.

Issues were fixed by the Munsif and

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the suit came on for hearing on the 27th September. Witnesses for the Plaintiff were examined from the 27th to the 30th September. On the 1st October it was adjourned to the 3rd October. The examination of Plaintiff's last witness was completed on that day and the Defendant applied for one day's adjournment to produce their witnesses. One day's time was allowed. On the 4th October, however, the case was not taken up as the Court was engaged in other work and on the 5th October to which date it was adjourned one witness for the Defendant was examined. On the 6th October four witnesses for the Defendant were examined and the Defendants then put in a petition praying for a day's adjournment on the ground that owing to the delay in the trial their witnesses had gone away and had not returned as it was not expected that the examination of the witnesses who were present would be concluded that day. The prayer was refused and the case disposed of. The Munsif after discussing the evidence in his judgment states his finding in the following terms:—"From the evidence and circumstances of the case I am inclined to hold that the Plaintiff was lawfully married to Defendant No. 1. \*Previously in his judgment he remarks "A cursory perusal of the evidence on the Defendant's side would convince any one that the marriage of Defendant No. 1 was not celebrated with Defendant No. 3." He finds that Plaintiff is entitled to the relief prayed for and in decreeing the suit with costs and interest he orders "that the Plaintiff was lawfully married to Defendant No. 1 and he is entitled to restitution of conjugal rights

and the Defendant No. 1 shall present herself to the Plaintiff within a fortnight for that purpose."

The Defendant appealed. The grounds of appeal appear to have been 1. That there was no legal marriage between the Plaintiff and Defendant No. 1 and therefore he was not entitled to any decree for restitution of conjugal rights.

2. That the suit was not maintainable against Defendant No. 1, as she was a minor.

3. That the lower Court was wrong in not granting an adjournment to Defendants so as to enable them to produce the rest of his witnesses.

4. That there was no demand by Plaintiff to Defendant No. 1 and refusal by Defendant No. 1; and 5. That having regard to the provisions of Art 35, Sch. II of the Limitation Act the suit was not maintainable.

The findings of the Sub-Judge were against the Defendant on all the points and he dismissed the appeal with costs. Defendants Nos. 1, 2 and 3 have appealed and in this Court the contentions have been,

1. That the suit is not maintainable against Defendant No. 1, who is admittedly a minor, regard being had to the provisions of Art. 35 of Sch. II of the Limitation Act.

2. That the Courts below have both failed to find what rites and ceremonies were necessary to constitute a legal marriage in the Rajbungsai caste, to which the parties belong and that those rites and ceremonies were performed in the case of the alleged marriage between Plaintiff and Defendant No. 1 so as to constitute a valid marriage.

\*  
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3. That the Munsif in refusing to grant the adjournment prayed for by the Defendant for the examination of her witnesses failed to exercise a sound and wise discretion and that the Defendants have been prejudiced thereby and

4. That a suit for restitution of conjugal rights does not lie in the case of Hindus.

It will be convenient to consider, first, the 1st and 4th points. The learned pleader for the Appellant admits that so far as Bombay and the N.-W. P. are concerned the High Courts of Bombay and Allahabad have held that a suit for the restitution of conjugal rights will lie in the case of Hindus. His suggestion is that in this Court the question has never been in contest and that it has been assumed rather than directly held that such a suit would lie. We are unable to accept his contention. The learned pleaders on both sides have referred us to the various cases in the different High Courts in which restitution of conjugal rights has been sought by a husband. On going through them we find as follows:—

In Bengal there does not appear to have ever been any doubt that under the Hindu law a husband had a right to have brought under his protection a wife who had either run away from his house or who was being kept from coming to his house by other persons. The only matters about which there appears to have been doubt were, what form of suit the husband could bring for relief and by what Courts such a suit would be heard. In the case of *Bazloor Ruheem v. Shamsunnissa Begum* (1) the Privy

Council set at rest the latter question and decided that a suit for restitution of conjugal rights whether brought under the Mahomedan or Hindu law could be entertained by the civil Courts in India.

As regards the form of suit which a husband should bring for the recovery of his wife it was decided by this Court in the case of *Chotun Bibee v. Ameer Chand* (2) that a suit will not lie by a husband to recover possession of the person of his wife, but a suit will lie in the nature of a suit for restitution of conjugal rights. Some doubt having arisen as to the form in which a decree in a suit of this nature should be framed it was held by this Court, (Loch, J. and Dwarka Nath Mitter, J.), following the principle laid down in the case referred to above, that the form of the decree in such a suit should be that the Plaintiff is entitled to his conjugal rights and that his lawful wife be directed to return to his protection, *Koobur Khansama v. Jan Khansama* (3), and the same two Judges arrived at a similar decision in the case of *Melaram Nudial v. Thanooram Bamun* (4). Subsequently it was held in the case of *Karoonamoyee Dabee v. Gungadhur Surmah* (5) that a decree requiring a wife to return to her husband is not illegal and is in conformity with what is asked for in a suit for restitution of conjugal rights and in another case reported at page 92 of the same volume [*Lall Nath Misser v. Sheoburn Pandey* (6)] it was held that an order to third parties to send back the Plaintiff's wife

(2) 6 W. R. 105 (1866).

(3) 8 W. R. 467 (1867).

(4) 9 W. R. 552 (1868).

(5) 20 W. R. 50 (1873).

(6) 20 W. R. 92 (1873).

(1) 11 M. I. A. 551 (1867).

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with her jewels could hardly issue without an order to the wife to return to her husband. These cases all support the view that a suit for restitution of conjugal rights among Hindus is maintainable and in the case of *Gatha Ram Mistree v. Moolita Kochin* (7) the Judges (Markby, J., and Romesh Chandra Mitter, J.) held that there was neither doubt nor difficulty in saying that such a suit would lie. A similar view was held by the Judges (Garth, C. J., and Pontifex, J.), who decided the case of *Jogendrananlini v. Hurry Doss Ghose* (8), though in that case they thought fit to impose a condition on the husband that he should provide a house for the reception of his wife such as would be in every respect fit for the reception of a virtuous and respectable wife.

The cases heard in the Bombay High Court show that it has all along been held that a suit would lie against a wife by a Hindu husband for restitution of conjugal rights and for damages and injunction against those harbouring her, *Yamunabai v. Narayan Moreskhar Pendse* (9). In the well known case of *Dadaji Bhikaji v. Rukmabai* (10) it was held that a suit for restitution of conjugal rights was maintainable and that Courts cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than a marital offence by the complaining party, as was held to be the only grounds on which the divorce Court in

England would refuse relief in *Scott v. Scott* (11). It is to be observed that in that case it was held that the suit would lie equally for institution as for restitution of conjugal rights. The same view was entertained in the case of *Bai Sari v. Sankla Hira Chand* (12) and *Fakirgauda v. Gangi* (13).

In the Allahabad High Court it was held in the case of *Paigi v. Sheonarain* (14) that a suit for restitution of conjugal rights among Hindus was maintainable though the Honorable Judges expressed the opinion that whereas in that case there were special circumstances requiring such a course, a civil Court was entitled, while recognizing the civil right of the husband to his wife, to put such conditions on the enforcement of his rights by legal process as the circumstances of the case might fairly demand. And again in the later case of *Binda v. Kaunsilia* (15) in which the law and authorities on the subject are reviewed by Mr. Justice Mahmood in a careful and elaborate judgment, it was definitely laid down that the civil Court of British India can properly entertain a suit between Hindus for the restitution of conjugal rights and that it was not necessary as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the Plaintiff and refusal by the Defendant.

All these cases leave in our minds no doubt that a suit for restitution of conjugal rights between Hindus is maintainable and we are therefore unable to accept

(7) 23 W. R. 179 (1875).

(8) I. L. R. 5 Cal. 500 (1879).

(9) I. L. R. 1 Bom. 164 (1876).

(10) I. L. R. 10 Bom. 301 (1886).

(11) Amb. 383 (1859).

(12) I. L. R. 16 Bom. 714 (1892).

(13) I. L. R. 23 Bom. 307 (1898).

(14) I. L. R. 8 All. 78 (1885).

(15) I. L. R. 13 All. 126 (1900).

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the contention of the learned pleader for the Appellant that such a suit would not lie.

The authorities to which we have been referred, namely, Mr. Banerjee's lectures on the Hindu Law of Marriage, 2nd Edition, p. 141, and Mayne on Hindu Law and Usage, sec. 91, fully support this view.

The next question raised is whether such a suit is maintainable by a Hindu husband against his minor wife, having regard to Art. 33, Sch. II of the Limitation Act. On this point the view taken by Mr. Banerjee in his lectures on Hindu Law and Marriage is that, where the wife is qualified by her age to perform her conjugal duties, the proper remedy for a husband in a case where the wife refuses to live under his protection is a suit for restitution of conjugal rights. And in the case of *Suntosh Ram Doss v. Gera Pattuck* (16) it appears to have been assumed that such a suit would lie, as it was held that where there is a custom that a child wife should not go to live with her husband till a certain event happened the Court was right in refusing a decree for restitution of conjugal rights until such an event had happened.

That a Hindu husband has the right of guardianship over his minor wife cannot be doubted and in the case of *Kaleoram Dokanee v. Musatt. Gendhanee* (17) the Judges of this Court (Markby, J., and Romesh Chandra Mitter, J.) held that according to Hindu law, after marriage a husband is the legal guardian of his wife's person and property whether she

is a minor or not. The marriage of an infant being under the Hindu law a legal and complete marriage the husband has the same right as in other cases to demand that the wife shall reside in the same house with him, except upon tangible and definite grounds which show that under the special circumstances of the case the wife is absolved from this duty, and the Judges remarked that they could not say without contravening the Hindu law that the infancy of the wife constituted such a ground, though they thought it might be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family. If as legal guardian of the person and property of his minor wife a Hindu husband is entitled under the law to insist that she shall live with him, it seems useless to argue that he is not entitled to similar relief in a suit for restitution of conjugal rights, if the wife has attained an age at which she is considered fit to discharge her conjugal duties, though in the eye of the law she may still be a minor.

In the case of *Binda v. Kaunsilia* (15) it was held that Art. 35 of Sch. II of the Limitation Act could not be held to apply to such suits, but that the limitation applicable was Art. 120, Sch. II read with sec. 23 of that Act. In the Bombay High Court a contrary view was expressed in the case of *Fakirgauda v. Gangi* (13), but in that case it was held that the demand and refusal contemplated by Art. 35 of Sch. II of the Limitation

(16) 23 W. R. 22 (1874).

(17) 23 W. R. 178 (1875).

(13) I. L. R. 23 Bom. 307 (1898).

(15) I. L. R. 13 All. 126 (1890).

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Act must be a demand to and a refusal by a wife being of full age and sound mind, and that it would not run in the case of a minor.

There seems to be little doubt that the Legislature in framing Art. 35 of Sch. II of the Limitation Act had not in contemplation the fact that a suit for restitution of conjugal rights would under the Hindu law lie against a minor wife, but at the same time there can be no doubt that Limitation Act is not intended to define or create causes of action but simply to prescribe the period within which existing rights may be enforced in the Courts of law [*Jivi v. Ramji* (18)] and the Privy Council have laid down with sufficient emphasis in the case of *Bazloor Ruheem v. Shumsoonnissa Begum* (1) that in suits regarding marriage and caste and all religious usages the Hindu law with regard to Hindus is to be considered as the general rules by which Judges are to form their decisions.

In this case the lower Courts have both found that the Defendant No. 1 is of a sufficient age to be fit to live with her husband as his wife and if all the facts as alleged on behalf of the Plaintiff in this case are proved, we are of opinion that we are bound, by the balance of the authorities to which we have referred, to hold that the present suit for the restitution of conjugal rights against the Defendant No. 1 brought by the Plaintiff is maintainable, in spite of the fact that she is still in the eye of the law a minor. We must therefore decide this point against the Appellant.

There is, however, one point with regard

to suits of this nature which we think we ought to notice as it appears to arise out of the facts in this case and not to have received direct attention in cases previously tried. We think that there can be no doubt that the law contemplated, when a decree in a suit of this nature is passed directing a wife to return to her husband, that the wife should return to her position as a wife in the household. We mention this because there are undoubtedly certain acts which if committed by a wife during her absence from her husband would have the effect of at least placing her out of caste. Amongst these would certainly be cohabitation with another man as his wife. In this case the Defendant No. 1, who is almost hardly more than a girl and seems to be quite under the influence of her relatives, is alleged to have been living for some time with Defendant No. 3 as his wife. If this be a fact there seems little doubt that a mere decree of a civil Court directing her to return to her husband could not of itself restore her to her position as wife of the Plaintiff in his household as she would be out of caste. The learned pleader for the Respondent has assured us that the restoration to caste would be a simple matter and would be arranged by the Plaintiff as a matter of course. This may be the case, but there can be no doubt that if the Defendant No. 1 were not restored to caste she would be placed in a position of serfdom in the house of the Plaintiff. We do not believe that it is contemplated by the law that such should be the result of a decree issued by a civil Court in a case of this nature.

Their Lordships of the Privy Council

(1) 11 M. I. A. 551 (1867).

(18) I. L. R. 3 Bom. 209 (1879).



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in the case of *Buzloor Ryheem v. Shumsoonnissa Begum* (1) laid down that there may be cases in which the Court would qualify its interference by imposing terms on the husband. In the case of *Paigi v. Sheonarain* (14), the Hon'ble Judges of the Allahabad High Court followed that view and imposed conditions on the husband; and, similarly also, the Hon'ble Judges of this Court imposed certain conditions on the husband in the case of *Jogendranandini v. Hurry Doss Ghose* (8).

In this case the Defendant No. 1 appears to have some landed property; whether that fact has or has not had any influence on the institution of this suit we do not pretend to say. But in a case like the present where the Defendant is a mere girl and where, if she has been put out of caste, the act involving the loss of caste has been done under the influence of others, a Court passing a decree directing her return to her husband should be careful to see that the decree is not made use of simply for the purpose of obtaining her property and reducing her to a state of serfdom in the house of her husband. It would seem in such a case to be a necessary condition to impose on the Plaintiff, when granting the decree, that he should make all the arrangements necessary for the restoration of the Defendant to caste and to her position as his wife in his household—supposing it to be a fact that she has become out of caste.

As regards the second point taken by the learned pleader for the Appellant it is necessary to notice the findings of

the two lower Courts as regards the question whether there was a legal marriage between the Plaintiff and the Defendant No. 1. If such a marriage was actually and properly celebrated it would be legal and binding although it had been performed without the consent of the uncles, supposing that their consent ought to have been previously obtained, (see Mayne, para. 9, and the case of *Bae Rulgut v. Jeychand* (19), on which the dictum is based). The question whether the uncles consented to the marriage, if there was a legal marriage, or not, which was raised by the pleader for the Appellant, would not appear therefore to be of importance under the circumstances of this case. The Munsif in his judgment says "From the evidence on both sides it appears that the most essential ingredients in the marriage of the Rajbungsî caste to which the parties belong are that a barber and two *bairatis* should officiate in the ceremony. In the case of well-to-do persons priests are engaged to perform the religious parts of the ceremony. A man is employed to throw water and he is called the *mistar* but his presence is not indispensably necessary. The Plaintiff examined the priest, the barber, one of the two *bairatis*, the *mistar*, the marriage broker and others to prove his marriage with Defendant No. 1. If their evidence be believed then it is to be held that the Plaintiff married Defendant No. 1."

Having thus stated what he considered to be the essentials of the marriage he subsequently came to the following conclusion:—"From the evidence and circumstances of the case I am inclined to

(1) 11 M. L. A. 551, 615 (1867).

(8) I. L. R. 5 Cal. 500 (1879).

(14) I. L. R. 8 All. 78 (1885).

(19) Bellais 43: s. c. 1 Mor. N. S. 181 (1843).

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hold that the Plaintiff was legally married to Defendant No. 1."

In this judgment there is no statement of the rites and ceremonies necessary to constitute a legal marriage in the Rajbungsi caste. The persons whose attendance was necessary, presumably to perform these ceremonies, are mentioned, but there is no finding how or whether the ceremonies were performed. The Sub-Judge in appeal records the following finding:—"As to the fact of marriage between Defendant No. 1 and Plaintiff, I hold after careful perusal and weighing of all proofs and probabilities on both sides that the lower Court has rightly held that such marriage had taken place in due form of Hindu Rajbungsi caste to which they belong. That being so it should be seen if there be any legal bar against Plaintiff getting a decree in the suit." Subsequently holding that there was no such bar he dismissed the appeal.

The Sub-Judge does not definitely find what rites and ceremonies were necessary to constitute a legal marriage between the parties or whether they had been performed.

Three rulings are relied on by the Respondent to support the view that no special finding, on those points were necessary and that the fact of the celebration of the marriage having been proved it should be presumed that the necessary rites were performed.

The first is one, *Inderun v. Rama Swamy* (20), in which their Lordships of the Privy Council held that when once you get to this that there was a marriage in fact, there would be a presumption in favour of there being a

marriage in law. The question in that case however was whether there could be any legal marriage between the parties, the Pundits having held that there could not. The opinion of the Pundits was not accepted by the Privy Council. This was apparently a case of inheritance. The second case is that of *Brindabun Chandra v. Chandra Kurmohar* (21) in which the Hon'ble Judges of this Court (Norris and Ghose, JJ.) held in a suit for restitution of conjugal rights that the fact of the celebration of the marriage having been established the presumption in the absence of anything to the contrary is that all the necessary ceremonies have been complied with. In that case, however, there appears to have been findings by both the lower Courts with regard to the rites and ceremonies performed at the alleged marriage and on those materials the Judges of this Court who heard the case were able to arrive at an independent opinion and at a finding, reversing the findings of both the lower Courts. In this case there are absolutely no materials to enable us to come to any finding on this point.

In the third case, *Administrator-General of Madras v. Anandachari* (22), the Judges followed the ruling in the last-mentioned case and held that the fact of the celebration of marriage being admitted the presumption would be that all necessary ceremonies were performed in the absence of evidence to the contrary. That case was also one in which a question of inheritance was involved.

However much, such a presumption may be taken as rightly arising in cases

(21) I. L. R. 12 Cal. 140 (1885).

(22) I. L. R. 9 Mad. 468 (1886).

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involving questions of inheritance, so as to avoid illegitimacy, we cannot agree that in a case like the present it could have the effect to which the learned pleader for the Respondent would wish us to give it. In this case the validity and legality of the marriage is one of the most essential points in issue and we cannot hold that we are entitled to presume from the mere finding that the marriage was celebrated, that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed. On this point the lower Courts should have come to a distinct finding.

It remains to consider lastly the third point raised in the appeal, *viz.*, whether the Munsif in refusing to grant the adjournment prayed for by the Defendants for the examination of their witnesses failed to exercise a sound and wise discretion and whether the Defendants have been prejudiced thereby. From the ordersheet of the case in the Munsif's Court it would appear that when the case came on for hearing the Munsif commenced by following a practice, which is not uncommon in the mofussil Courts when a number of witnesses are offered for examination in a contested suit, of taking up the case late in the day on several successive days and of examining one or two witnesses only on each day. This may occasionally suit the convenience of the presiding officer of the Court or may seem to him to be necessary having regard to the other current and possibly urgent work of the Court. But it is a course which this Court has always discouraged, and amongst its other and many disadvantages, it has the effect of

leading the parties to believe that not more than one witness or possibly two witnesses, if their evidence is likely to be short, will be examined in a day and so to lead them, in order to save expense, not to keep all their witnesses in attendance but to bring them up day after day as it seems likely that they will be examined. This is what we are informed happened in this case. The Defendants were led to believe from the course adopted by the learned Munsif in examining the witnesses for the Plaintiff that their witnesses would be similarly examined in dribblets and in consequence they were not careful to have all their witnesses present on the 5th October. Four witnesses were present and it was thought that their examination would at least extend over one day if not over more. However on the 5th October the Munsif appears to have abandoned the dilatory procedure which he followed in the early stages of the trial and to have had all the 4 witnesses for the Defendants examined in succession on the same day. This is said to have taken the Defendants completely by surprise and when on the completion of the examination of the 4th witness they found that their other witnesses, who had gone away on account of the previous delay, had not returned, they put in an application praying for a day's adjournment only in order to secure their attendance. The Munsif rejected the application without recording any reason for his order and the Sub-Judge has held that he was right in not granting the indulgence asked for which the Defendants did not deserve. The Sub-Judge's reason for holding that the Defendants did not deserve the indul-

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gence apparently was that they did not move the Court for an adjournment on the last dates of hearing until all the witnesses on their side were examined. He does not appear to have taken into consideration the explanation of the Defendants that they were taken by surprise by the sudden change of procedure adopted by the Munsif in the trial.

In our opinion, especially in a case like the present, where the decisions of the points in issue in the suit are of the greatest possible importance to Defendant No. 1 as in fact affecting possibly the whole of her future life, the Court of 1st instance should take the greatest care consistent with reason that a full opportunity is given to the Defendants to lay before the Court all the evidence they may be able to produce to support their defence. And, certainly, when a Court by its own procedure has lulled a party into a sense of false security, if afterwards, by a sudden change in procedure, it takes that party by surprise it ought not to refuse to that party a reasonable opportunity to recover from the false position in which he has been placed. The case of *Akikunnissa Bibi v. Rup Lal Das* (23) to which we have been referred does not appear to be on all fours with the present case. In this case Defendants' failure to have all their witnesses in attendance on the 5th October is said to have been due to a belief, induced in them by the previous procedure of the Munsif in the case, that there was no chance of all their witnesses who were present being examined on that day and as we are unable to hold that the belief of the Defendants in that

respect was not reasonable, we differ from the Sub-Judge and are of opinion that the Munsif failed to exercise a wise and sound discretion when he refused to grant the application for an adjournment for one day only in order to secure the attendance of the absent witnesses. It is impossible for us with the facts before us to say that the evidence of the witnesses who were not examined could not have affected the merits of the case and we are unable therefore to hold that the error or irregularity of the Munsif is covered by the provisions of sec. 578, C. P. C.

Until the Defendants had had an opportunity of examining all their witnesses the questions of the legality and due performance of the alleged marriage also could not be satisfactorily determined.

We consider, therefore, that the judgments and decrees of the lower Courts cannot be maintained. We accordingly set them aside and direct that the suit be remanded to the Munsif with directions to give the Defendants reasonable opportunity and assistance to secure the attendance of their witnesses and after examining the witnesses who may be produced to dispose of the case on the whole evidence in view of the remarks contained in this judgment.

Costs to abide the result.

Having regard to the view we have taken of the appeal, no order is necessary in the Rule.

*Appeal allowed : Case remanded.*

S. C. S.

S. R. D.

## [CIVIL REVISIONAL JURISDICTION.]

RULE No. 1259 OF 1900.

MACLEAN, C. J.	NABU BEPARI,
BANERJEE, J.	Petitioner,
	v.
HARINGTON, J.	SHEIKH MAHOMED
1900.	and another,
6, August.	Opposite Parties.

*Guardians and Wards Act (VIII of 1890), secs. 34, 41, 38-42—Guardianship, termination of—Guardian, liability of, after attainment of majority by ward—Power of District Judge—Jurisdiction.*

*The summary powers created by sec. 34 of the Guardians and Wards Act cease as soon as the minority of the ward ceases. The object of that section is to give the Court, as representing the interest of the minor, certain summary powers for the protection of his property during minority.*

*Sec. 41 cannot be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of guardianship.*

This was a rule issued on the 18th of May 1900, against the order of the District Judge of Dacca, dated the 28th of April 1900.

The facts of the case appear from the judgment.

*Mr. Hill* and *Babu Sarat Chandra Basack* for the Petitioner.

*Babus Ashutosh Dhur* and *Rajendra Nath Bose* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

In this case a rule was granted at the instance of one Nabu Bepari calling upon one Sheikh Mahomed to show cause why an order made by the District Judge of Dacca, on 28th April 1899, should not

be set aside on the ground that it was made without jurisdiction.

It appears that the Petitioner, Nabu Bepari, was appointed sole guardian to the Respondent, Sheikh Mahomed, who was then a minor, on 13th September 1881. Seventeen years later namely on 13th September 1898, a petition was presented praying that Nabu Bepari might be removed from his guardianship. On 25th November in the same year the District Judge of Dacca passed an order under sec. 34 of the Guardians and Wards Act, VIII of 1890, directing the guardian to file accounts up to the year 1895 and on 14th January 1899 another order was passed directing the filing of further accounts.

On 1st February 1899 the minor Sheikh Mahomed attained his majority; whereupon the guardian returned his certificate of guardianship to the Court, and prayed for his discharge.

On 3rd March Sheikh Mahomed prayed that a Commissioner should be appointed to examine the accounts and on 15th April he presented a further petition praying that the guardian should be directed to hand over to him all his property, and that a Commissioner should be appointed to examine the accounts and to ascertain and report what was due to the ward. The learned District Judge holding that he was empowered so to do under sec. 34, sub-secs. (c) and (d) and under sec. 41 of the Guardians and Wards Act made an order in the terms of the petition. The guardian appealed to the High Court against so much of the order as directed the appointment of a Commissioner to examine the accounts and to report but as the order was only for an examination and

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report the appeal was withdrawn. Subsequently the Commissioner reported that Rs. 10,647 odd was due to the ward and on 28th April the learned District Judge made an order directing the guardian to pay that sum to the minor within one month. This order it is now sought to set aside.

In support of the order of the learned Judge it is contended that sec. 34 of the Guardians and Wards Act renders the guardian liable to exhibit his accounts if and when the Court shall require him, and that that liability exists until the guardian is discharged by the Court and it is argued that although sec. 41 provides that the powers of a guardian are to cease when the minor attains his majority there is nothing in the section to take away his liabilities until he has received his discharge. It was also contended that when the powers of the guardian ceased under sec. 41 of the Act, the Court still had jurisdiction under sub-secs. (3) and (4) of that section to order him to render accounts.

On the other hand it was contended on behalf of the guardian that the provisions of sec. 34 are only applicable to a guardian during the minority of the ward and that on that minority coming to an end the liability of the guardian to account must be enforced by the ward who has become *sui juris* in a regular suit and it is further pointed out that sub-sec. (3) of sec. 41 does not empower the Court to order the guardian to render accounts, and pay to the ward the balance found to be due on them, but only enables the Court to require the guardian "to deliver, as it directs, any property in his possession or control be-

longing to the ward, or any accounts in his possession or control relating to any past or present property of the ward." This it is contended is a power entirely distinct from that of requiring the guardian to "exhibit his account as directed," as given by sec. 34. There would be some force in the Respondents' contention if the guardian could be regarded as merely an officer of the Court, but he stands in a fiduciary character towards his ward, and is, as such accountable to him. The object of sec. 34 is to give the Court, as representing the interest of the minor, certain summary powers for the protection of the property. As soon as the ward becomes *sui juris* the necessity for the power conferred on the Court by sec. 34 ceases. He can then sue his guardian for an account, and can ratify expenditure or dispense with accounts as he thinks fit. The necessity, therefore, for giving the Court, as the protector of the minor's property, the summary powers created by sec. 34, ceases as soon as the minority ends, and the ward becomes capable of representing and protecting his own interest.

It is true that while sec. 41 provides for the cessation of the powers of the guardian on the ward attaining his majority it makes no provision for the cessation of his liabilities until he obtains his discharge. It is argued that this indicates that the liabilities of the guardian are preserved, and, *inter alia*, his liability to account under sec. 34. There would be great force in this argument if the liability to account was created by and only enforceable under sec. 34, but that is not so. The liability to account is

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incident to the fiduciary relation in which the guardian stands to the ward, and is entirely independent of sec. 34. That section creates a summary method of enforcing the liability.

There is no clear expression of intention in the Act that the guardian's liability to account is to continue to be enforceable by a summary process against which no appeal lies, after it has become enforceable by the ward in the ordinary process of law. In the absence of such expression of intention we think it must be held that the summary powers of the Court cease when the power of the ward to sue for an account comes into existence.

This view is strengthened by a critical examination of sec. 34 and by a general view of the Act. All the sub-sections of sec. 34, excepting (c) and (d) are clearly on the face of them inapplicable to the condition of things which arises when the ward becomes *sui juris*, and if it was intended that sub-secs. (c) and (d) should be applicable after that event it is difficult to see why they should have been inserted in sec. 34, and why the Court should only be empowered under sub-sec. (d) to direct the payment of the balance of the ward's money into Court, and should not be given the wider powers regarding property handed over on the termination of the guardianship which are given to it under sec. 41.

The sections headed "termination of the guardianship" are those from 38 to 42 and the section which deals with the power of the Court as to accounts on the termination of the guardianship, *i.e.*, sec. 41, only empowers it to require the guardian "to deliver, as it directs, any

accounts in his possession or control relating to any past or present property of the ward." This in our opinion cannot be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of the guardianship. Had it been intended to give the Court such a power, it is in this section that we should have expected to find it.

For these reasons we disagree with the interpretation which the learned Judge in the Court below has placed on sec. 41, and we think he is wrong in supposing that he had jurisdiction to make an order under sec. 34, sub-secs. (c) and (d) after the ward had become *sui juris*. We think, therefore, if the order is regarded as made under sec. 34 (d) it is bad on two grounds, first, because there was no jurisdiction to make it after the ward had become *sui juris*, and, secondly, because, it is not an order for payment into Court as provided by sub-sec. (d) of that section, but for payment to the minor himself.

If it is regarded as made under sec. 41 it is equally objectionable, as it is not an order for "the delivery of property in the possession or control of the guardian," but an order for the payment of a sum found to be due on an investigation, which the Court had jurisdiction to authorize.

The rule, therefore, must be made absolute with costs 3 gold mohurs.

*Rule made absolute.*

S. C. S.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. MIS. NO. 98 OF 1900.

AMEER ALI, J.	}	In the matter of
STEVENS, J.		RADHA KRISTO BARAT,
1901.		Complainant,
3, January.		* v.
		GOKULA NUT,
		Accused.

*Reformatory Schools Act (VIII of 1897), secs. 8, 9, 16—Penal Code Act (XLV of 1860), sec. 379—Theft—Code of Criminal Procedure (Act V of 1898), sec. 439—High Court, power of revision of—Order for detention of youthful offender in Reformatory School without passing sentence, legality of—Jurisdiction of High Court to consider legality or propriety of conviction, sentence or order, if affected by sec. 16, Reformatory Schools Act—Limitation of power.*

*Sec. 16 of the Reformatory Schools Act (VIII of 1897) does not affect the jurisdiction of the High Court, as a Court of revision, to consider the legality or propriety of the conviction or sentence or of any order passed by a Subordinate Court other than that mentioned in that section.*

*SHEIKH REASUT v. J. COURTENEY (1), referred to.*

*The law requires that a Magistrate trying a case or one to whom the proceedings of the case are submitted under sec. 9 of the Reformatory Schools Act, should, in the first instance, sentence the accused to a term of imprisonment or transportation, which he may then commute into one of detention in a Reformatory School for such period as the law prescribes.*

*An order for the detention of a youthful offender in a Reformatory School, when no sentence of imprisonment or of transportation has been passed, is bad in law.*

This was a rule issued on the 14th of December 1900, against an order of the District Magistrate of Bogra, dated the 23rd of July 1900.

The facts of the case were as follows :—

The complainant, Radha Kristo Barat, missed his umbrella valued at 12 annas in a haat (market place). On search it was found in the possession of the accused Gokula Nut, a boy of ten years of age. About that time a gang of Nuts had come and encamped in the neighbourhood. The accused admitted that the umbrella was in his possession but said that it had been purchased by his father for him. Thereupon the accused was prosecuted and placed on his trial before Babu Mahendra Chandra Mozumdar, Deputy Magistrate of Bogra. The Deputy Magistrate on the 23rd day of July 1900 found that the accused was a boy of ten years of age, that the identity of the umbrella with that of the complainant's stolen one had been clearly proved and that he was guilty of an offence under sec. 379, I. P. Code; but instead of passing any sentence upon him the Deputy Magistrate forwarded and submitted the proceedings to the District Magistrate under sec. 9 of the Reformatory Schools Act (VIII of 1897), he being of opinion that the boy was a proper inmate of a Reformatory School. There was, however, no evidence to shew that the accused either stole the umbrella or that he knew that it had been stolen.

The District Magistrate on the same day made an order directing the accused to be detained in the Alipur Reformatory School for a period of seven years, without himself passing any sentence on him.

Then the present rule was obtained against that order of the District Magistrate.

No one appeared in the case.



## RADHA KRISTO BARAT v. GOKULA NUT.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner in this case, a boy of ten years of age who is said to belong to a gang of Nuts, was found in possession of an umbrella which is claimed by the complainant. There was no evidence that he stole the article.

The trying Magistrate, however, convicted him under sec. 379 of the Indian Penal Code but passed no sentence; and considering the lad to be a proper inmate of a Reformatory school forwarded the proceedings to the District Magistrate under sec. 9 of Act VIII of 1897. The District Magistrate thereupon recorded the following order:—"Considering that the boy convicted is only ten, I order that he be detained in the Alipuri Reformatory School for a period of seven years.

This order is clearly in contravention of the provisions of the law which requires that the Magistrate trying the case or to whom the proceedings are submitted under sec. 9, should, in the first instance, sentence the prisoner to a term of imprisonment or transportation which he may commute into detention in a Reformatory for such period as he thinks proper.

In our opinion, however, this is not a case in which any sentence of imprisonment should be passed. The boy was only found in possession of property which was alleged to be stolen; there was nothing to show that he knew it had been stolen. He should therefore have been at once discharged. Had guilty knowledge been made out, this being the boy's first offence so far as we can gather from the record, it would have been a

fit case for a few stripes by way of school discipline. But as we have already observed, there is nothing to show that he knew the umbrella to be stolen property and therefore he was entitled to be acquitted.

Sec. 16 of the Reformatory Act does not authorize the Appellate Court or Court of revision to interfere with the finding of the Magistrate as to the age of the boy, or to alter or modify an order of detention passed in substitution of imprisonment or transportation. But as we have pointed out in the case of *Sheikh Reasut v. J. Courteney* (1), it does not affect this Court's jurisdiction, to consider the legality or propriety of the sentence or of any order other than that mentioned in sec. 16 nor the legality or propriety of the conviction. We think the order in this case was entirely irregular and improper. And we direct that the boy be discharged and made over at once to the custody of his parents.

*Rule made absolute: Conviction and sentence set aside.*  
H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 790 OF 1900.

SHEIKH REASUT,

Petitioner,

v.

AMEER ALI, J.

STEVENS, J.

1900.

J. COURTENEY, Guard,

28, November. E. B. S. Ry., Opposite Party.

*Reformatory Schools Act (VIII of 1897), secs. 8, 16—Penal Code (Act XLV of 1860), sec. 379—Theft—Criminal Procedure Code (Act V of 1898), sec. 439—High Court, revisional jurisdiction of, as to legality, or*

(1) 5 C. W. N. 211 (1900).

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*propriety of conviction, sentence or order—Youthful offender—First offence—Sentence, alteration of.*

*Sec. 16 of the Reformatory Schools Act (VIII of 1897) does not in any way take away the jurisdiction of the High Court, as a Court of revision, to alter or set aside the sentence in substitution of which an order for detention in a Reformatory school is made.*

*A young lad was found abstracting a piece of coal from a waggon and was on a charge for theft sentenced to a month's rigorous imprisonment and ordered, in lieu thereof, to be detained in a Reformatory School for 4 years. The High Court, on the ground of its being the first offence and a trivial one, set aside the sentence and passed one of whipping by way of school discipline.*

This was a Rule issued on the 27th of September 1900, against the order of the Deputy Magistrate of Sealdah, dated the 21st of August 1900.

The facts of the case appear from the judgment.

*Babu Hemendra Nath Mitter* for the Petitioner.

THE JUDGMENT OF THE COURT was as follows:—

In this matter a Rule was issued on the District Magistrate to shew cause why the sentence should not be modified on the ground that this was a very trifling theft and that, so far as appears from the record, it was the Petitioner's first offence. It appears that the trial was a summary one and that the accused is a boy whose age has not been found by the trying Magistrate. He is stated to have been found abstracting a piece

of coal from a waggon the value of which is said to be about six pies. The trying Magistrate, as already observed, without finding what the age of the boy was and without stating whether, in his opinion, he was a proper person to be an inmate of the Reformatory School, sentenced him to rigorous imprisonment for one month and, in lieu thereof, directed that he be detained, in the Reformatory School for four years. The evidence recorded is extremely slight. There is nothing to show that the Petitioner was ever before convicted or what his antecedents are and we certainly think that a sentence of one month's rigorous imprisonment was not a proper sentence for the offence committed.

Our attention has been called to the provisions of secs. 8 and 16 of the Reformatory Schools Act. Sec. 16 provides that a Court of Appeal or revision should not alter or reverse any order passed with respect to the age of an youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment. But it does not in any way take away the jurisdiction of this Court to alter or set aside the sentence in substitution of which the order for detention is made. The power of the Court remains in tact to consider the propriety or legality of any sentence passed upon an youthful offender. In that view, we are of opinion that the sentence of one month's rigorous imprisonment is an improper sentence. The accused is a young lad, for even in the descriptive roll sent up from the Police, he is put down as 15 years of age. And this appears to be

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his first offence. We accordingly set aside the sentence of imprisonment for one month and, in lieu thereof considering the nature of the offence, direct that the Petitioner do undergo a whipping of five stripes by way of school discipline, and then be discharged from custody.

*Rule made absolute :*

*Sentence altered.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 374 OF 1900.

PRINSEP, J.	{	PRIYA NATH BOSE,
HANDLEY, J.		Complainant, Petitioner,
1900.	{	v.
6, July.		ROY BASANTA KUMAR
		SINGH, Accused,
		Opposite Party.

*Code of Criminal Procedure (Act V of 1898), sec. 250—Compensation for vexatious accusation—Imprisonment in default of payment of compensation—Simultaneous order.*

*It is only after an attempt has been made to realize the compensation awarded that a Magistrate is competent to pass an order of imprisonment for default. A simultaneous order of imprisonment in default of payment of compensation is illegal.*

This was a rule issued on the 19th May 1900, against the order of the Honorary Magistrate of Midnapur, dated the 7th February 1900, affirmed on appeal by the District Magistrate of Midnapur on the 30th March 1900.

The facts of the case were shortly as follows:—The Petitioner, Priya Nath Bose, lodged a complaint against Roy Basanta Kumar Singh for offences under secs. 448, 504, 352 and 143, I.P. Code. The case was dismissed and the accused

was acquitted on the 1st February 1900, and the complainant was called upon to shew cause why he should not pay Rs. 25 as compensation for bringing a vexatious accusation under sec. 250, Cr. P. Code. The complainant shewed cause by a written petition. His objection was, however, not recorded by the Honorary Magistrate who on the 7th February 1900 made an order directing the complainant to pay Rs. 25 to the accused as compensation and he further directed in the same order that in default of payment of such compensation the complainant do undergo imprisonment for a certain term.

The complainant thereupon preferred an appeal against that order to the District Magistrate of Midnapur and that officer held that although there were two grave irregularities in the proceedings of the Honorary Magistrate, viz., first, that the order for compensation was not passed on the day the order of acquittal was made, and, secondly, that the objection of the complainant in shewing cause was not recorded by the Honorary Magistrate,—those were mere irregularities which did not prejudice the party and cause a failure of justice and that as mere irregularities they were cured by sec. 537 of the Code of Criminal Procedure. The District Magistrate then affirmed the order of the Honorary Magistrate.

The Petitioner then moved the High Court and obtained the present rule, and on his behalf it was contended that the summary order of imprisonment on non-payment of compensation was illegal.

*Mr. Abdur Rahim and Babu Bipin Behary Ghose for the Petitioner.*

No one appeared to shew cause.

PRIYA NATH BOSE v. ROY BASANTA KUMAR SINGH.

The JUDGMENT OF THE COURT was as follows:—

The rule will be made absolute. It has been frequently pointed out by this Court that sec. 250, C. Cr. P., does not permit a Magistrate, who has passed an order directing the complainant to give compensation to the accused, forthwith to add to his order that, in default of payment of compensation, imprisonment for a certain term shall be undergone. The law requires that an attempt should be made to realize the amount ordered to be paid as compensation and that, if it be not recovered, an order of imprisonment may be passed in default. In this instance, the order was a summary order to follow non-payment of the compensation. The order of imprisonment is accordingly set aside.

*Rule made absolute.*

H. P. C.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 914 OF 1899.

PRINSEP, J.	}	SUCHANDI KOLITANI,
STANLEY, J.		Complainant,
1900.		Petitioner,
14, February.		v.
		DOM KOLITA, Accused,
		Opposite Party.

*Code of Criminal Procedure (Act V of 1898), sec. 250—Compensation for frivolous and vexatious accusation, objection against, failure to record and consider—Simultaneous order of imprisonment in default of compensation.*

*A Magistrate ought to record and consider any objection made and urged by the complainant against the making of an order for compensation for bringing a*

*frivolous and vexatious accusation, and a failure to do so makes the order bad in law.*

*An order of imprisonment in default of payment of compensation cannot, under the terms of sec. 250 of the Code of Criminal Procedure, be made unless and until it is found that the payment of the compensation cannot be enforced by legal process.*

This was a rule issued on the 12th of December 1899, against the order of the Assistant Commissioner of Jorhat, dated the 25th of August 1899.

The facts of the case were shortly these:—Complainant Suchandi Kolutani lodged a complaint against her husband for having defamed her by publishing a false accusation that she had misbehaved with one Kollai and by driving her out of the house. The accusation was, she alleged, false and in consequence of it, she had been outcasted. So she brought against her husband, Dom Kolita, a charge under sec. 500, I. P. Code. This complaint was dismissed and accused acquitted by J. Cornish, Esq., Assistant Commissioner of Jorhat, on the 25th August 1899. The Assistant Commissioner made the following order in regard to payment of compensation:—"I regard this as a most unjustifiable complaint. . . . The complainant has, in my opinion, shewn no reason why she should not pay compensation for bringing a vexatious charge. She is, therefore, ordered to pay the accused Rs. 30 under sec. 250, Cr. P. C., and accused is acquitted under sec. 258, Cr. P. Code. In default of paying the compensation Suchandi to undergo simple imprisonment for 14 days."

SUCHANDI KOLITANI v. DOM KOLITA.

Against this order the Petitioner moved the High Court and obtained the present rule.

*Babu Prosunno Gopal Roy* for the Petitioner.

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows :—

The order for compensation under sec. 250, Cr. P. C. is bad. The Magistrate has not proceeded in accordance with law as he has failed to record and consider any objection which the complainant might urge, against the making of such order before he passed it. In the next place, the order of imprisonment in default of payment of the compensation is bad because it cannot, under the terms of sec. 250, be awarded unless it is found that the payment of the compensation cannot be enforced by legal process. The orders must, therefore, be set aside and the Magistrate must proceed in accordance with law. The amount, if paid, will be refunded.

*Rule made absolute : Orders set aside.*

H. P. C.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 297 OF 1900.

PRINSEP, J.  
HANDLEY, J.  
1900.

RASH MOHAN PAL,  
Petitioner,  
v.

6, June. MOHIM CHANDRA CHAKRA-  
VARTY, Opposite Party.

*Indian Penal Code (Act XLV of 1860), secs. 143, 341—Erecting a fence over a way—Obstruction to public pathway—Decree of Civil Court—Maps and plans depicting way—Unlawful assembly—Wrongful restraint—*

*Magistrate, duty of, to maintain decrees of Civil Court—Rule, enlargement of, at the hearing.*

*In deciding whether a person, accused of wrongful restraint by erecting a fence over a way, had, as he alleged, obtained a decree of the civil Court with regard to that particular way, a Magistrate should, instead of obtaining evidence to modify or question a decree passed by the civil Court declaring rights of parties, confine his attention to observing or enforcing the terms of the decree of the civil Court.*

This was a rule issued on the 19th of April 1900, against the order of the Honorary Magistrate of Munshigunge, dated the 17th of February 1900, which order was, on appeal, affirmed by the District Magistrate of Dacca, on the 5th of April 1900.

The facts of the case appear from the judgment.

*Mr. W. Jackson, Babu Basunta Kumar Bose and Babu Hara Chandra Chuckerbarty* for the Petitioner.

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows :—

There has been a long-standing dispute between the parties regarding a right of way and the matter has been before the civil Court and been dealt with by a decree passed on an arbitration award. The Petitioner has been convicted of wrongful restraint in erecting a fence which has been found to be over the way which was declared to exist in that decree and he has also been convicted of being a member of an unlawful assembly the common object of such assembly being to deprive the complainant's master of a

## RASH MOHAN PAL v. MOHIM CHANDRA CHAKRAVARTY.

right of way by means of criminal force or show of criminal force.

Now, in regard to the first offence found, namely, the wrongful restraint which has been committed by the erection of the fence, the Magistrate has found considerable difficulty in determining that this fence was over the way covered by the decree and he has arrived at that conclusion not from the terms of the decree itself and the map attached to such decree by which the rights of the parties were declared but he has taken upon himself to question the map and to examine two of the arbitrators and the Nazir of the Court in order to determine what should have been rightly depicted in that map and so as, in fact, to declare what should have been decreed as shown by a map properly drawn. He has then, in fact, interpreted the decree in a manner different from its terms as explained in that map and he has acted on evidence to modify or correct that decree. If, however, that decree was incorrectly expressed it could be altered only by the Court which passed it. The Magistrate has on this evidence found that the map was an erroneous map, although it was a record of a civil Court, and he has upon this finding, held that the Petitioner has committed an offence by erecting an obstruction over the way decreed by the civil Court.

We cannot regard the course taken by the Magistrate as proper. He should have confined his attention to observing or enforcing it in the terms of the decree of the civil Court without obtaining evidence to modify or question it and we would further observe that, if there was such difficulty in determining the direc-

tion of the way, we cannot understand how the accused could be properly convicted of having wilfully disturbed a right what was decreed against him in the civil Court. He should, at least, have been given the benefit of the doubt of having acted in accordance with the decree of the civil Court and the map attached thereto declaring the direction of the way. So far, therefore, we think that the conviction under sec. 341, I. P. C., is bad and that the conviction and sentence should be set aside.

It has, however, been brought to our notice that, owing apparently to an oversight, the conviction and sentence under sec. 143, I. P. C., which was simultaneously passed has not been referred to in the rule. We think that it is a matter which depends upon the conviction of the other charge, for, if the common object of this unlawful assembly was, as stated in the charge, to deprive the complainant's master of a right of way, we think that the act of the accused cannot fall within its terms by reason of the grounds already stated for setting aside the conviction of wrongful restraint. We, therefore, set aside both the convictions and the sentence and direct that any fines that may have been imposed should be refunded.

*Rule made absolute :*

*Conviction set aside.*

H. P. C.

## PRIVY COUNCIL.

[ON APPEAL FROM MADRAS HIGH COURT.]

LORD HOBHOUSE. IMMADIPATTAM  
 LORD DAVEY. [THIRUGNANA, Defend-  
 LORD ROBERTSON. ant, Appellant,  
 SIR R. COUCH. v.  
 1900. PERIYA DORASAMI,  
 Heard, 15, Nov. Plaintiff and anr.,  
 Judgment, 8, Dec. Respondents.

*Family arrangement—Contract to transfer—Incomplete transfer—Implement of contract to transfer—Pleadings—Burden of proof.*

In 1882 an usufructuary mortgage of the disputed properties was executed by Plaintiff's father, his uncle and his cousin, Thirugnana, the present Defendant. In that mortgage a certain sum was stated to have been borrowed "in order that, after a settlement of the differences existing between the members of the family, the same might be paid as a recompense to. . . . Ovala . . . (the Plaintiff's father), one of us for his transferring even now the right to" the properties to the Defendant "and his addressing an arzi to the Collector stating the said fact." An arzi was submitted to the Collector in which Ovala stated that he had transferred the properties to the Defendant. He also made a similar statement to the Tahsildar and there was a mutation of names from Ovala to Thirugnana. At that time Plaintiff was not born. There was no registered deed of transfer and possession was all along with the mortgagee. Plaintiff brought the present suits to redeem the properties. The Defendant Thirugnana, by his pleadings, claimed that the properties had been transferred to him, but in appeal he contended that the transaction amounted to a contract to transfer and he was entitled to call upon Plaintiff to implement that contract :

Held—*That though there may have been an intention to transfer the property, it was never so transferred in the mode required by law.*

*That the onus of proving a transfer is upon the party who relies upon it.*

*That the Defendant not having raised the issue in the first Court that there was a valid contract to transfer, he cannot now be allowed to raise it and to ask the Plaintiff to implement that contract.*

Quære—*Whether if the documents in proof contained on their face clear evidence of a valuable consideration passing to Ovala, it was not open to the Defendant to ask for implement of contract on appeal.*

These were appeals from two suits brought in *forma pauperis* by the Respondent Periya, son of the late zemindar of Ayakadu, to redeem family property. The principal Defendant, the Appellant, was a near relative of the Plaintiff. The Defendant Chetty was the mortgagee; he did not dispute Plaintiff's title.

While the property was in the hands of Plaintiff's father he mismanaged it to such an extent that it became liable to a heavy debt. Decrees were obtained by creditors, with the result that a document was executed by the adult members of the family including the Plaintiff's father Ovala, and the mortgagees' representative, the above-named Lukshman Chetty, on the 4th November 1882, called an usufructuary mortgage.

It was under this arrangement that the Appellant claimed and alleged that he was thereby constituted proprietor of the property. The evidence with regard to Appellant's claim that the property was transferred to him is to be found in this mortgage deed, and in an arzi written by Plaintiff's father to the

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Collector three days after. The important portions of the mortgage deed and the *arzi* are stated in their Lordships' judgment.

The actual possession of the property has been with the mortgagee Defendant.

The principal issue raised was "whether by the arrangement come to between Plaintiff's father and the Defendant the property passed to the latter."

The Sub-Judge of Madura held that Appellant was entitled to succeed on that issue. He declined to consider the question, because he thought it was taken too late, that the alleged transfer was invalid inasmuch as it could only be made under the Transfer of Property Act by a registered document.

The High Court, *inter alia*, said with reference to the mortgage:—

"It may be said that there was declaration of an intention on the part of Plaintiff's father to divest himself of his ownership in the zemindari," but nothing was done to give legal effect to this intention, and without a registered conveyance it was not competent for him to pass the property, whether the transaction was in the nature of a sale or in the nature of a gift . . . . . It is hardly suggested that the Plaintiff's father absolutely divested himself of the ownership in such a manner as to vest an indefeasible title on the Respondent." The High Court decided both suits in Plaintiff's favour.

*Mr. Mayne* for the Appellant.

*Mr. Philips* for the Plaintiff-Respondent.

*Mr. Branson* for the Mortgagee.

*Mr. Mayne* now relied on the terms of the said mortgage deed, the *arzi*,

and certain documents of later date, showing that Appellant was, as he urged the openly recognized zemindar, and as evidence that the transfer was recognised. He urged that absolute transfer of title to the Zemindari was part of a family arrangement, all the terms of which were embodied in the said registered mortgage deed.

LORD DAVEY.—You have got no conveyance.

*Mr. Mayne*.—No, we have not, but we have it all set out in this family arrangement.

LORD DAVEY.—No consideration passed from you, you were a mere volunteer.

*Mr. Mayne*.—The mortgagee relied on our undertaking personal responsibility to Government. He then further commented on the terms of the mortgage deed more particularly referring to cls. 25 and 27 thereof.

Their Lordships did not call on *Mr. Phillips* for reply.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—The subject of this litigation is the impartible Zemindari of Ayakudi. In the year 1882 Oyala was its owner. Transactions then took place by virtue of which Thirugnana, his nephew, claims to be owner. He, along with his minor son, is the substantial Defendant below and now Appellant. Afterwards in the year 1883 Periya, the Plaintiff below and now Respondent, was born to Oyala by his wife Angammal. He also claims to be owner by inheritance from his father who died in the year 1890.

There are in fact two suits, Nos. 53



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and 54 of 1895. But the only difference between them is that the bulk of the property which is comprised in one suit, is subject to a mortgage which the Plaintiff seeks to redeem: and that a small portion of it, consisting of the palace, the temple, and some endowments, comprised in the other suit, is not so subject. The question in both suits is the same, *viz.*: What was the effect of the transactions in the year 1882? Other issues have been raised, but have not been urged at this Bar. The Subordinate Judge decided in favour of the Defendant. The High Court decided the other way; and the Defendant appeals from their decision.

Ovala came to the Zemindari in the year 1872 by transfer from his father, who declared himself to be old and unable to manage the affairs. He seems to have been no more capable than his father, and in his hands the debts of the estate, which were large before, became larger. In the year 1879 he executed an usufructuary mortgage by way of lease for 19 years to one Ramanathan Chettier in consideration of advances of money and of a sum of Rs. 3,000 per annum to be paid by the mortgagee for the maintenance of the family. Debts, however, went on increasing, and on the 4th November 1882 a new arrangement was made with Lakshamanan Chettier, who was the heir of Ramanathan and is the present mortgagee. . .

The deed of that date is a deed poll executed by (1) Ovala the zemindar. (2) His brother Karutha. (3) The Defendant Thirugnana son of Karutha, and (4) another son of Karutha: and addressed by them to the mortgagee

Lakshamanan. It commences by stating the "particulars of our having usufructually mortgaged the Zemindari to him for Rs. 2,47,000." It gives an account of the debts affecting the estate, of which much the largest is the debt already due to Lakshamanan. Other subsequent items amount to about Rs. 65,000, all of which the four parties to the deed declare to be due by them. Among them is specified "Rs. 10,000 borrowed from you on this date in order that, after a settlement of the differences existing between the members of our family, the same might be paid as a recompense to the said I. Ovala Kondama Naiker Aliyan Avergal, one of us, for his transferring even now the right to Ayakudi Zemin and Rettayambadi Mitta to I. Thirugnana Sammanda Ovala Kandama Naiker Aliyan Avergal and his addressing an *arzi* to the Collector of Madura District stating the said fact."

The parties then state that they had importuned the mortgagee to take an usufructuary mortgage on the estate in lieu of interest on his debt, that he had kindly agreed to do so, and that they had conveyed 28 villages with their incidents or appurtenances to him. They stipulate that he shall pay the peshcush and road-access to Government, and also an allowance "for our maintenance at the rate of Rs. 270 per mensem." Clauses 24 and 25 are as follows:—

"24. We shall not only inform the Collector of the Madura District, the Sub-Collector of the Dindigul Division and the Tahsildar of the Palani Taluk by means of *arzis* and *yadast* that a conveyance on usufructuary mortgage has been made to you and that all the proceedings in revenue matters should be conducted in your name, but also cause the said fact to be published by means of proclamation in the villages.

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"25. As soon as the above-mentioned mortgage amount, the amount spent by you on repairs and the amount of expenses incurred by you in suits, are paid in full at the end of any Fusli either by all of us jointly or by I. Thirugnana Sammanda Ovala Kondama Naiker Iyen Avergal, you should surrender the said Zemin and the Mitta to I. Thirugnana Sammanda Ovala Kondama Naiker, one of us."

The *azis* contemplated in the deed were presented by Ovala on the 7th November. One is addressed to the Deputy Collector of Madura as follows :—

"As besides being too old and infirm to bear and manage our two Zemindaris of Ayakudi and Rettayambadi and all other immoveable and moveable properties appertaining thereto and the duties of Hukdar of Pachala Naickenpatti village attached to Sri Agobalesvara Perumal Devasthanam, we are also issueless, we have transferred the right to Immudipattam Thirugnana Sammanda Ovala Kondama Naiker who is the eldest son of our brother Karutha Kondama Naiker and who is the next heir to get the said Zemin and all other possessions, and have at this very moment delivered the said Zemin and all other possessions into the hands of the said Thirugnana Sammanda Ovala Kondama Naiker after entering into an arrangement with him that he should be paying us month by month at the rate of Rs. 250 per mensem for the maintenance of ourself and those attached to our family. Therefore, I request that the name of the said Thirugnana Sammanda Ovala Kondama Naiker may be entered in the register and that orders may in future be issued for conducting all the revenue proceedings through him as the zemindar for the Zemins and as Hukdar for the Devasthanam in our place."

The other is addressed to the Collector of Madura in similar terms.

On the 17th November Ovala made a statement before the Tahsildar of Palani Talook, which is in the following terms :—

"The Arzi, dated the 7th instant, now read and shown is the one addressed by me to the Sub-Collector. I have also written to the Collector on the said date. As I have surrendered to my brother's son Thirugnana Sammanda

Ovala Kondama Naiker, son Kondama Naiker, the villages and all other possessions attached to the Zemin, in consequence of my inability to look after all the affairs relating to the said Zemin and for other reasons as stated in the said Arzi, all proceedings relating to the Government should, in future, be conducted through him."

After this was signed by Ovala and the Tashildar, another question was put to Ovala, to which he answered "I have no issue," and this again is signed by him and the Tahsildar.

These are the transactions relied on by the Defendant to prove the transfer under which he claims. It is not disputed that according to the law established at this time such a transfer could not be effected except by a registered deed. The *azis* and the statement made to the Collector clearly do not bear any such character. Mutation of names in the Collector's books seems to have been effected in the year 1888; though possession of the 28 villages has always been with the mortgagee, and it does not appear that Ovala was ever put out of possession of the other property. But even if a complete change had been effected in these respects, it would at the utmost do no more than give a starting point for the law of limitation. It would not supply the conditions of the law of transfer.

The Subordinate Judge would not allow the Plaintiff the benefit of this law because he had not made it the subject of express pleading and issue. In this he was wrong, because the party who relies on a transfer must prove it, and the second issue, as the High Court point out, raises the question whether by the stated arrangements the property had passed to the Defendant.

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The question then is whether the mortgage effects the alleged transfer. Directly, it does not. It contemplates such a transfer and an *arzi* stating the fact, and it requires that the mortgagee, if paid off either by all the family or by the Defendant, shall surrender to the Defendant. But both in form and in substance it is a transaction between the family and the mortgagee and not one between the several members of the family.

The defendant's case is then put in a different way, and this is the point principally argued at the Bar. It is contended that though the mortgage may fall short of an actual transfer it shows a good contract for one and that the Defendant may now call upon Ovala's heir to implement that contract. Certainly, if such a right exists it would be an answer to the Plaintiff's claim and the exact form in which it could be enforced need not be considered. The High Court held it to be fatal to the Defendant that his case was not put in that way in the Court below, and that no evidence was tendered upon it. Clearly it was for the Defendant to allege a contract between himself and Ovala, founded on valuable consideration, that Ovala should cease to be owner and that he should become owner. In the absence of such an allegation the circumstances which led Ovala to execute the mortgage and to present the *arzis* have not been examined.

If the documents in proof contained on their face clear evidence of a valuable consideration passing to Ovala, it would have to be considered whether it was open to the Defendant to make such a

case on appeal. Mr. Mayne has argued the case very fully on the supposition that it is open. So treating it, their Lordships cannot find that the existence of a contract for valuable consideration between the Defendant and Ovala is proved by the mortgage deed. It is suggested that the transfer was part of a general family arrangement; but there is no proof of that. It is contended that the family were making themselves liable for payment to the mortgagee. But, as the High Court point out, the family was a joint family, and the estate a joint estate, though impartible; and the object was to strengthen the mortgagee's title, not to effect changes in the family. It did not signify to the mortgagee whether the estate when redeemed went back to Ovala or to the Defendant. All wished to save it from sale, and in the then position of Ovala it was likely that either his brother Karutha or his nephew the Defendant would be zemindar on his death. No reason is given why a transfer of interest from the uncle to the nephew should form part of a joint effort by the family to keep the estate in the family. If there was any reason it should have been alleged and proved.

As to pecuniary benefits accruing directly to Ovala only two are mentioned. One is the pension of Rs. 250; which is only a continuance of a similar payment by Ramanathan, and which is for the maintenance of all the members of the family. The other is the sum of Rs. 6,000, said to be given to Ovala as a recompense for his transfer of the property. But there is no evidence that this recompense ever really reached

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Ovala's hands, and the documents give reason for doubting it. It was to be paid "after a settlement of the differences existing between the members of our family." No evidence has been given of any such settlement. To treat the intended payment as the consideration for Ovala's transfer is inconsistent with his *arzi*s presented three days later and with his statement to the Tahsildar made thirteen days later. In none of these documents does he allude to the receipt of money, except that he is to have Rs. 250 per mensem for maintenance of himself and family. The reasons he assigns for the transfer are that he is infirm, that he has no issue, and that Thirugnana is the next heir. If there had been any substance in the allegation that the mortgagee had paid Rs. 6,000 to Ovala as consideration for transferring the estate, it is inexplicable that it should not be mentioned in the *arzi*s which were intended to effect the legal transfer.

With such imperfect evidence on the face of the documents it was imperative on the Defendant that in order to avail himself of an antecedent contract he should by his pleadings and evidence have put it in a proper course of trial. Not having done so, he has been rightly adjudged to have failed on that issue.

The case is not free from obscurity or difficulty. But their Lordships think that the High Court has arrived at the sound legal conclusion, *viz*, that though there may have been an intention to transfer the property it never was effected in the mode required by law; and that the intended transferee cannot now call for implement of the intention

because he fails to show any contract founded on valuable consideration.

The mortgagee has been added as a Respondent in these appeals. Mr. Mayne now asks that he may be relieved from paying the Respondent's costs, because, as nobody sought to attack his interests, he need not have appeared. The mortgagee is clearly interested to watch the litigation in the redemption suit; but he has judiciously kept himself from doing more; treating the controversy between the cousins as a matter indifferent to himself. It is quite possible that arrangements might have been made with him to dispense with his appearance. But none have been made; and he appears here, maintaining the same attitude of neutrality as before. The Appellants say that they were obliged to bring the mortgagee here as a matter of procedure. If so, it is one of the necessary incidents of the appeal, and the costs of it must be taken as part of the costs of this appeal.

In giving the foregoing reasons their Lordships have not distinguished between the more important suit for redemption, and the other for possession. The result in both is governed by substantially the same consideration, and the cases have been so treated by the High Court. Their Lordships will humbly advise Her Majesty to dismiss both appeals as against both Respondents, whose costs the Appellants must pay.

Solicitors: *Messrs. Lawford & Waterhouse* for the Appellants.

Solicitors: *Messrs. Keen, Rogers & Co.* for the Respondents.

*Appeals dismissed.*

C. W. A.

[ORDINARY ORIGINAL CIVIL  
JURISDICTION.]

SUIT No. 568 OF 1871.

SALE, J.	{	COOMAR SATTYA SANKAR
1900.		GHOSAL and others,
5, July.		v.
		RANEE GOLAPMONEE DEBEE
		and others.

*Receiver's accounts—Exceptions to accounts—Mofussil accounts—Receiver, liability of—Procedure—Practice—Costs—Civil Procedure Code (Act XIV of 1882), sec. 503.*

A Receiver is responsible for all properties which comes into his custody or management and he is responsible not only for actual sums received by him but for those which might have been received by him but for his wilful neglect and default.

BALAJI NARAYAN PATVARDHAN v. RAM CHANDRA GOBIND (1) referred to.

The only question which properly arises on an application by a Receiver to pass his accounts is as to the items of that particular account and involves the inquiry whether all his collections, made on behalf of the property of which he is the Receiver, are duly entered in the accounts and next, whether all his disbursements are payments properly made in respect of that estate.

A Receiver's liability is not restricted to matters shewn upon his accounts.

If there is any liability attaching to the Receiver other than that which appears on the face of the accounts the proper course is to sue the Receiver for the purpose of establishing that liability.

Questions with regard to the soundness or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters

that can be disposed of in the shape of exceptions to accounts.

Even where a *prima facie* case of the responsibility of the receiver for malpractices of his servants is made out, an inquiry into such practices is foreign to an application to pass Receiver's accounts.

The objection that a Receiver has not included in his accounts collections made in the mofussil, cannot be dealt with upon an application to pass his accounts.

If a *prima facie* ground is made out of the accountability of the Receiver for the mofussil collections, the proper course is to either postpone the passing of the accounts until the question of the Receiver's liability is established by suit or to pass the accounts reserving the right of the parties to establish any claim they may make against the Receiver in a suit properly framed for the purpose.

This matter came on in Chambers upon exceptions to the Receiver's accounts when it was adjourned into Court. The estate in question was a very large one and consisted mainly of four large zemindari situated in various districts in Eastern Bengal and in Kidderpore in the suburbs of Calcutta. Many years ago certain members of the family interested in the estate were appointed Receivers. Subsequently in 1878, they retired from that position and an Advocate of this Court was appointed Receiver. From that time there had been many changes in the receivership. Mr. Caspersz was appointed in the place of Mr. Dunne in 1893 and continued as such till 1899, when, being desirous of going to England for a short time, Mr. Graham was, with the consent of all the parties, appointed to act for him. The present exceptions were filed both to the

(1) I. L. R. 19 Bom. 660 (1894).

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last accounts filed by Mr. Caspersz and those filed by Mr. Graham. They were heard together.

It appears that the usual practice under the Receivers had all along been as follows:—Each separate Zamindari was under the immediate charge of a *naib* who through *tahsildars* collected the rents and out of the gross collections paid the Government revenue, mofussil establishment, expenses of litigation and other local expenses of and incidental to collection and management, and, from time to time, but at no fixed periods, remitted to the Receiver sums on account of surplus collections called *irshal* profits. The *naibs* used to render monthly statements, called *mascabars*, showing collections and disbursements, debiting under the latter head the monies so remitted. These monies were applied by the Receiver towards the expenses of the sudder establishment, High Court costs and other expenses in Calcutta and, subject thereto, towards paying the nett available income of the estate to the beneficiaries. The Government revenue and cesses and the superior landlord's rents and taxes amounted in all to about 60 per cent. of the gross collections. Separate accounts were kept by each *naib* in respect of each of the four zamindaries.

Under an order of Court, dated the 10th of March 1880, the same procedure was followed with regard to the Kidderpore properties. The sudder office at Kidderpore was under the immediate charge of the Dewan, Annoda Prosad Mookerjee, who had occupied that position for a great many years and who was immediately assisted by a sheristadar and

a sudder muktear and it was the duty of these two officers to receive and check the *naib's* accounts.

According to the practice followed by all the previous Receivers, half-yearly accounts used to be filed showing moneys actually received by the Receiver and how the same had been disbursed by him and for the information of the parties the said accounts also shewed payments (though not actually disbursed by the Receiver) for Government revenue and cesses and rents to superior landlords for the period covered by the accounts. The receipts included and mainly consisted of *irshals* or remittances from the four *naibs*, but details of local receipts and disbursements by the *naibs* were never included. It appears that no exception had ever been filed to any of the accounts previously filed by any of the Receivers. It was also stated that from time to time proposals had been made by the various Receivers that all monies should be remitted in the first instance to the sudder office and disbursements made from that office, but such proposals were always objected to by the beneficiaries.

The exceptions filed were numerous, but the principal objections were as follows:—

As against Mr. Caspersz,—“(1). That the said accounts are incomplete and incorrect (a) on the ground that they do not contain the accounts of the whole estate (the account of the zemindaries being left out), (b) that they do not show what the gross rental is, how much realized, how much in arrears, the total cost of realisation and the nett income which I am advised and verily believe the Receiver's account ought to show, (c) made unusually lengthy by transfer entries of the Government revenue, cesses and rents to superior landlords paid in the mofussil.

“(4) That the mofussil accounts not bein

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incorporated with these accounts, there is nothing to shew what the Dewan's journey to the mofussil cost the estate and what benefit the estate derived, as without shewing the benefit, the Receiver, I am advised and verily believe, is not entitled to charge the expenses against the estate.

"(7). Credit entry of one rupee only on the 4th February from Ram Ugra Sing—This man stood surety for Sewbarat Panday, who embezzled Rs. 291 from the Receiver's office and it was arranged that Ram Ugra Sing should pay Rs. 8 monthly to make up this amount. An explanation why only one rupee was realised. The whole amount embezzled still remains due and Ram Ugra has also been dismissed. An inquiry should be directed on this subject.

"(8). Debit of Rs. 4,000 for Kidderpore taxes. It appears from the Kidderpore accounts that nearly Rs. 19,000 are due from the tenants for unrealised taxes and that Rs. 9,791 are debited to the *naib* on suspense account for pleaders' fees and taxes, yet the sum (Rs. 4,000) is paid out of the sudder office although the receipts from Kidderpore amount only to Rs. 3,053-6-3. An enquiry should be directed on this point.

"(10). That the compensation account is not embodied in this account but the balance only shewn. That if the compensation account be examined it will be found that large sums of money received on this account have not been paid to the parties under the order of 12th July 1886 but have been misapplied to the general purposes of the estate. . . . .

"(11) That the suspense account shews a large sum of money, Rs. 11,004-15-6; of this amount Rs. 957 stand in the name of Girija Bhoosan Mookerjee who retired from service some time ago, . . . . .; Rs. 9,791-13 in the name of Lal Mohan Banerjee, *naib* of Kidderpore, is pending for a long time and the said *naib* has been dismissed without rendering any accounts.

"(15) That the litigation expenses are very heavy and incurred without the sanction of the Court or consent of the parties and should be disallowed.

"(16) That an account of the zemindaries has never been filed by Mr. Caspersz, but if such account is taken it will appear that the estate has not been properly managed but that on the other hand the estate has been put to great loss by such management.

"(17). That I have inspected the zemindari

accounts up to 1304 B. S., and the correspondence with the mofussil and I found

"(a) that the average collections did not exceed 59 per cent. of the current rents but that in some cases not more than 7 per cent. was realised.

"(b) That up to 1304 current arrears amounted to Rs. six lakhs. . . . .

"(c) That instalment bonds were entered into for payment of the amount due under rent decrees without any sanction of Court or consent of parties which became ultimately unrealisable and more than Rs. 20,000 were lost to the estate. . . . .

"(d) That several instalment bonds were entered into with substantial talukdars of the estate for payment of the amount due under rent decrees (which could be realised at once after giving up interest), without any sanction of Court or consent of the parties, to the great injury of the estate. . . . .

"(f) That several taluks and under-tenures were brought by the estate in execution of rent decrees and 12 years were allowed to elapse from the purchase without taking any steps to take possession or re-settle the same and the estate has been put to great loss. . . . .

"(g) That rent decrees to the extent of Rs. 20,000 have been allowed to be barred by limitation.

"(i) That the said Mr. Caspersz . . . . . sanctioned without leave of Court or consent of parties, a sum of Rs. 7,644-9-3 for the expenses of a criminal case under sec. 147, Cr. P. C., relating to certain plots of land in Madan Mollah, whereas the collections from the said Madan Mollah amounted to Rs. 136 on an average of 3 years."

As against Mr. Graham's accounts, the principal objections, besides some of those taken against Mr. Caspersz' accounts, were:—

"(8). The cheque for Rs. 100 debited to Messrs. Carruthers and Co. on the 17th February, should not have been debited as the cheque has not yet been delivered.

"(15). That if an account of the zemindaries be taken and an enquiry directed, it will be found that Mr. Graham has caused considerable loss to the estate. . . . .

"(16). That the *chota kuti* and lands appertaining thereto in the District of Burisal were acquired by the Government under the Land

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Acquisition Act. Under the award of the Land Acquisition Collector Rs. 11,767-2-9 were awarded as compensation, but the Collector reduced the amount to nearly half of it and served notice upon the Receiver for the time being, Mr. Caspersz to accept the amount but the said Mr. Caspersz declined to accept the amount and asked the matter to be referred to the civil Court for ascertaining the valuation Mr. Graham . . . . accepted the Collector's award without any sanction of Court or consent of the parties, received payment of the said amount and put the estate to the loss of nearly Rs. 15,000 as the proper price of the said building and land would have been not less than Rs. 20,000.

"(17) That soon after the appointment of the said Mr. Graham his attention was called to the fact that there were large sums of compensation money for lands acquired by Government for the Kidderpore Wet Docks in the hands of the Receiver which have been misapplied for the purposes of the estate but which ought to be paid to the parties in accordance with the order of 12th July 1886, but the said Mr. Graham refused to comply with the said request or to set the compensation account right. . . .

"(18). That the said Mr. Graham has himself mixed up the compensation fund and the general fund.

"(20). That the said Mr. Graham by dismissing the *naib* of Kidderpore instead of suspending him and taking accounts from him and by accepting the resignation of the *devan* without taking an account from him of his dealings with the estate has caused great injury to the estate especially as the said *devan* received large sums of money as *nuzzur* while in the *mofussil*, bonuses for granting time to judgment-debtors for instalments granted to them, for settlements made by him, which sums have not been credited to the estate.

"21. That the said Mr. Graham . . . . granted two months' time to . . . . to pay Rs. 1,200 due from him on the two decrees for arrears of rent and gave up nearly Rs. 500 for interest due on the said decrees, and ordered instalments to be entered into for the payment of the decretal amount, all of which, your Petitioners are advised and verily believed, the said Receiver had no power to do without the sanction of this Hon'ble Court.

"28. That the said Mr. Graham has without leave from the Court or consent of the parties

compromised suit No. 505 of 1899 pending before the second Munsif's Court of Alipur wherein Tarapodo Ghose was the Plaintiff and he was the Defendant for the removal of a wall, after putting the estate to the cost of over Rs. 500 in defending the same. In this case no leave was obtained from the High Court to bring this suit against the Receiver.....

"31. That the said Receiver.....ordered payment of Rs. 150 to the officers of the Road-cess Department to hush up inquiries about the false return filed by the estate and caused a loss of the said amount to the estate."

The rest of the objections dealt principally with the management of the zemindaries by the Receiver. Both Mr. Caspersz and Mr. Graham filed affidavits in reply, but it is not necessary for the purposes of this report to set them out here.

*Messrs. Garth and C. R. Das* for the Plaintiffs.

*Mr. S. P. Sinha and Mr. C. R. Das* for the Defendants, Rani Golapmonee Debee, Suttya Sri Ghosal and Suttiya Mohan Ghosal.

*Mr. A. Chauthuri* for Dakhina Mohan Roy.

*Messrs. Hill and Chakravarti* for Mr. Caspersz.

*Messrs. Jackson and Knight* for Mr. Graham.

The other parties appeared by their respective Attorneys.

The JUDGMENT OF THE COURT was as follows :—

SALE, J.—The question which arises upon this application is as to whether certain accounts filed by two Receivers appointed in this suit should be passed. Certain exceptions have been filed to the accounts submitted by the Receivers and the question is whether these exceptions are well founded. The facts shortly are these. The estate in question is a very



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large one and consists mainly of four large zemindaris situated in the mofussil. I believe there are properties in Calcutta belonging to the estate but no question arises as to these. Very many years ago certain members of the family interested in the estate were appointed Receivers. Subsequently they retired from that position and Mr. Fergusson, an advocate of this Court, was appointed Receiver in their place. That was in 1878. From that time to this there have been from time to time Receivers appointed all of whom have been advocates of this Court, and they have filed their accounts every six months and all such accounts have been passed, I think, without any exception being taken thereto. I think this is the only occasion when exceptions have been filed to the Receiver's accounts. It appears that Mr. Caspersz was appointed Receiver in the place of Mr. Dunne in 1893. He continued as Receiver till 1899 and passed his accounts at intervals in the ordinary way. He was leaving the country in that year and proposed that Mr. Graham should be appointed to act for him during his absence from the country. He obtained the consent of all parties to this proposal and Mr. Graham was appointed Receiver in March 1899. Mr. Caspersz returned to this country in September of that year and proposed to take up the appointment vacated by him. That was objected to by the parties. Mr. Graham was not anxious to continue and asked to be relieved of his duties. That also was objected to. The result was Mr. Graham at the suggestion of the Court, continued to act as Receiver, but shortly afterwards finding that the parties persisted in maintaining a hostile attitude he was

compelled to make an application to the Court for his discharge from the office of Receiver and he was accordingly discharged in the month of March of 1900.

In the meantime steps had been taken to oppose the applications of these gentlemen to pass their accounts. The first account objected to is that of Mr. Caspersz which covers the period of six months from August or September 1898 to the end of March 1899. It appears that this account was filed in the ordinary course and remained for months without any objection being taken to it. It is said that during the period Mr. Graham acted as Receiver, the parties obtained inspection of certain mofussil accounts and that from the information obtained thereby, they became aware for the first time of certain errors and omissions which necessitated objections being filed to the accounts both of Mr. Caspersz and Mr. Graham. I do not believe that these so-called discoveries have anything to do with the filing of these exceptions.

The matter supposed to be discovered are matters of which the parties must have had general knowledge for years past. They may not have known of certain particulars disclosed in the accounts inspected but the principle and methods adopted by the Receivers in rendering their accounts which are now so strongly objected to must have been known to the parties for a long course of years.

The question now is whether these exceptions disclose any real or just ground for refusing to pass the accounts which the Receivers have filed. I propose to deal with the exceptions to the accounts filed by both Receivers at one and the

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same time, as what I have to say will apply to both sets of exceptions equally.

There is first a general ground of exception taken to these accounts and that is that they do not cover the whole extent of the liability or accountability of the Receivers, inasmuch as they do not include the mofussil accounts of the estate. It seems to me this is not strictly speaking a matter of exception to the accounts filed. The only question which properly arises on an application by a Receiver to pass his accounts is as to the items of the particular account and involves the inquiry whether all his collections, made on behalf of the property of which he is the Receiver, are duly entered in the accounts, and next whether all his disbursements are payments properly made in respect of the estate of which he is the Receiver. These are the only matters which can be conveniently dealt with on an application to pass accounts. But it by no means follows that a Receiver's liability is to be restricted to matters shown upon his accounts. If there is any liability attaching to the Receiver other than that which appears on the face of the accounts the proper course is to sue the Receiver for the purpose of establishing that liability. It is impossible on an application to pass a Receiver's accounts to go into serious questions with regard to his liability and responsibility, which are really not dependent upon the accounts filed by him, but arise independently of his accounts. Questions of this sort can only be satisfactorily dealt with by suit. There is, moreover, but little doubt as regards the question what the liability of a Receiver really is. That liability

is defined in sec. 503, Civil Procedure Code, and is also explained by Farran, J., in *Balaji Narain Patwardhan v. Ram Chandra Govind Kanade* (1). The Receiver is responsible for all properties which came into his custody or management and he is responsible not only for actual sums received by him but for those which might have been received by him but for his wilful neglect and default. It is unusual and improper to raise questions with regard to the soundness or prudence of the system of management adopted by a Receiver or to seek to charge him for wilful default or negligence on an application by him to pass his accounts. These are not matters which can be disposed of in the shape of exceptions to accounts. Applying these tests to the several exceptions which have been filed to the accounts submitted by the Receivers, it appears that not a single one of these exceptions can be supported as a proper exception to these accounts. In not one of them is the objection taken that the Receiver has received any sum which he has not properly credited, nor is there a single exception which charges that any payment or disbursement appearing in the accounts either has not been made by him as a fact, or, if made, was not made for the purposes of the estate. If any such questions had been raised by the exceptions, and it appeared there was substance in the dispute, it might have been necessary to refer such dispute or disputes for enquiry. But after a long hearing and careful examination of the matters raised by these exceptions all I need say is that there does not appear to be one which has either been estab-

(1) I. L. R. 19 Bom. 660 (1894).

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lished or which would justify a reference for further enquiry.

In substance the exceptions consist of objections more or less specific to the mode of management adopted by the Receivers.

Certain of them allege misconduct of the Receivers in respect of the estate property as regards alleged improper compromises of claims or suits.

Another class of exceptions complain that Receivers have sanctioned methods on the part of the *naiibs* or other employés of the estate which are not justifiable.

It is said also that instalment bonds have been improperly taken by the *naiibs* for a consideration with the object of giving time to the debtors to pay their debts and also that *nuzzurs* have been received by various employés of the estate and have not been credited. It is suggested in respect of all these matters that the management by the Receivers has been at fault and has caused loss to the estate. I do not understand it to be suggested that the Receiver is personally responsible in respect of bribes which the employés of the estate have received.

But I am asked that an enquiry should be directed on these allegations for the purpose of establishing the fact that the management by the Receivers has not been beneficial to the estate. All I need say is that there is nothing in the evidence to show that the Receivers are in any sense personally responsible for the mal-practices of the servants of the estate which are complained of, and even if a *prima facie* case of responsibility on the part of the Receivers had been made

out, it seems to me that an enquiry of this sort would be foreign to the purposes and scope of the present application.

I think therefore all these exceptions must be disallowed, but I should like to make some observations upon a matter which rises only incidentally upon these exceptions, but has been made the subject of considerable argument, and that is the objection to the effect, that the accounts filed by the Receivers are improperly confined to sums that have come into their own hands and their dealings therewith.

It is urged that in these accounts of the Receivers there is no account included of the mofussil collections made by the employés of the estate and it is contended that a Receiver's accountability extends to all these collections whether they came to the Receiver's hands or not. My difficulty in respect of this argument is that I do not see how a question of that sort can be determined upon an application to pass accounts. It might have been necessary to adopt one or other of the following courses: to postpone the passing of these accounts until the question of the Receiver's liability has been established by suit, or to pass the accounts reserving the right of the parties to establish any claim they may make against the Receivers in a suit properly framed for the purpose.

I do not think it necessary to take either of these courses. No suit has been instituted in respect of this matter although the parties have had months to consider what they are pleased to call their discoveries, and in the next place before I can take either of these courses, I must see if any real *prima facie* ground

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of accountability was made out against the Receivers in respect of this matter. It seems to me that the evidence now adduced entirely contradicts the alleged accountability. It is quite clear that the Receivers from the first disclaimed all responsibility in respect of sums other than those directly remitted to them from the mofussil. That position was taken by the Receivers from the very first, and there can be no stronger evidence of this fact than this, that from 1878, twenty two years ago, accounts of the Receivers filed in this Court have been confined to sums actually received by them and this has been done with the approval and sanction of the parties and of the Court.

The Receivers have not included in their accounts the mofussil collections by the servants of the estate, and for this very good reason, that the parties objected to the Receivers having any control over the mofussil collections. From time to time one Receiver after another has pointed out the difficulty which arises in respect of the management of the estate by reason of all mofussil collections not being permitted to come to their hands and on one occasion an application was made on the part of the then Receiver that he ought to be allowed out of some large funds then available to form a reserve fund for paying Government revenue and it was pointed out that if that was done it would enable the Receiver to undertake the responsibility of paying Government revenue and of making all mofussil collections. But as usual, in the history of this suit, when any course has been suggested by the Receiver for the benefit of the parties, it is strongly objected to

by them. They preferred the old system that the Receivers should have no control over the *naiibs*, that the *naiibs* should make all local collections and disbursements including the payment of Government revenue and how, on the face of this, the present Applicant and his supporters can urge that the Receiver is responsible for the acts of the *naiibs* I fail to understand. The Receiver can only be responsible for mofussil collections if he is in a position to exercise control over them. But here the parties insist upon the accountability of the Receivers and at the same time object to put them in a position to exercise effective control.

There is a great deal in Mr. Garth's argument with which I entirely agree. I agree that the system adopted with regard to the management of this estate was unsound and could only result in loss to the estate and that so long as it continued, anything like good management was impossible. I also agree that because this system has been adopted till now, there is no reason why the parties should not be at liberty to put an end to that system. There is nothing so far as I know, to prevent the parties taking the management of the estate in their own hands, or if they prefer the Receiver to remain in possession of the estate, to propose a scheme which would enable him to be responsible for the payment of Government revenue and the receipt of all mofussil collections. But knowing as I do the history of this estate, I think it is safe to predict that, if any such application is made by one party, it would be opposed by all the rest. If the parties would only agree to take the management of the estate upon them-

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selves, it would relieve the Court of a considerable burden and enable the parties to gratify their own wishes and ideas as to the proper management of the estate. I should be happy to assist the parties in following out any such course of action.

It is quite a different thing to raise all these objections, which in my opinion are utterly unreal and unsubstantial and devoid of good faith, to the management of the Receivers and upon an application of this sort.

Under these circumstances it seems to me that the applicant has failed to show that *prima facie* ground exists for supposing that the Receivers are liable for anything except that which appears in their accounts. I express no opinion whether this finding will affect in any way any issue which the parties may seek to raise by suit as to any larger accountability on the part of the Receiver.

I must disallow all the exceptions, and I pass the accounts filed and direct that the applicants who filed exceptions do bear and pay their costs and pay the Receiver's costs. The Receivers will be entitled to their costs as between attorney and client.

*Mr. Knight* asks that the sureties be vacated.

THE COURT.—Yes.

*Mr. A Chaudhuri* submits that the applicants should pay his costs.

THE COURT.—I do not see my way to allow that.

*Mr. Knight* asks for costs as of a hearing. The suit was placed on the peremptory list and treated as a hearing.

*Mr. C. R. Duss*.—That was at their request and to suit their convenience.

*Mr. N. C. Bose*.—I do not see why it should be treated differently.

THE COURT.—I do not see my way to direct costs on scale 2.

*Mr. Knight*.—The share of *Mr. N. C. Bose's* client is under attachment; *Messrs. Carruthers'* client's shares are also under attachment and *Mr. Garth's* clients are insolvents. Costs should be paid out of the fund in Court. Receiver has to pay monthly sums for maintenance, our costs should be paid out of that

*Mr. C. R. Duss*.—If there are any funds in the hands of the Receiver they can execute the order by attachment. The Receiver is not the Receiver now. He is not in possession.

THE COURT.—I will give the present Receiver liberty to pay the costs sanctioned and debit the same to the shares of the parties who have filed exceptions. Certified for counsel.

*Mr. M. M. Chatterjee*.—Does your Lordship make any order as to my costs.

THE COURT.—No.

*Mr. N. C. Bose*.—As regards the costs of the other parties there will be a general taxation of our costs.

THE COURT.—Yes.

*Babu Bhuban Mohan Das*, Attorney for some of the Plaintiffs.

*Mr. N. C. Bose*, Attorney for the Plaintiff Sattyabadi Ghosal.

*Messrs. Carruthers & Co.*, Attorneys for some of the Defendants.

*Messrs. Dignam & Co.*, Attorneys for *Mr. Graham*.

*Messrs. Sanderson & Co.*, Attorneys for *Mr. Caspersz*.

*Mr. A. H. Gillanders*, *Babus M. M. Chatterjee* and *Bhupendra Sri Ghosa* for some of the other parties.

S. R. D. *Exceptions disallowed,*



## SHRO PERSHAD SINGH v. BABU TILUK SINGH.

two mortgage sales against a purchaser at a prior mortgage sale to have it settled upon what terms the latter was to redeem him and keep the property, and praying that if the latter did not pay him off, as ordered, he might be allowed to pay off the Defendant and take the property.

The Defendant strenuously contended that the Plaintiff was a mere *benamidar* and could not sue at all. The Munsif held that this was the case and dismissed the suit.

On appeal the Subordinate Judge held that this was not the case. He accordingly gave the Plaintiff a decree directing the Defendant to pay to the Plaintiff within three months the proportionate amount paid by him for Beni Singh's 8-pie share in Mirzapore, the property in dispute, failing which payment, the Plaintiff was to be at liberty to pay into Court the amount of Rs. 201 paid by the Defendant for the property, on doing which the Plaintiff would be entitled to have his name registered as owner of the property.

The Defendant appeals. On his behalf it has been contended that the Subordinate Judge had no right to record the evidence of Beni Singh; that the Defendant should be allowed to redeem the Plaintiff by paying, not a proportionate amount of the purchase-money paid by him but a proportionate amount of the amount of his mortgages.

We need not say much about the first of these grounds. The Subordinate Judge's action in taking the evidence of Beni Singh is warrantable by the provisions of sec. 568, C. P. C. We cannot interfere with his finding that the Plaintiff is not a *benamidar*.

The Appellant's second plea raises a more difficult question. It is not easy to see what are the equities in this case. But on the whole we think the Appellant's plea must prevail. The Plaintiff when he sued the mortgagors did not make the Defendant, whose mortgage was then in existence, a party to the suit. The Defendant purchased the equity of redemption before either of the sales at which the Plaintiff purchased and before the date of the Plaintiff's second decree.

All the proceedings taken by the Plaintiff including the sales at which the Plaintiff purchased are consequently of no effect as against him. When the Plaintiff purchased the equity of redemption in the property in dispute, at the sales in execution of his two decrees it had already passed to the Defendant. So what the Plaintiff purchased and paid for was the mortgagee's rights and the equity of redemption in the remainder of the property not covered by the Defendant's decree. It is true the Defendant's decree and consequent sale were of no effect as against the Plaintiff as he was not made a party to the Defendant's suit, but his only right would seem to be to redeem as mortgagee.

In these circumstances, we must modify the decree of the Subordinate Judge and direct that the Defendant do pay off the proportionate amount of the Plaintiff's mortgages due on the property purchased by him. Failing payment by the Defendant within three months, the Plaintiff will be entitled to pay off the Defendant by depositing Rs. 201 as directed by the Subordinate Judge.

The appeal is to this extent decreed with costs in proportion.

H. C. B.

*Decree modified.*

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

Nos. 1712 AND 1788 OF 1898.

FAZLAR RAHMAN CHOW-

DHRY, Plaintiff,

AMEER ALI, J.

Appellant,

BRETT, J.

1900.

26, July.

RAJ CHUNDER SEN and

others, Defendants,

Respondents.

*Possession, suit for—Previous suit on the basis of possession without title, dismissal of—Dispossession by Plaintiff in the previous suit—Previous decree, effect of—Title, want of, of Plaintiff in subsequent suit.*

*Defendants brought a suit in 1886 for a declaration of their title and to recover possession of the lands in suit against the Plaintiff. The suit was dismissed, Defendants having failed in that suit to prove their title. Defendants subsequently dispossessed the Plaintiff in 1890; and Plaintiff instituted the present suit in 1896 but could not prove his title :*

*Held—That the effect of the decree in the previous suit was to declare as against the present Defendants, that Plaintiff's possession was lawful, and such being the case and the Defendants being wrong-doers and having no title, the Plaintiff in the present suit, on the basis of the decree in the previous suit and his previous lawful possession, is entitled to recover possession if the lands are the same.*

NISU CHAND GAITA & ORS. v. KANCHIRAM BAGANI (3), GOBIND CHUNDER KONDOO & ORS. v. TARUK CHUNDER BOSE & ORS. (2), ISMAIL ARIFF v. MAHOMED GHIOUS (1) distinguished.

There were two appeals preferred on the

(1) I. L. R. 20 Cal. 834 : S. C. L. R. 20 I. A. 99 (1898).

(2) I. L. R. 3 Cal 145 (1877).

(3) 3 C. W. N. 568 (1899).

23rd of August 1898, against the decree of G. Gordon, Esq., Officiating District Judge of Zillah Chittagong, dated the 30th of April 1898, reversing the decree of Babu Prankrishna Biswas, Munsif of Fatickhary, dated the 31st of May 1897.

The two suits out of which these two appeals arose were brought by the Plaintiff for recovery of possession of a plot of land which the Plaintiff claimed as a part and parcel of his taluk Amina Bibi and Noabad jote No. 14. The lands with respect to the suit out of which appeal No. 1788 arose relates to one gunda of the south-eastern portion of the plot and the other appeal relates to the remaining portion. The Plaintiff brought two suits instead of one as the one gunda of land above-mentioned was held by Defendant Makar Ali and Latu as tenants under the zemindar Defendants Raj Chandra Sen, and Bungshi Mohon Sen, while the remaining portion was in the khas possession of the Sen Defendants. In 1886, the Sen Defendants were said to have sued the Plaintiff for possession of this very land on the allegations that it belonged to their taluk and the suit was dismissed up to the High Court. The Plaintiff relied on this decree as entitling him to eject the Defendants. The Defendants Nos. 1 and 2 being unsuccessful in the suit brought by them were alleged to have wrongfully trespassed into the house erected by the Plaintiff in the month of Jaista of 1252 Maghi.

The facts of the previous suit as well as the reasons for its dismissal will appear from the judgment passed on appeal in that case by the first Appellate Court which was as follows :—

The subject-matter of the suit giving rise to



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these two appeals is 9½ gundas. The Munsif has given the Plaintiffs a decree for 1 gundas odd and dismissed their claim for the remainder. The Plaintiffs have appealed in respect of the latter; the Defendants in respect of the former. The Plaintiffs claim that the land appertains to their taluk which became their property under a decree they obtained against the heirs of one Mobaruk Ali in 1883 or 1884 in a foreclosure suit. The 1st Defendant claims that the land appertains to the taluk No. 20572 which he purchased in October 1884 upon its being sold for arrears of revenue upon default being made by the aforesaid heirs of Mobaruk Ali and their co-sharer. The question is to which taluk does the disputed land appertain, to that alleged by the Plaintiffs or that alleged by Defendant. And this question has very wisely been narrowed down by the parties to the point, as part and parcel of which taluk was the land measured at the survey of 1200 Maghi and this has been the only point argued in this Court.

I do not think that it is shown that the disputed land appertains to any of the *days* alleged by the Plaintiffs. \* \* \* \* \*

\* \* The survey was conducted in the most unscientific and rudest manner. It would be impossible to identify by means of it such a small quantity of land as is involved in the present suit, independently of landmarks, and such marks are not available in the present suit for more reasons than one. The burden of proof lay upon the Plaintiffs and they have not discharged themselves of it. The judgment of the Munsif is set aside in so far as he has decreed any portion of the claim in favour of the Plaintiffs; the appeal No. 525 is dismissed; the appeal No. 537 is decreed, and it is ordered that the Plaintiffs' suit be dismissed and Plaintiffs-Appellants do pay Defendants-Respondents their costs in both Courts. The 4th May 1888.

On appeal the High Court dismissed the appeal by its judgment, dated 13th May 1889.

The Munsif decreed the present suits and remarked as follows at the end of the judgment:—

What is the effect of the former decree dismissing the Defendant's suit against the present Plaintiff? The 5th issue is not very happily worded for there can be no estoppel by conduct.

What was evidently meant by that issue is, whether the Plaintiff is entitled to recover possession on the strength of that decree. What was decided in the case was that the then Plaintiffs, the present Defendants, had failed to prove their title to the land and their suit was accordingly dismissed. Nothing was then decided as to the title of the present Plaintiff. The decree therefore is no evidence of Plaintiff's title but only of the absence of Defendants' title to the land. Sec. 13 of the Code of Civil Procedure has therefore no application to the present case and the question of Plaintiff's title is not *res judicata* though the decree is conclusive evidence of the fact that the present Defendants have no title to the land. But nevertheless, I think the Plaintiff is entitled to succeed. I admit that in a suit for ejectment, the Plaintiff must succeed by the strength of his own title and not by the weakness of Defendants'. But the circumstances of the present case are peculiar. Here we find the Plaintiff is in quiet possession when the present Defendants sue to eject him. The Court refused to allow him to do this and then he took the law in his own hands and turned the Plaintiff out. It would be contrary to public policy to allow him to do this and sanction this wrongful act on his part. It would be holding out a premium to lawlessness if a Plaintiff after losing his case is allowed to turn the Defendant out by force and then call on him to prove his title when that Defendant sues to be restored to possession. A person in complete possession is entitled to be protected against a trespasser who has no sort of title or interest in the land. In the case of Ismail Arif and Mahomed Ghous (20 Indian Law Reports, Calcutta, 834), their Lordships of the Privy Council held that possession is sufficient evidence of title as owner as against a wrong-doer and that it is just and proper that a person in possession should be able as against a person who has no title and is a mere wrong-doer to obtain a declaration of title as owner and an injunction to restrain the wrong-doer from interfering with his possession. Here the case is much stronger. The Court refused to eject the Plaintiff and confirmed, so to speak, the Plaintiff's possession and then the Defendant took the law in his own hands and did what the Court refused to allow him to do. It is manifestly intolerable that he should be allowed to do this and the Plaintiff is entitled to be restored to possession as against

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a trespasser and a wrong-doer, whom the Court refused to assist even though the Plaintiff comes in to Court more than six months after dis-possession. His previous possession is sufficient to create a presumption of title in his favour and entitle him to eject the Defendants.

The District Judge, in appeal, dismissed the suits and made the following observations:—

"The most important question in the case is as to the effect of the former decision. It appears to me that the decision of the lower Court cannot stand. Had the conduct of the Appellants been so intolerable as the lower Court imagines, the Respondent had abundant remedy not only under the Specific Relief Act but even in the Criminal Courts. As it was he did nothing for more than six years, although he now says that dispossession was by a definite and hostile act such as the actual entering of his home by force. It appears to me that if a man waits for six years before resenting an act of this nature he must offer clear proof that he had title at the time when dispossession took place.

The lower Court has not gone so far as saying that the decree in the former suit proves that the Respondent had any title, in fact it has expressly stated that it is no evidence upon that point but it seems to imagine that it is evidence that he was in possession. I think that this view is wrong. No doubt an inference as to a man's possession may be drawn from the fact that another has brought a suit to evict him, but I do not think that such an inference is strong enough to warrant a finding that there was actual possession of all the lands claimed.

Even assuming that the Respondent was in possession of some portion of the land and apart from the decree in question, after reading the evidence I find that the proof is as the learned Munsif has shown quite insufficient. I think that under the circumstances of the case the suit will have to be decided upon the title. I do not know any authority for the proposition that if a man who has no title abandons or is deprived of his possession he can recover except as against a mere trespasser the property which he has lost. The Appellants in the present case are not shown to be mere trespassers and the ruling quoted by the Munsif has no application.

I hold therefore that the Respondent having failed to prove his title, his suits must be dismissed.

The appeals are decreed with costs.

Plaintiff preferred this second appeal.

*Babus Saroda Charan Mitter and Hem Chunder Mitter* for the Appellant in No. 1712.

*Babu Hem Chunder Mitter* for the Appellant in No. 1758.

*Babu Akshoy Kumar Banerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff instituted two suits in the Munsif's Court to recover possession from the Defendants of two plots of land from which he alleged he had been forcibly dispossessed by them in Jaista 1252—1890. His case was that he had purchased the land at an auction sale for arrears of revenue in 1247, 20th October 1884, when the rights of the previous owner Jakar Ali were sold, and that he obtained possession. The Defendants brought a suit against him in 1886 (No. 294 of 1886) for a declaration of their title and to recover possession. That suit was wholly dismissed in appeal, the judgment of this Court in second appeal being delivered on the 13th May 1889.

Defendants Nos. 1 and 2 are the superior landlords and the land claimed is said to appertain to the site of their Zemindari cutchery building. Having failed in the suit the Defendants dispossessed the Plaintiff in 1890, and in consequence these two suits were instituted in 1896.

The Munsif framed 4 issues of which the fourth is of importance in this appeal. It was as follows:—"Is the land identical with the land covered by

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decree No. 297 of 1886 and are the Defendants estopped from disputing the Plaintiff's title."

The decision of the other issues practically depended on the decision of this issue. The Munsif in an elaborate judgment found that the lands were identical with the lands claimed by the Defendants in suit No. 294 of 1896. That suit was however dismissed on the failure of the present Defendants who were then Plaintiffs, to prove their title. The title of the present Plaintiff was not found in that case to have been proved. On this account the Munsif held that sec. 13 of the Code of Civil Procedure could not be held to apply nor the question of Plaintiff's title be held to be *res judicata* between the parties. The Munsif, however, found that the decree in that case was conclusive evidence that the present Defendants have no title to the land. The present Plaintiff was then in possession and the Munsif was of opinion that the Defendants could not be allowed, after losing their case for ejectment in Court to turn the Plaintiffs out by force, and then to call on him to prove his title, when he sued to be restored to possession. He held that the principle laid down by the Privy Council in the case of *Ismail Ariff v. Mahomed Ghous* (1) applied to this case, viz., "that lawful possession of land is sufficient evidence of right as owner as against a person who has no title whatever and who is a mere trespasser." He held that the Defendants having failed to prove their title in the previous suit were in the position of trespassers or wrong-doers when

they dispossessed the Plaintiff and that the Plaintiff's possession at the time of that suit and till dispossession was "sufficient to create a presumption of title in his favour to entitle him to eject the Defendant." He accordingly gave the Plaintiff decrees in both suits. The Defendant appealed to the District Judge, who reversed the decrees of the Munsif and directed that both suits should be dismissed. The Plaintiff has appealed to this Court. As to the question of the identity of the lands in these suits with the lands which were the subject-matter of suit No. 294 of 1886 the District Judge does not come to any definite finding. He, however, found that the Munsif was wrong in holding that Plaintiff to support his title in this suit could set up alone his possession at the time of the suit in 1886 and on that, obtain decrees to eject the Defendants. He seems to have held that the Plaintiff was bound to prove his title to all the lands, that the inference could not be drawn from the previous suit that Plaintiff was in actual possession of all the lands claimed, that Appellants in the present case were not shown to be mere trespassers and the ruling quoted by the Munsif has no application. He accordingly held that the Respondent having failed to prove his title, his suit must be dismissed.

The arguments in this Court have been confined to the point whether, supposing the lands in this suit to be identical with those claimed in suit No. 294 of 1886; the fact, that Plaintiff was then in apparent lawful possession of those lands and the Defendants had failed to establish their title to them, would entitle

(1) I. L. R. 20 Cal. 831; S. C. L. R. 20 I. A. 99 (1893).

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the Plaintiff in this suit, after subsequent forcible dispossession by Defendants, to obtain decrees for the ejectment of the Defendants as trespassers and wrong-doers, without at the same time otherwise proving his own title. In support of the appeal it is argued on the authority of the Full Bench Ruling in *Gobind Chunder Koondoo and ors. v. Taruk Chunder Bose and ors.* (2) that Defendants, having failed to prove their title in their previous suit, are barred from setting up the same title against the Plaintiff in this suit and that in subsequently dispossessing the Plaintiff they acted as trespassers and wrong-doers and that the principle laid down in the case relied on by the Munsif [*Ismail Ariff v. Muhomed Ghous* (1)] would apply and that the Plaintiff's previous lawful possession was sufficient evidence of his right as owner against them. In fact the Plaintiff's suit is brought on the decree in the previous case and on his previous lawful possession as proved at the time of that decree and it is contended that the Defendants cannot set up as against the Plaintiff's claim their title which in the previous suit was held to be invalid, even though since the decision of that suit they have contrived to obtain possession of the property.

In opposition, the ruling in the case of *Nisu Chand Gaita and ors. v. Kanchiram Bagani* (3) is relied on. In that case it was held that in a suit against a trespasser to recover possession brought more than 6 months after the date of dispossession the Plaintiff must prove

title: and mere previous possession for any period short of the statutory period of 12 years cannot be sufficient for the purpose. The cases of *Ismail Ariff v. Muhomed Ghous* (1) and *Nisu Chand Gaita and ors. v. Kanchiram Bagani and ors.* (3) are, however, to be distinguished from the present case. In the former case of *Ismail Ariff v. Muhomed Ghous* (1) the Plaintiff was in possession, and prayed for a decree declaring his right, and an injunction restraining the Defendant from disturbing his possession, and the Privy Council held that he was entitled to the relief which he sought. If he had been dispossessed and had brought a suit under sec. 9 of the Specific Relief Act within 6 months he could have recovered possession even as against a person who might establish a better title. Their Lordships of the Privy Council held that such being the case, it was only right and just that if he brought the suit before dispossession he should be declared entitled to retain possession as against a mere wrong-doer, and should obtain an injunction restraining the wrong-doer from interference with his possession. In the case before us the Plaintiff is out of possession. In the case of *Nisu Chand Gaita and ors. v. Kanchiram Bagani* (3) the Plaintiff was out of possession and he sued to eject the Defendant on the basis of a previous possession which was for a period of less than 12 years and which did not itself give him an absolute title. It was held in that case that the Plaintiff could not recover on proof of a posses-

(1) 1. L. R. 20 Cal. 834: s. c. L. R. 20 I. A. 99 (1893).

(2) 1. L. R. 3 Cal. 145 (1877).

(3) 3<sup>rd</sup> C. W. N. 568 (1899).

(1) 1. L. R. 20 Cal. 834: s. c. L. R. 20 I. A. 99 (1893).

(3) 3 C. W. N. 568 (1899).

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sion which was insufficient to give him title as he had failed to bring a suit under sec. 9 of the Specific Relief Act to recover possession within 6 months after dispossession. The present case is totally different from this last case. Here no doubt the Plaintiff is out of possession, but he sues on the basis of the decree passed in the suit No. 294 of 1886 coupled with his previous lawful possession as found at the time of that suit. In that suit in 1886 the parties were the same, though the positions they held as Plaintiff and Defendant were the reverse of those held by them in the present suit. In that suit the issue raised between the parties was whether the lands appertained to the taluk No. 1528 of the present Defendant (the then Plaintiff) as being included in the survey *dags* 5872 and 5873 or whether they belonged to the taluk of the present Plaintiff (the then Defendant). The present Plaintiff was then in possession. It was held that the present Defendants had failed to prove that the lands in suit were included in the two *dags* or that they had any legal title to them or that they had any right to eject the present Plaintiff. Their suit was accordingly dismissed. Subsequently in 1890 they forcibly dispossessed the present Plaintiff. When this suit is brought by the Plaintiff to recover possession the Defendants set up, certainly as far as the greater part of the land is concerned, identically the same title which it was found in the previous suit they had failed to prove. In para. 12 of their written statement they say,—“The disputed land appertains to *dags* 5872 and 5873 and the *gunzaish* excess of

taluk No. 1528 named Mahomed Dawi Nazir. The question is whether the present Defendants who are manifestly trespassers and wrong-doers can be allowed to set up, in opposition to the present suit of the Plaintiff to recover possession, a title which in the previous suit was held to be invalid in law, and whether they can compel the Plaintiff to prove his own title. We are of opinion that they cannot. So far as Defendants' title is concerned to the lands covered by the previous suit the question is *res judicata* between the present parties. It has been judicially held that they have no title. Having no title they cannot rely on their own trespass to defeat the present suit. At the time of the previous suit the present Plaintiff was in possession and the effect of the decree in that suit was to declare as against the present Defendants, that his possession was lawful. Such being the case and the Defendants being admittedly wrong-doers and having no title we hold that the Plaintiff on the basis of the decree in the previous suit and his previous lawful possession is entitled to recover possession from the Defendants of the lands covered by that suit, and the Defendants have no case against him.

We are, therefore, unable to agree with the findings of the District Judge and set them aside and his decrees.

The District Judge has not attempted to decide the question which now becomes the most important for decision, *viz.*, whether the lands in the present suits are in whole or part identical with those covered by suit No. 294 of 1886. The two appeals must therefore be remanded to the District Judge for the disposal

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of this question and for the decision of the appeal on the merits, having regard to the findings of this Court in this judgment. Costs to abide the result.

S. C. S.

*Case remanded.*

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM APPELLATE DECREE**

No. 2313 of 1898.

HARI DOYAL SINGH ROY

and others, Defendants,

BANERJEE, J.

Appellants,

BRETT, J.

v.

1900.

SHEIKH SAMSUDDIN and

11, December. another, Plaintiff, and

*pro forma* Defendant,

Respondents.

*Civil Procedure Code (Act XIV of 1882), secs. 11, 315—Refund of purchase money when judgment-debtor has no saleable interest in the property sold—Suit for such refund, whether maintainable—Remedy.*

*Sec. 315 of the Code of Civil Procedure is not exhaustive and does not confine an execution purchaser to the special remedy provided by that section and a suit lies under sec. 11 of the Code for a claim to get a refund of the purchase money when the judgment-debtor is found to have no saleable interest in the property sold.*

MUNNA SINGH v. GAJADHAR SINGH (1), KISHUN LAL v. MUHAMMAD SAFDAR ALI KHAN (2), PACHAYAPPAN v. NARAYANA (3) referred to.

This was an appeal preferred on the 28th of November 1898, against the decree of Babu Mahim Chandra Ghose, 3rd Subordinate Judge of Hughly, dated the 24th August 1898, passed on appeal

from the decree of Babu Siris Chandra Mukerjee, Munsif, 3rd Court of Howrah, dated the 21st December 1897.

The facts of the case were as follows:—

The Plaintiff, Sheikh Samsuddin, brought this suit, out of which this appeal arose, to recover from the principal Defendants, Hari Dayal Singh Roy and others, Rs. 600, being the amount of purchase money and compensation, after setting aside a rent decree and sale, made at the instance of the principal Defendants, as fraudulent. The Principal Defendants alone appeared and pleaded, *inter alia*, that the Plaintiff had no cause of action and that his suit for setting aside the sale and refund of purchase money was not legally maintainable. The first Court held that the Plaintiff had a cause of action and that the suit was maintainable and upon the findings arrived at, it gave the Plaintiff a modified decree for Rs. 480 with costs. On appeal, the Subordinate Judge dismissed the appeal, holding that the suit was maintainable.

Against that decree the Defendants preferred this appeal and the principal point urged was that the lower Courts were wrong in holding that a regular suit was maintainable for refund of purchase money paid by a purchaser at an execution sale.

Babus Saroda Charan Mitter and Soroshi Charan Mitter for the Appellants.

*Moulvi Serajul Islam* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

In this appeal, which arises out of a

(1) I. L. R. 5 All. 577 (1883).

(2) I. L. R. 18 All. 383 (1891).

(3) I. L. R. 11 Mad. 269 (1887).

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suit for refund of the purchase money paid by the Plaintiff-Respondent, on the ground that the judgment-debtor, whose interest was advertised for sale, had no saleable interest, two grounds have been urged before us on behalf of the Defendants-Appellants, first, that the lower Appellate Court is wrong in not allowing the question that the Plaintiff was a mere benamidar to be raised, and, second, that the lower Appellate Court is wrong in holding that a regular suit is maintainable for refund of purchase money paid by a purchaser at an execution sale.

As to the first point we are of opinion that the Court of Appeal below was quite right. The question of *benami* was not taken in the written statement, nor was it made the subject of an issue, and it was not even raised in the memorandum of appeal before the lower Appellate Court. That being so, the lower Appellate Court in our opinion has rightly refused to allow the question to be raised.

As to the second point, the argument is, that as there is a special provision in sec. 315 of the Code of Civil Procedure under which an auction-purchaser is allowed to receive back his purchase money when the judgment-debtor is found to have had no saleable interest in the property which purported to be sold, the auction-purchaser could avail himself only of that provision, and was not entitled to maintain a regular suit. Sec. 315, however, whilst it provides a simple and summary procedure by which an auction-purchaser, under circumstances like the present, can recover back his purchase money, does not contain

any provision barring a civil suit, such as we find in sec. 312, or sec. 244, of the Code. That being so, and there being a clear right in the auction-purchaser to claim refund of the purchase money in a case like the present, a right, the existence of which is recognized in sec. 315 itself, we think a civil suit would lie under sec. 11 of the Code.

It was finally contended that the questions arising in such a suit would come under sec. 244 of the Code. We do not see how that can be so. The question whether an auction-purchaser is entitled to receive back his purchase money by reason of the judgment-debtor having no saleable interest in the property sold can hardly be regarded as a question between the parties to a suit.

We should add that the view taken by the Court of Appeal below that the suit is maintainable is amply supported by authority. See *Munna Singh v. Gajadhar Singh* (1), *Kishun Lal v. Muhammad Safdar Ali Khan* (2), and *Pachayappan v. Narayana* (3).

The grounds urged before us therefore both fail, and this appeal must consequently be dismissed with costs.

*Appeal dismissed*

H. P. C.

- (1) I. L. R. 5 All. 577 (1883).
- (2) I. L. R. 13 All. 383 (1891).
- (3) I. L. R. 11 Mad. 269 (1887).

[APPEAL FROM ORIGINAL CIVIL  
JURISDICTION.]

No. 2 OF 1900.

MACLEAN, C. J. PRINSEP, J. HILL, J. 1900. 21, December.	}	CHOONEY MONEY DASSEE, Defendant, Appellant, v. RAM KINKUR DUTT and another, Plaintiffs, Respondents.
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*Hindu Law—Hindu mother, interest of, on partition—Abatement of suit—Arbitrator—Valuator—Civil Procedure Code (Act XIV of 1882), secs. 506, 522—Decree upon award of valuator—Right to sue, revival of.*

Upon a partition, D. was allotted a one-third share of certain premises as a Hindu mother. A suit brought by her to restrain Appellant, who had purchased the two-thirds share of the sons, from encroaching upon her was compromised and by consent an order purporting to be made under sec. 506, Civ. P. C., was made referring it to certain persons to settle the price of D.'s share and interest in the disputed property, and directing that, upon payment by the Appellant to D.'s attorney of the price so settled, D. do convey all her share and interest in the property to the Appellant. After the award as to the price, but before decree thereon, D. died leaving two sons, the present Respondents, who obtained an ex parte order reviving the suit in their names. They subsequently applied for a decree upon the award under sec. 522, Civ. P. Code :

Held—That the order of reference upon the compromise gave D. certain fresh rights in respect of which the right to sue survives to her representatives, the present Respondents.

Oakey & Sons v. Dalton (1), Jones v. Simes (2), and Phillips v. Homfray (3) referred to.

*The persons to whom it was referred to settle the price of D.'s share were rather valuers than arbitrators and the order of reference cannot accordingly be regarded as one under sec. 506, Civ. P. C.*

In re Carus-Wilson v. Greene (4) referred to.

*No decree on the award of the valuers can be made under sec. 522, Civ. P. C.*

This was an appeal from a decision of Ameer Ali, J., sitting as a Judge of the High Court in its Ordinary Original Civil Jurisdiction, dated the 13th June 1899.

The facts of the case are shortly these : On a partition between the sons, the present Respondents, their mother Denomoyee was allotted a one-third share of the property to be held by her as a Hindu mother. Subsequently the shares of the two sons were purchased by the Defendant-Appellant. The present suit was instituted by Denomoyee to restrain the Defendant from encroaching on her portion of the premises and for damages. The suit was compromised on the following terms as set out in the petition of compromise filed by Denomoyee :

"That it has been arranged between the parties that this suit should be settled on the following terms, viz., that the Defendant shall buy the Plaintiff's share and interest in the disputed property at a price to be settled by Babu..... and Babu....., as arbitrators, and in case of difference between them, the question of the price is to be referred to the umpirage of ..... whose decision will be final and binding on both parties.

"That upon payment by the Defendant to the Plaintiff's attorney of the sum to be fixed

(1) L. R. 35 Ch. Div. 700 (1887).

(2) L. R. 43 Ch. Div. 607 (1890).

(3) L. R. 24 Ch. Div. 439 (1882).

(4) L. R. 18 Q. B. Div. 7 (1886).



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by the said arbitrators or the umpire, as the case may be, the Plaintiff will convey all her share and right in the said property to the Defendant or as she may direct."

Thereupon on the 22nd June 1899, an order was made by consent of parties whereby it was ordered,

"That it be referred to the final decision of Babu..... and Babu....., to settle the price of the Plaintiff's share and interest in the disputed property the subject-matter of this suit, and which was allotted to her on partition in the said plaint mentioned, and to make their award in writing and submit the same to this Court, together with all proceedings, depositions and exhibits in this suit, on or before the 3rd August next; and in case of difference of opinion between the said arbitrators, the said matters be referred to the final decision of..... as umpire, who is to make his award in writing and submit, etc..... And it is further ordered, that, upon payment by the Defendant to the Plaintiff's attorney of the price so to be settled as aforesaid by the said arbitrators or umpire, as the case may be, the Plaintiff do convey all her share and interest in the said property to the Defendant free from all incumbrances, if any, created by her....."

The award was made on the 6th September 1899, but before a decree was passed on the award, and on the 13th September the Plaintiff died leaving the two sons, who had, as already stated, sold their two-thirds share to the Defendant. On the 18th September, the two sons obtained an *ex parte* order reviving the suit in their names. On the 16th November 1899, the Defendant gave notice of motion to discharge the above *ex parte* order. This application as also an application by the Respondents for judgment upon the award came on before Ameer Ali, J., on the 8th December, when his Lordship refused the application and gave judgment upon the award.

His Lordship's judgment, as well as the facts of this case, are fully reported in A. C. W. N. 280. \*

*Sir Griffith Evans* (with him *Mr. Garth*) for the Appellant.—It is not an award at all. Mere valuation by a person nominated by the parties to value the property is not an award (*see Russell on Awards*, 8th Edition, pp. 17 and 18, Q. B. D. 7). The agreement to refer the question of valuation to certain persons was not for the purpose of settling any dispute which had arisen between the parties, but was for the purpose of preventing any dispute which might arise between them. The report of the referee, in this case *Mr. Belchambers*, is in no sense an award and there cannot be any judgment upon it, as upon an award. Besides the matter referred was outside the scope of the suit. The suit was wrongly revived. What the Defendant had agreed to buy was the life interest of the original Plaintiff, a Hindu widow. Upon her death, the cause of action did not survive to her sons, who had previously sold their entire interest in the property to the Defendant in the action. The life tenant complained of certain interference with her rights of enjoyment of the property. Upon her death the suit could not be revived. A mere agreement to buy does not under the Transfer of Property Act pass any interest to the intending purchaser, sec. 54, Transfer of Property Act. The agreement to buy and sell has become incapable of performance upon the lady's death. The sons have nothing to convey, therefore the decree and the order for revival of the suit are both bad.

*Mr. A. Chaudhuri* (with him *Mr. S. P. Sinha*) for the Respondents.—It is too late now to raise the question as to whether the report of *Mr. Belchambers*

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can be treated as an award or not. The parties in their petition asked the Court to refer the matter then in dispute between them to two persons as arbitrators and in case of difference between them to Mr. Belchambers, as an umpire, and it is upon such application that those persons were vested with powers such as are given to arbitrators under the Civil Procedure Code, namely, to examine witnesses on oath and to make their award. Here the suit was settled upon the terms that the Defendant was to buy the original Plaintiff's interest upon a price to be thereafter fixed, but as they differed about the value the matter was referred to certain persons. After the decision of the umpire as to the value, the Defendant was called upon by the original Plaintiff to pay the amount and take the conveyance from her. The Defendant neglected to do so. Plaintiff died thereafter but the Defendant cannot take advantage of that fact, as by the original decree in the suit, it was directed that the Defendant was to pay the said Plaintiff upon the value being fixed. The lady became entitled to the money before her death and it is now due to her estate represented by her sons, who have, under the circumstances, been rightly placed on the record by revivor. See Specific Relief Act, sec 13, Ill. (b). It is not correct that an agreement to buy land does not create any interest in the intending purchaser. Sec. 54, Transfer of Property Act, says that it does not, of itself, create any interest in or charge on such property. He acquires certain rights. See Specific Relief Act, sec. 27 (b), sec. 40, Transfer of Property Act, sec. 91, Indian Trusts Act (II of 1882). He can dispose

of such right by Will (Dart's Vendors and Purchasers, 6th Edition, p. 306). It is useless to discuss whether the original cause of action survived in the son. The original decree created certain rights in the Plaintiff since deceased and the suit has been rightly revived. Under the Code persons not parties to any suit, might have asked the Court to refer matters in dispute between them to arbitrators and might have obtained a decree upon their award. The objection that the report of Mr. Belchambers in the present case is not an award is merely technical.

*Sir Griffith Evans* in reply.—What I meant was that in consequence of an agreement to buy land, the equitable interest in it does not pass to the intending purchaser as in England. The contract has no such effect on the property.

THE JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—The original Plaintiff in this suit was one Sreemutty Denomoyee Dassee, a Hindu widow, and on the 16th September 1898 she brought an action against the Defendant Chooney Money Dassee (the present Appellant) alleging in effect that the Defendant had wrongfully trespassed and encroached upon the Plaintiff's property and asking for a declaration that the Defendant had no right to do what she was doing, for an injunction, damages and costs.

The Plaintiff's case was briefly as follows:—Her husband died many years ago leaving herself and two sons, Hari Das and Ram Kinkur, surviving him and leaving as part of his estate a certain house in Calcutta known as No. 6,

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Gobind Chandra Sen's Lane. This house was eventually partitioned, and on the 16th June 1900 one-third of the house in question was allotted to the Plaintiff to be held and enjoyed by her as a Hindu mother, during the term of her natural life. By divers conveyances and acts—in the law the Defendant ultimately became the owner of the whole house, subject to the above interest of the Plaintiff in one-third of it. According to the Plaintiff's story the Defendant then demolished a portion of the buildings allotted to the portion of the premises allotted to the Plaintiff for her life and committed other acts of trespass and hence the action. The Defendant, by her written statement, denied the alleged encroachment and trespass. On or about the 22nd June 1899 the Plaintiff presented a petition to the Court and in paragraphs 4 and 6 stated as follows:—

"That it has been arranged between the parties that this suit should be settled on the following terms, viz., that the Defendant shall buy the Plaintiff's share and interest in the disputed property at a price to be settled by Babu Jadu Nath Sen of Sibnarain Dass' Lane, and Babu Bepin Behary Dhur of 98, Clive Street, Calcutta, as arbitrators, and in case of difference between them, the question of the price is to be referred to the umpirage of R. Belchambers, Esqr., the Registrar of this Honourable Court, whose decision will be final, and binding on both the parties.

"That upon payment by the Defendant to the Plaintiff's attorney of the sum to be fixed by the said arbitrators or the umpire, as the case may be, the Plaintiff

will convey all her share and right in the said property to the Defendant or as she may direct." And the Petitioner asked for an order referring to the arbitration of the arbitrators named "to settle the price of the Plaintiff's interest and share in the disputed property" and for further relief, consequential upon that price being so determined.

On the 22nd June 1899 the order, set out at page 7 of the Paper-book, was made, and this order, to my mind, has created the difficulty in the case. It provided for a reference to two persons named to "settle the price of the Plaintiff's share and interest in the disputed property," with a proviso for reference, in case of difference to Mr. Belchambers, the Registrar of the Court, as umpire, and ordered that, upon payment by the Defendants to the Plaintiff's attorney of the price so to be settled as aforesaid by the said arbitrators or umpire, as the case may be, the Plaintiff do convey all her share and interest in the said property to the Defendant free from incumbrances, if any, created by her. This order, I understand, was made by consent and in chambers, and apparently without any discussion. It evidently purports to be made under sec. 506 of the Code of Civil Procedure.

The matter then proceeded, the arbitrators differed as to the price, and Mr. Belchambers found the price to be Rs. 2,850, treating the Plaintiff as entitled to an absolute interest in the property. This so-called award was dated the 4th September 1899, and the Plaintiff died on the 13th of the same month, after having, as is alleged, offered to execute a conveyance to the Defendant, and after

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demanding Rs. 2,850 as the purchase money determined by Mr. Belchambers. By an *ex parte* order, dated the 18th September 1899, her sons Hari Dass and Ram Kinkur were upon their own petition placed upon the record in the stead of the deceased Plaintiff, as her heirs and representatives. On the 16th November 1899 the Defendant gave notice of motion to discharge the above *ex parte* order.

The application to discharge this *ex parte* order as also, as I understand, an application for judgment on Mr. Belchambers's award came before Mr. Justice Ameer Ali sitting on the Original Side, who refused to set aside the order of the 18th of September 1899 and gave judgment in terms of the award of Mr. Belchambers under sec. 522 of the Code of Civil Procedure.

Hence the present appeal. We have then to deal with two points: (1) whether the Judge in the Court below was right in refusing to discharge the order of the 18th September 1899, and (2) if so, whether he was right in giving judgment in terms of the award under sec. 522.

Upon the first question, whilst it is perfectly true, that we are not dealing with the case of the heir to the property which has been injured seeking to carry on the action commenced by his predecessor-in-title for damages for that injury, as, in the present case, Hari Das and Ram Kinkur have no interest in the property which belongs to the Defendant, it is, I think, at least doubtful whether the principle of the cases of *Oakey & Sons v. Dalton* (1) and *Jones v. Simes* (2)

rather than that of *Phillips v. Homfray* (3) does not apply. But be that as it may, the order of the 22nd June must be taken into consideration in dealing with this part of the case, and that order appears to me to make a substantial difference in arriving at our conclusion. That is still a subsisting order, it has not yet been discharged and we are bound, therefore, to give some effect to it. It changed the position of the parties in the litigation; so far as one can judge it was intended to be an order to give effect, in some shape or other, to the compromise at which the parties had arrived; it obviously contemplated the payment to the Plaintiff of the purchase money awarded, with a consequent conveyance by her. Assuming for the moment that Hari Das and Ram Kinkur, as her representatives, are, under this order, entitled to the purchase money awarded—a point upon which I express no opinion,—can it be rightly said that the right to sue for it did not survive, or that they are not entitled to be placed in her shoes so that they may be able to receive it, and to enforce the order of the 22nd June? Was it intended that all the proceedings under this order were to determine on the death of the original Plaintiff? I think not. The order of the 18th September is, perhaps, not very happily or carefully worded, but it must, I think, be regarded as an order enabling Hari Das and Ram Kinkur to proceed with the suit, as it then stood, that is, as modified or partially determined by the order of the 22nd June, in which view, having regard to the terms of that order, I think the Court below was right

(1) L. R. 35 Ch. Div. 700 (1887).

(2) L. R. 43 Ch. Div. 607 (1890).

(3) L. R. 24 Ch. Div. 439 (1883).

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in its conclusion upon this part of the case. In short that order gave the Plaintiff certain fresh rights or, at least possible rights, in respect of which the right to sue survives to her representatives. On this point, then, the appeal fails.

Upon the second point I unfortunately am unable to agree with the learned Judge in the Court below. He has declared that the award ought to be carried into effect. What is there in the so-called award to carry into effect? Mr. Belchambers has only determined the amount of purchase money—he has done nothing else. The Appellants say the amount has been determined upon a wrong principle, *viz.*, upon the view of the mother having an absolute interest in the one-third share, when she had only the interest of a Hindu mother. I say nothing about that now. The difficulty arises from the terms of the order of the 22nd June, and from the circumstance that it appears to have been treated as if it were one under sec. 506 of the Code. It may well be that it was intended, in making that order, to make one under sec. 506, but obviously it cannot properly be regarded as one under that section, for what the so-called arbitrators and umpire were to decide was not any matter in difference between the parties in the suit but merely to settle the price of the Plaintiff's share and interest in the disputed property. They were, in effect, rather valuers than arbitrators [see *In re Carus-Wilson and Greene* (4)] and if the reference were not properly a reference under sec. 506, it is reasonably clear that no order could properly be made under sec. 522, the

section under which the learned Judge purported to act. This seems to conclude the matter. I may add that this point, which has been carefully argued before us, does not appear, so far as one can judge from his judgment, to have been drawn to the attention of the Judge in the Court below. The appeal, then succeeds on this point. Then what is the proper course to be pursued? I think this order of the Court below must be discharged and the case remanded to the lower Court with liberty to either party to apply to that Court as they may be advised. If the present Respondents consider they are entitled to the purchase money as determined by Mr. Belchambers, it may be that they can make a proper application to the lower Court for an order directing payment to them: but I express no opinion as to whether they are so entitled, nor has that question been, as yet, determined by the Court of first instance. If on the other hand no step be taken by the Respondents, it will, probably, be open to the Appellant to apply to the lower Court for an order determining the litigation for want of prosecution. But I do not see that we can properly do more, at the present juncture, than remand the case. As regards costs, the victory has been divided and there will be no costs of the appeal, the more so as the present Appellant was a consenting party to the order of the 22nd June, to which I attribute most of the difficulty which has arisen. As regards the costs of the hearing before Mr. Justice Ameer Ali each party will bear their own costs. We do not interfere with his order refusing to discharge the order of the 18th September.

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PRINSEP J.—I am of the same opinion.

HILL J.—I am also of the same opinion.

*Messrs. Watkins & Co., Attorneys for the Appellant.*

*Mr. N. C. Bose and Babu Sarat Chandra Dutt, Attorneys for the Respondents.*

*Case remanded.*

S. R. D.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 372 OF 1900.

PRINSEP, J.	TARAK NATH NUNDY,
HANDLEY, J.	Complainant, Petitioner,
1900.	v.
5, July.	GOBINDA CHANDRA MITRA,
	Accused, Opposite Party.

*Court of Wards, servants of, prosecution of, by proprietor of estate on assuming management.*

*The owner of an estate on assuming management thereof is competent to prosecute a servant of the Court of Wards for criminal breach of trust committed during the management of the estate by the Court.*

This was a rule issued on the 18th of May 1900, against the order of the Deputy Magistrate of Khulna, dated the 18th of April 1900.

The facts of the case are as follows :—

The estate on behalf of which the present complaint was made was up to the year 1305, B. S., under the administration of the Court of Wards. The accused, Govind Chandra Mitra, who was charged with criminal breach of trust, was a servant under the Court of Wards. His services were dispensed with in 1304, B. S., by the Court of Wards. The items in respect of which it was alleged he committed breach of trust related to 1303,

i.e., when he was employed under the Court of Wards. The estate having come into the hands of the proprietor on his attaining majority he prosecuted the accused for criminal breach of trust committed in 1303 when he was in the service of the Court of Wards. The trying Magistrate dismissed the complaint on the ground that the proper party to prosecute was the Court of Wards and that it would be a dangerous policy if landlords after the release of their estates and the discharge of servants legally employed under the Court were allowed to prosecute them at pleasure at any time.

The complainant thereupon moved the High Court for further enquiry into the matter.

*Babu Shama Prosumno Majumdar* for the Petitioner.

No one appeared to show cause against the Rule.

The JUDGMENT OF THE COURT was as follows :—

Strictly speaking this application for further inquiry in a case in which the Magistrate had discharged the accused should have been made either to the District Magistrate or to the Sessions Judge instead of to this Court direct. It was, however, in consequence of the nature of this application, the error of the Magistrate being clear, that we have consented to deal with it ourselves.

The accused was prosecuted for criminal breach of trust in respect of moneys said to have been misappropriated by him when he was a servant of the zemindar, who is represented by the complainant while the estate was under the manage-

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ment of the Court of Wards. The Magistrate, in discharging the accused, seems to think that the accused could not be properly prosecuted at the instance of the owner of the estate, even though the money of such person may have been misappropriated, but that the prosecution could be only on behalf of the Court of Wards, because the accused was a servant of the Court of Wards when the offence was committed. But the Court of Wards are in no way concerned in this matter. The Court of Wards acted in the management of this estate only on behalf of its real owner and, as they have relinquished the management, it is clearly within the power of the owner of the estate to proceed against any person who may have caused damage to it even during the time when it was under the management of the Court of Wards. In this view we think that the order of the Magistrate discharging the accused was erroneous and that there should be a further inquiry held.

*Rule made absolute.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 450 AND 512 OF 1900.

PRINSEP, J.	}	AKHOY KUMAR CHATTERJEE,
HANDLEY, J.		in No. 450.
1900.		PUNCHANUN BAGIS & ORS.,
16, July.		in No. 512, Petitioners,
		v.
		THE QUEEN EMRESS.

*Criminal Procedure Code (Act V of 1898), secs. 110, cl. (f), 117, cl. 3—Repute, evidence of, admissibility of.*

*Evidence of repute is not admissible in cases coming under cl. (f) of sec. 110 of the Code of Criminal Procedure.*

*Where the imputations were that the Petitioners had from some time past made themselves very objectionable in the neighbourhood and that they had been annoying the villagers in various ways, by kicking at their doors at night or throwing brick-bats on the roof and annoying respectable women :*

Held—That these imputations, even if proved, do not constitute conduct so as to render the Petitioners liable to give security for good behaviour by reason of their being so desperate and dangerous as to render their being at large without security hazardous to the community.

This was a rule issued on the 13th of June 1900, against the order of the District Magistrate of Khulna, dated the 28th of April 1900.

The facts of the case appear from the judgment.

Mr. P. L. Roy and Babu Chandra Kant Sen for the Petitioner in No. 450.

Babu Chandra Kant Sen for the Petitioners in No. 512.

No one appeared to show cause against these rules.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner, Akhoy Coomar Chatterjee, together with four others, has in the same proceedings been required to give security under sec. 110 (e) and (f), that is to say, for habitually committing or attempting to commit, or abetting the commission of, offences involving a breach of the peace and for being so desperate and dangerous as to render their being at large without security hazardous to the community.

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The Magistrate's judgment, however, makes it clear that though he proceeded against the Petitioners also under cl. (e), he really required security from them under cl. (f) and, indeed, the evidence is directed only to prove the conduct of the Petitioners within the terms of cl. (f).

It has been pointed out to us that the evidence on which this order has been passed is evidence of general repute which is not admissible in proceedings taken under cl. (f) but only in proceedings in which the facts to be proved is that a person is a habitual offender.

We think that this contention is sound and that evidence of repute is not admissible in cases coming under cl. (f). We have read the evidence of the witnesses in this case and we find that it consists almost entirely of evidence of repute and that where, in one or two instances, there is some attempt to prove acts against the accused, the evidence is so vague and the acts to which it relates are said to have been committed so long ago that it is impossible to consider this evidence sufficient to justify an order requiring Petitioners to give security for good behaviour. The facts proved seem to be that the Petitioners have from some time past made themselves very objectionable in the neighbourhood and that they have been annoying the villagers in various ways by knocking at their doors at night or throwing brick-bats on the roof. But what seems to have given most offence has been that they have, in their lewdness, been constantly annoying respectable women.

These imputations, however, even if proved, do not, in our opinion, constitute

conduct so as to render the Petitioners liable to give security for good behaviour by reason of their being so desperate and dangerous as to render their being at large without security hazardous to the community. It appears to us that acts of this description do not fall within these terms.

The rules are, therefore, made absolute and the orders for security are set aside.

*Rule made absolute.*

S. C. S.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 457 OF 1900.

STEVENS, J.

HANDLEY, J.

1900.

2, August.

SRIHARI SHOME and

BABAR ALI, Petitioners,

v.

LAL KHAN, Opposite  
Party.

*Penal Code (Act XLV of 1860), secs. 114, 144—Possession of deadly weapon, if necessary to render each member of unlawful assembly liable for offence under sec. 144—Criminal Procedure Code (Act V of 1898), secs. 106, 522—Binding down to keep the peace, order for—"Criminal force," meaning of—Order for restoration of immoveable property.*

*When one person instigates another to join an unlawful assembly armed with a deadly weapon and afterwards joins the unlawful assembly himself, he may be punishable under sec. 144, I. P. Code, read with sec. 114, even though he was not himself armed with a deadly weapon.*

*Sec. 106 of the Code of Criminal Procedure may apply to a case in which armed men are assembled with the intention of committing a breach of the peace but no breach of the peace occurs because the assembly does not go so far.*

*The term "criminal force" used n*



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*sec. 522 of the Code of Criminal Procedure must be understood as defined in sec. 350 of the Penal Code and to justify an order for the restoration of possession of immoveable property under sec. 522, Cr. P. Code, the dispossession must have been by the actual use of criminal force and not merely by the show of such force.*

RAM CHANDRA BORAL v. JITYANDRIA (1)  
ISHAN CHANDRA KOLLA v. DINA NATH  
BHADAK (2) followed.

This was a rule issued on the 14th of June 1900, against the order of the Sub-divisional Magistrate of Munshigunge, dated the 6th of April 1900, which order was, on appeal, modified by the Sessions Judge of Dacca on the 4th May 1900.

The facts of the case and the arguments addressed to the Court appear from the judgment.

Mr. Jackson and Babu Harendra Narayan Mitter for the Petitioner.

No one appeared to show cause against the Rule.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS :—

The Petitioners were convicted by the Subdivisional Magistrate of Munshigunge under sec. 147, I. P. C., and they were sentenced to undergo each one year's rigorous imprisonment. They were also directed to execute bonds with sureties each to keep the peace for one year. A further direction was made under sec. 522, C. Cr. P., for the restoration of the party of the complainant to the posses-

sion of the disputed chur from a portion of which they had been dispossessed.

The learned Sessions Judge, on appeal, was of opinion that the offence of rioting had not been proved. He, therefore, altered the conviction, in the case of the Petitioner Babar Ali, to one under sec. 144 and, in the case of the Petitioner Srihari Shome, to one under that same section, read with sec. 114, I. P. C., maintaining the sentences and the orders under secs. 106 and 522, C. Cr. P.

It appears, upon the findings of the Courts below, that the complainant's party had erected some huts on a very newly-formed chur and, at the time of the occurrence, some 15 or 16 persons of the party appear to have been on the chur guarding those huts. The Petitioners came up with a large party, the numbers of which are variously stated at from 300 to 450, many of them armed with fish spears and other weapons. The Petitioner Srihari Shome, however, is said to have carried nothing but an umbrella. It seems that, on his order to beat the other party and break down their houses, some of the party of the Petitioners' party advanced, when the complainant's party immediately took to flight. Thersupon the party of the Petitioners broke down the houses.

It has been contended, as regards Srihari Shome, that no conviction under sec. 114 read with sec. 144, I. P. C., could be maintained from the peculiar nature of an offence punishable under sec. 144, which requires that the person committing it should be armed with a deadly weapon. We are not entirely prepared to accede to this contention. We think that if it were proved that

\* (1) 2 C. W. N. 305 : s. c. I. L. R.  
25 Cal. 434 (1897).  
(2) 4 C. W. N. 307 (1899).

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one person instigated another to join an unlawful assembly armed with a deadly weapon and afterwards joined the unlawful assembly himself, he might be punishable under sec. 144, read with sec. 114, even though he were not himself armed with a deadly weapon. In the present case, however there is no finding upon the evidence that there was any such instigation. The District Judge merely says that he thinks it must have been so. We think, then, that the conviction as regards Srihari Shome must be altered to one under sec. 143, I. P. C.

It has further been contended that the orders under secs. 106 and 522, C. Cr. P., are bad. Authority has been cited to show that there may be cases of unlawful assembly in which no breach of the peace occurs, because the assembly does not go so far and to which accordingly sec. 106 does not apply.

We are not prepared, however, to hold that that section has no application to a case like the present, in which armed men were assembled, as the occurrence showed, with the intention of committing a breach of the peace, for, the order was actually given to beat the persons who were at the time in occupation of the chur and an actual breach of the peace in pursuance of that order was prevented only by the fact that those persons at once took to flight and abandoned the position.

As regards the application of sec. 522, C. Cr. P., we have the authority of the case of *Ram Chandra Boral v. Jityandria* (1), which has been followed in the case of *Ishan Chandra Kolla v. Dina Nath*

(1) 2 C. W. N. 305 : s. c. I. L. R. 25 Cal. 434 (1897).

*Bhadak* (2) for the proposition that the terms "criminal force" used in sec. 522, C. Cr. P., must be understood as defined in sec. 350, I. P. C., and that, to justify an order for the restoration of possession of property under sec. 522, the dispossession must have been by the actual use of criminal force and not merely by the show of such force. We are unable, therefore, to maintain the order under sec. 522. The conviction and sentence in the case of Babar Ali are maintained. The conviction in the case of Srihari Shome is altered to one under sec. 143, I. P. C., and the sentence is reduced to six months' rigorous imprisonment. The orders under sec. 106, C. Cr. P., are maintained. The order under sec. 522, C. Cr. P., is set aside and if, as we understand has been the case, any action has been taken upon it, the state of things existing at the time when the order was passed must be restored.

*Rule made absolute in part.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 535 OF 1900.

PRINSEP, J.	KAILASH CHUNDER PAL
HANDLEY, J.	and another, Petitioners,
1900.	v.
4, September.	JOYNUDDI, Opposite
	Party.

*Summary trial—Complaint disclosing facts constituting offence of a graver nature—Process, issue, of, for minor offence if proper—Procedure—Jurisdiction of Magistrate—Code of Criminal Procedure (Act V of 1898), secs. 260, 530 (g)—Irregularity or illegality—Transfer of a case upon order for retrial, without issuing a rule.*

(2) 4 C. W. N. 307 (1899).

**KAILASH CHUNDER PAL v. JOYNUDDI.**

*A Magistrate is bound to proceed and regulate his proceedings at the trial as for the offence made up of the facts complained of if on the examination of the complainant, there is no reason to believe that the complaint is exaggerated or false and process is issued for the attendance of the accused.*

*When a Magistrate deliberately disregards the offence actually complained of, it becomes no question of mere irregularity but his proceedings are absolutely void under the provisions of sec. 530 of the Code of Criminal Procedure.*

*The High Court without issuing a rule directed a transfer of the case to some other Magistrate in ordering retrial.*

This was a rule issued on the 9th of July 1900, against the order of the Deputy Magistrate of Comillah, dated the 21st of June, an application for a reference of which order to the High Court for revision was rejected by the Sessions Judge on the 30th of June 1900.

The facts of the case material to this report appear from the judgment.

*Mr. P. L. Roy* for the Petitioners.

No one appeared to show cause against the Rule.

THE JUDGMENT OF THE COURT was as follows:—

A rule was granted in this case on the ground that the summary trial held was without jurisdiction, inasmuch as the offence charged in the complaint on which process was issued was rioting, an offence which was not triable summarily. The examination of the complainant is to the effect that 17 or 18 persons attacked and beat him and he gives reason for

this attack on him. There was nothing before the Magistrate except this examination of the complainant on which he proceeded to deal with the case by issuing process on the accused to attend. The case, therefore, was undoubtedly *prima facie* one of rioting and the proceedings should have been regulated accordingly. We do not understand the explanation given by the Magistrate who considers that he "would have laid himself open to a charge of improper use of his discretion if he had tried such a case under sec. 147, I. P. C.," and he adds:—"Nine-tenth of the *marpit* cases and trespass cases are technically rioting cases, at least so far as the complainant's statement goes, but it would be absurd to try them all as rioting cases." We cannot understand what the Magistrate means by this. If, on the examination of the complainant, there is no reason to believe that the complaint is exaggerated or false and process is issued for the attendance of the accused, the Magistrate is bound to proceed and regulate his proceedings at the trial as for the offence made up of the facts complained of and there is no reason why, if that offence is rioting, the proceeding should not be so regulated. The real difference is that in proceedings held by what is known a summary procedure, the record is more easily prepared and the powers of the Magistrate in regard to finality of punishment are enhanced, but these are no sufficient reasons why the Magistrate should deliberately disregard the offence actually complained of. There is no question of irregularity in this matter, as the Magistrate seems to think. Sec. 530 (q), C. Cr. P., declares that if a

**KAILASH CHUNDER PAL v. JOYNUDDI.**

Magistrate, not empowered by law in this behalf, tries an offender summarily, his proceedings shall be void. We have, therefore, no option in the matter. A fresh trial must therefore be held and under the circumstances we think that it should be held by some other Magistrate. The proceedings, therefore, will be taken by the District Magistrate or by some other Magistrate to whom he may think proper to transfer them.

*Rule made absolute : Case  
sent back for retrial.*

H. P. C.

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NO. 791 OF 1900.

AMEER ALI, J.	}	SAHIRAM AGARWALLA
STEVENS, J.		and
1900.		JIBUN KAMAR,
21, November.		Petitioners.

*Code of Criminal Procedure (Act V of 1898), secs. 2, 195, 203—Sanction to prosecute for bringing a false complaint—Penal Code (Act XLV of 1860), sec. 211—Police-report declaring complaint false—Application for enquiry into the complaint—Complaint—Judicial determination.*

*An application for an enquiry into their complaint, made by persons in shewing cause why they should not be prosecuted for bringing a complaint declared by the Police to be false is in effect in the nature of a complaint, and a sanction for prosecution for bringing a false complaint cannot be given until and unless that complaint is judicially determined.*

*"Judicial determination" of a complaint does not necessarily mean the trial of the persons against whom the complaint is made but the final determination of the matter of the complaint by the officer*

*holding the enquiry, upon evidence produced before him.*

QUEEN-EMPRESS v. SHAM LALL (1),  
SHEIKH KUTAB ALI v. EMPRESS (2) followed.

This was a rule issued on the 27th of September 1900, against an order of the Deputy Commissioner of Lakhimpur dated the 11th of September 1900, as well as the order of the Extra Assistant Commissioner of Dibrugarh, dated the 22nd of August 1900.

The facts of the case material to this report appear from the judgment.

Mr. P. L. Roy and Babu Dasarathi Sanyal for the Petitioners.

No one appeared to shew cause against the Rule.

THE JUDGMENT OF THE COURT was as follows:—

A rule was obtained by the two Petitioners under the following circumstances: Sahiram's house was burnt down and a complaint was made before the Police by Jibun, his servant, that the house was burnt by two persons, Mafizullah and Chuni Lal. The Police reported the complaint to be false. Upon that, notice was issued upon the Petitioners to show cause why they should not be prosecuted under sec. 211, I. P. C. Thereupon the Petitioners, in showing cause, asked for an inquiry into their complaint. The matter was then referred to the Extra Assistant Commissioner for inquiry and that officer examined certain witnesses produced by the Petitioners and expressed his opinion thus: after stating that he had examined certain witnesses and

(1) I. L. R. 14 Cal. 707 (1887).

(2) 8 C. W. N. 490 (1899).

**SAHIRAM AGARWALLA and JIBUN KAMAR.**

that they had deposed to the facts alleged by the Petitioners, he goes on to say "so I think Chuni Lal and Mafizullah may be prosecuted under sec. 436, I. P. C." The matter appears to have been brought again to the notice of the Deputy Commissioner who directed a further inquiry to be held by the Extra Assistant Commissioner. On this occasion, several witnesses were examined before him on behalf of the Police and some of the former witnesses examined by the Petitioners were cross-examined, and the Assistant Commissioner came to the conclusion that the charge against Chuni Lal and Mafizullah was wholly false and he wound up his report by asking that sanction for the prosecution of the two men, Jibun Kamar and Sahiram, under secs. 211 and 109, I. P. C., might be accorded. Upon that the Deputy Commissioner on the 24th August directed a notice to issue to Sahiram to show cause within 7 days why he should not be prosecuted under secs. 211 and 109, I. P. C., and also upon Jibun to show cause why he should not be prosecuted under sec. 211. The Petitioners thereupon obtained this rule from this Court calling upon the Deputy Commissioner to show cause why the orders sanctioning their prosecution should not be set aside on the ground that the complaint of Jibun Kamar has not been judicially determined and upon two other grounds.

We think, having regard to the precedents cited before us, namely, the Full Bench case of *Queen-Empress v. Sham Lall* (1) and the case of *Sheik Kutab Ali v. Empress* (2), that we must make this

(1) I. L. R. 14 Cal. 707 (1887).

(2) 3 C. W. N. 490 (1899).

rule absolute upon the first ground. It is quite clear that the application of the Petitioners for an inquiry was in effect in the nature of a complaint and that no judicial determination has been arrived at, as pointed out in the cases to which we have referred and that, therefore, the orders complained of cannot be sustained. By judicial determination we do not mean a trial of the persons against whom the complaint was made by the Petitioners. What we mean is, as pointed out in the cases to which reference has been made, that the officer holding the inquiry must come to a conclusion upon the evidence produced before him and finally dispose of the matter of the complaint. The order sanctioning the prosecution of the Petitioners will accordingly be set aside.

*Rule made absolute :*

*Sanction set aside.*

H. P. C.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 434 OF 1900.

PRINSEP, J.	BAIJ NATH RAM MAWRARI,
HANDLEY, J.	Petitioner,
1900.	v.
16, July.	BURGESS, Opposite
	Party.

*Indian Penal Code (Act XLV of 1860), sec. 417—Cheating—Including an article in a bill not supplied—Payment of the bill in part—Intention to defraud.*

*The fact that a trader in a statement of his account included amongst other articles delivered, an article, which the complainant alleged she had returned, does not amount to cheating unless it is proved that he had intentionally done so with an intention to defraud and had*

**BAIJ NATH RAM MARWARI v. BURGESS.**

*obtained a payment of the whole bill or of the bill in part including the price of that article.*

This was a rule issued on the 4th of June 1900, against the order of the Deputy Magistrate of Monghyr, dated the 3rd of May 1900, which order was, on appeal, affirmed by the Sessions Judge of Bhagulpore on the 22nd of June 1900.

The facts of the case appear sufficiently from the judgment.

*Mr. W. Jackson* (with him *Mr. P. L. Roy* and *Babu Dasarathi Sanyal*) for the Petitioner.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner has been convicted of cheating under sec. 417, I. P. C., and has been sentenced to three months' rigorous imprisonment and his appeal has been dismissed by the Sessions Judge.

A rule has been granted to consider the facts on which the Courts have convicted the Petitioner of cheating and whether they constitute that offence.

It appears that Mrs. Burgess had dealings with the Petitioner who is a cloth merchant and that she owed him money. She mislaid his bill and more than once asked him for another one. In the end the Petitioner gave her a statement of account but not a bill with all its details. Shortly afterwards, Mrs. Burgess found the bill which she had received from the Petitioner and she noticed that amongst the items was an item for certain cloth which she says, she had returned. This has been disputed by the Petitioner and this really forms the foundation of the offence of cheating of which the Petitioner

has been convicted. The Courts have found that the cloth was returned and that, therefore, the Petitioner made an incorrect or, perhaps, a false charge against Mrs. Burgess. But the mere fact that there had been a wrong entry in a bill would not of itself constitute the offence of cheating.

To constitute that offence it must be proved that the accused by deceiving Mrs. Burgess fraudulently or dishonestly induced her to deliver property to her or intentionally induced her to do or omit to do something which she would not have done or omitted if she had not been so deceived, such an act or omission causing or being likely to cause damage to her in her property.

The lower Courts have found that the general statement of account instead of a detailed bill was intentionally given to Mrs. Burgess to deceive her so as to keep from her knowledge this item of the cloth which they found was improperly charged; and that had a bill with its details showing this item been given to Mrs. Burgess she would not have paid moneys to the accused, in fact, that the accused thus intentionally induced Mrs. Burgess to make payments to him by not giving her a bill with all its details including the item relating to the cloth;— in other words that if Mrs. Burgess had not been thus intentionally deceived by the accused she would not have made these payments. It is impossible, however, to understand how a wrong charge in the account could really have affected Mrs. Burgess's payments to the accused. Even excluding this disputed item of cloth which has been found against the accused, there still was admittedly, a

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considerable sum of money owing to the accused and there is nothing to show that any of these payments were made or applied expressly towards payment for this cloth. How then can it be said that in consequence of the suppression of knowledge of this item she was intentionally induced to make payments to the accused in liquidation of a debt admittedly due! Nor can it be reasonably found that the accused gave Mrs. Burgess a general statement of account with the intention of withholding from her knowledge this item. She had already received a detailed bill showing this item and she had never objected to it. To give her afterwards a general statement of the amount due by her on this bill is a transaction which ordinarily takes place, and she could then have asked to have the details. It is impossible to understand how it can be held that in consequence of her not being given a bill with all the items stated in detail, she made payments to liquidate a debt which she admits was justly due, which she would not otherwise have done. Lastly it cannot be held that by obtaining such payments damage was caused to her. There was certainly no damage done to her for the result of the payments was to reduce her debt to the Petitioner. To convict the accused of cheating it was necessary to prove all this.

The conviction and sentence are therefore bad and they must be set aside.

We observe that the Sessions Judge in his judgment has thought proper to disbelieve Mrs. Harris, a witness in this case, and in doing so, he states that he agrees with the Magistrate. But, on

reading the Magistrate's judgment, we find that he has believed Mrs. Harris. It is impossible, therefore, to account for this expression of opinion on the part of the Sessions Judge.

H. P. C. *Rule made absolute.*

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 446 OF 1900.

HADJEE AJAM GOLAM  
HOSSEIN

STANLEY, J.

1901.

7, January.

v.

THE SECRETARY OF  
STATE FOR INDIA  
IN COUNCIL.

*Income Tax Act (II of 1886), sec. 47—  
Principal place of business of a person,  
power of Governor-General to declare.*

*Sec. 47 of the Income Tax Act so far as it empowers the Governor-General in Council to declare which of several places of business should be deemed to be the principal place of business, applies only to the case of a company or a firm and not to the case of an individual carrying on business.*

The facts of the case, which was undefended, are fully stated in the judgment.

Mr. Knight for the Plaintiff commented on the different sub-sections of sec. 47 and contended that that section did not apply to the case of an individual carrying on business.

STANLEY, J.—This action has been brought by the Plaintiff, a merchant carrying on business in Bombay and also in Calcutta, to recover from the Secretary of State for India in Council Rs. 1302. I. 4., being monies which he alleges were paid by him under the compulsion of a distress warrant in respect of Income-tax which he had already paid in Bombay.

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It appears on the evidence of his Calcutta Manager that the Plaintiff carried on business in Bombay before he opened a branch in Calcutta and that his head office is in Bombay. He paid the Income-tax for the year 1898-99 in Bombay in respect of both businesses. He was assessed however for Income-tax in Calcutta in respect of the two businesses and, notwithstanding that he informed the Collector that he had already paid it in Bombay, he was required to pay it again in Calcutta and did so, as I have said, on the issue of a distress warrant for its recovery.

The Defendant filed a written statement in which there is an admission that the certificate of payment of Income-tax for 1898-99 given by the Collector of Bombay was in the hands of the Defendant but under the impression that the Income-tax ought to have been paid in Calcutta and not in Bombay the Collector in Calcutta thought fit to insist on its payment here.

It is suggested that, under an order made in pursuance of sec. 47 of Act 2 of 1886, the Governor-General in Council had declared that Calcutta should be deemed to be the principal place of business of the Plaintiff.

This section, however, so far as it empowers the Governor-General in Council to declare which of several places of business should be deemed to be the principal place of business, appears to me only to apply to a case of a company or a firm and not to the case of an individual carrying on business.

Sub-sec. 3 of that section is the portion of the section which deals with a person carrying on business in several

places and this section only enables the Governor-General in Council to declare which of those several places shall be deemed to be his residence.

In the case of a Company or a firm the Governor-General in Council may declare which of the several places of business shall be deemed to be the principal place of business.

Acting no doubt under some misconception, as it seems to me, the Collector in Calcutta ill-advisedly insisted on the payment of the Income-tax here. The money was paid on the 22nd June 1899 under compulsion, as I have said, of a distress warrant. I think that the Plaintiff has clearly established his right to recover this money.

In his claim he has asked for damages but his learned counsel has abandoned this portion of the claim and, under the circumstances, I shall give a decree for the amount claimed, Rs. 1302. I. 4. with interest at the Court rate of 6 per cent. from the 22nd June 1899, the amount so awarded to be satisfied within six weeks from the date of the decree.

Costs on scale No. 2 up to the time the suit was transferred; thereafter on scale No. 1. Interest on decree at 6 per cent.

The learned Standing Counsel applied to me that the case might be adjourned for a fortnight with a view to his client's filing his affidavit of documents and also for the purpose of considering as to whether or not the case should not be settled. I was unable to see my way to accede to this application and for this reason:

On 13th August 1900 an order was made for the discovery of documents and



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no discovery was made and on the 23rd November 1900 an application was made to me by the Plaintiff to compel the Defendant to file a list of documents under the former order. On this occasion I granted one month's extension and directed by the order that if the order was not complied with in the time mentioned, the action should be transferred to the undefended list and heard *ex parte*.

No sufficient ground was shewn to me by the learned counsel why I should rescind this order or allow any further time, having regard to the number of months which the Defendant had already had for making the discovery.

*Messrs. Pugh & Co.*, Attorneys for the Plaintiff.

S. R. D.

[ORDINARY ORIGINAL CIVIL  
JURISDICTION.]

SUIT No. 702 of 1900.

STANLEY, J.	}	QUAZIE MAHMUDAR
1900.		ROHMAN, Plaintiff,
6, December.		v.
		SARAI CHANDRA DUTT,
		Defendant.

*Civil Procedure Code (Act XIV of 1882), Chap. XXXIX—Negotiable Instruments—Summary Procedure—Leave to defend, extension of time to apply for—Limitation Act (XV of 1877), sec. 4 and Sch. II, Art. 159.*

*In a suit under Chap. XXXIX, Civ. P. C., the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time.*

*Quere—Whether the Court has power to grant an extension of time if an application for such extension be made before the time fixed by the summons has expired.*

This was a suit by the Plaintiff, as endorsee for value of a promissory note alleged to have been executed by the Defendant, instituted under Chap. XXXIX of the Civil Procedure Code, on the 30th August 1900. Summons was issued in the form given in Sch. IV, No. 172 of the Code, and the Defendant was given ten days from date of service to appear and apply for leave to defend if he intended to defend the action.

Mr. A. Chaudhuri was instructed by the Defendant to apply for leave to defend on the 19th of November 1900, the Defendant alleging that he had been served in the beginning of the month of October 1900, during the close holidays but the application, as a matter of fact, was not made till the 20th. The Courts re-opened on the 19th of November and the verified petition of the Defendant had been affirmed on that day. On counsel stating that having regard to the date when the application was being made a question of limitation arose, his Lordship directed notice to issue to the Plaintiff. The application was finally heard on the 3rd of December 1900.

Mr. R. Mitra (with him Mr. A. Chaudhuri) for the Defendant.—The Defendant is a resident of Hooghly, and this Court has held that a person who does not reside within the ordinary original jurisdiction of this Court should get sufficient time to appear and ask for leave, *Groom v. Wilson* (2).

Pontifex, J., in that case held, that inasmuch as sec. 532, Civ. P. C., provided that the summons was to be in the form given in the schedule, or in such

## QUAZIE MAHMUDAR ROHMAN v. SARAT CHANDRA DUTT.

other form as the High Court may from time to time prescribe, power to extend the time is given to the High Court by implication.

STANLEY, J.—Can a Judge sitting on the Original Side of the Court alter the form?

*Mr. Mittra.*—Under sec. 36 of the Letters Patent a single Judge has the same power as the High Court.

He also relied upon *Chandra Kant Roy v. Pogose* (1), *Joseph v. Solano* (6), and referred to certain unreported cases.

*Mr. J. G. Woodroffe* for the Plaintiff.—Under sec. 4 of the Limitation Act, the Court must take the point of limitation, it cannot be waived. Art. 159 of that Act expressly provides that the Defendant is to apply for leave to defend within ten days from the date of the service of summons. We say that the Defendant was served in the fourth week of September. It is very doubtful as to whether the Defendant was not barred even on the 19th of November when the Courts re-opened. He referred to *Eisenlohr v. Goona Moni Debi* (5) (before Sale, J., 12th March 1895) and *Madhub Lall Dugur v. Woopendra Narain Sen* (4). The cases referred to by Mr. Mittra all refer to extension of time of service, not the extension of time to appear after service. Sec. 534 gives the Defendant a right under special circumstances to set aside the decree and if necessary to stay or set aside execution, and that is the proper and the only course open to the Defendant.

*Mr. R. Mitra* in reply.—Sec. 534, Civ. P. C., supports my contention. If the Court can set aside the decree under special circumstances, such as exist in this case, it is merely a technical objection to say that the Court cannot give leave to the Defendant to defend the action before decree. The Court has got to be satisfied that the Plaintiff is entitled to a decree and there is an inherent power in the Court to order such steps or proceedings to be taken as may lead to the administration of justice.

STANLEY, J.—This matter comes before the Court on a petition filed by the Defendant for leave to defend the action.

The facts, upon which the point for my decision depends, are not disputed.

The suit was instituted on the 30th of August 1900 under Chap. XXXIX of the Code of Civil Procedure for the sum of Rs. 15,029 alleged to be due by the Defendant to the Plaintiff on the footing of a promissory note, dated the 24th of August 1900.

The summons prescribed by sec. 532 of the Code was served on the Defendant on the 21st September 1900 and as the ten days, during which the Defendant was entitled to apply for leave to appear and defend, expired during the long vacation, the Defendant had, up to the 19th of November, the first day on which the Court sat, to make his application.

The application was not made until the following day, the 20th of November, when I directed that notice of the application should be given to the Plaintiff.

Mr. Mittra on behalf of the Defendant contends that the Court has power to

(1) 3 B. L. R. O. S. 83 (1869).

(4) I. L. R. 23 Cal. 579 (1896).

(5) unreported (1895).

(6) 9 B. L. R. 111 (1872).

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extend the time named in the summons for applying for leave to appear and defend and relied upon the provision of sec. 36 of the Charter and referred me to several cases.

In the case of *Chandra Kant Roy v. N. P. Pogoos* (1), the head-note appears to me to be inaccurate. It is as follows:—“Where in a suit under Act V of 1866, the Defendant is at such a distance as would make it impossible for him to put in an appearance within the seven days allowed by the Act, the Court will stay execution for a time long enough to allow him to appear.”

The application there was under the previous Act (V of 1866) which contains somewhat similar provisions to those in the present Code.

From the head-note it would appear as if the Court had extended the time for a time long enough to enable the Defendant to appear. But what Phear, J., says at p. 84 is, “that, in all cases in which the Defendant resided so far off that the whole or a considerable portion of the time within which he might apply for leave to defend would be consumed in the mere journey, execution should be stayed, so as to allow time to make an application to set aside the judgment according to the provisions of sec. 4,” so that it is not—as would appear from the head note—that time was granted to allow the Defendant to appear but execution was stayed for a time long enough to enable the Defendant to apply under sec. 4 to set aside the judgment.

Mr. Mitra also relies upon the decision of Lordship, J., in the case of *Groom &*

*amr. v. Wilson* (2). In that case, however, the learned Judge in granting leave to the Plaintiff to file the plaint directed that, as the Defendant lived at Peshawar, the time within which the Defendant might obtain liberty to appear and defend should be a period of 28 days instead of 10 days the time specified in the form contained in the 4th schedule to the Code.

He held in fact that the Court in granting leave to issue a plaint under Chap. XXXIX might fix a reasonable time, having regard to the residence of the Defendant, within which the Defendant might apply for leave to defend and that the 10 days prescribed by the form was not an unalterable limit.

Accordingly in that case 28 days was fixed by the summons itself as the time within which the Defendant might apply for leave to appear and defend.

That was a different case from the present case in which the time fixed by the summons is 10 days.

Of the unreported cases to which I have been referred the first is the case of *Narendra Nath Bose v. Hari Lall Mallick* (3) which was heard on the 29th August 1898

In that case it appeared that the 10th day allowed by the summons expired on a Sunday and the application was made on the Monday following and the question there considered was whether the date of service should be excluded in computing the 10 days time. The matter came before Mr. Justice P. O’Kinealy and he allowed the Defendant liberty to appear and defend but on the express

(2) I. L. R. 3 Cal. 539 (1876).

(3) Unreported (1898).

(1) 8 B. L. R. O. S. 82 (1869).

## QUAZIE MAHMUDAR ROHMAN v. SARAT CHANDRA DUTT.

condition that the Plaintiff should be at liberty to raise this question under the Statute of Limitation. The learned Judge said:—"On the question whether the application was made in time I have said that I will allow the Defendant leave to appear and defend but as the application is made *ex parte* I will allow the Plaintiff, if he so wishes, to be heard on the question of limitation." So there was no adjudication on the question which is raised before me.

Counsel on behalf of the Plaintiff contends that once the period fixed by the summons has expired the Court has no power to extend the time and he relies on sec. 1 of the Indian Limitation Act which provides that: "Subject to the provisions contained in secs. 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence."

The present case does not fall within any of the provisions of secs. 5 to 25, and under sec. 159 of the Limitation Act, the time from which leave to appear and defend a suit under Chap. XXXIX of the Code of Civil Procedure runs is from the service of the summons.

This was so held by Sale, J., in the case of *Madhub Lall v. Woopendra Narain* (4). In a subsequent case before Sale, J., which is unreported and which was disposed of on the 12th March 1895, *F. Eisenlohr v. Goona Moni Debi* (5), Mr. Avetoom applied for leave to file a warrant on behalf of the Defendant. On

the part of the Plaintiff it was objected that the suit was under Chap. XXXIX and leave to appear and defend had not been obtained. Plaintiff's counsel submitted that Mr. Avetoom had no *locus standi* not having obtained leave to appear and defend and objected to his being heard.

The learned Judge stated that the proper course for Mr. Avetoom to take was to apply under sec. 534, Civ. P. Code, to set aside the decree. The Defendant not having within the time allowed by law applied for leave to appear and defend, an application at that stage for leave to appear and defend could not be entertained.

I am of opinion that sec. 4 of the Limitation Act is mandatory and that the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time. I refrain from expressing an opinion as to the power of the Court to grant an extension of time if an application for such extension be made before the time appointed by the summons had expired.

My decision does not conflict with the decision of Pontifex, J., in the case before him in which on the presentation and admission of the plaint the time was extended by the Court to 28 days. This seems to me to be a reasonable course to adopt in a case where the Defendant resides at a distance.

Under these circumstances, but with regret, I hold that I have no power to extend the time in this case. The Defendant has a remedy under sec. 534 if he can make out a case for the application of the section.

(4) I. L. R. 23 Cal. 578 (1896).

(5) Unreported (1895).

## QUAZIE MAHMUDAR ROHMAN v. SARAT CHANDRA DUTT.

The application must be dismissed with costs.

Mr. R. C. Mitter, Attorney for the Plaintiff.

Mr. A. S. Barrow, Attorney for the Defendant.

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2182 OF 1898.

AMBER ALI, J.  
BRETT, J.

SHEIKH NIZAMUDDIN,  
Defendant, Appellant,

1900.

3, August.

MOMTAZUDDIN & anr.,  
Plaintiffs, Respondents.

*Forfeiture—Denial of landlord's title before suit—Intention—Written statement—Landlord and Tenant Act (VIII of 1869).*

*A denial of landlord's title, in order to operate as a forfeiture must be an express denial prior to the institution of the suit; a denial in the written statement does not operate as a forfeiture; and if what transpired before suit is ambiguous in its character it would be irregular and hardly in accordance with the principles of law to refer to the written statement to explain the intention of the Defendant.*

This was an appeal against the decree of Babu Shyam Kisore Bose, Subordinate Judge of Zillah Sylhet, dated the 1st of December 1898, confirming the decree of Babu Tara Prosunno Dass, Munsif of Sylhet, dated the 21st of July 1898.

The facts of the case appear from the judgment.

Moulvie Seraful Islam for the Appellant.

Babu Gobinda Chandra Das for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The suit out of which this second appeal arises was brought by the Plaintiffs to recover possession from the principal Defendants of 3 *kedars* of land upon the allegation that they belong to Taluk Lakshman Deb: that the Plaintiffs have purchased the same from the vendor Defendants, who not having executed a *kobala*, were sued; and upon a decree obtained by the Plaintiffs, the *kobala* was executed by them in respect thereof. They further allege that the principal Defendants were holding the said lands under the vendors of the Plaintiffs, under a *bhagidar jote* right; and that upon the execution of the *kobala* they asked the Defendants to give them possession, and upon their refusal to do so, they bring this suit to obtain *khas* possession. They base their cause of action upon the refusal, and put the date as the 19th of Pous 1302, B. S., their date of purchase; and also the 5th of Jaista 1303, when the principal Defendants were verbally requested to give up the lands.

The Defendants, among other pleas, alleged that the land in suit appertained to *mehal* Rajbullabh, and not to *taluk* Lakshman Deb: they further alleged that the vendors of the Plaintiffs had no title; that, as a matter of fact, one Shib Joy Surma and others were proprietors in respect of a twelve-annas share, which the Defendants had purchased from them; and that in respect, of the remaining four annas, they were in possession of the same, by virtue of a *raiyati* title derived from Brojo Mohun Chowdhry.

## SHEIKH NIZAMUDDIN v. MONTAZUDDIN.

The Munsif, in a judgment which is by no means satisfactory, held against the Defendants, and made a decree in favour of the Plaintiffs.

The Defendants appealed to the Subordinate Judge, who sets out in full the allegation of the parties, and deals with the principal questions involved in the case, and with which we are concerned in the present appeal.

One of the objections taken before the learned Subordinate Judge against the decree for *khas* possession was that, inasmuch as, according to the Plaintiffs' own shewing, the Defendants had a tenant right, they could not be evicted without notice; and the learned Subordinate Judge dealt with that question first. He says:—"In the written statement the tenant right was not set up; on the contrary the Defendants expressly denied having held as tenants. It is, however, clearly proved in the case that previously one Foyzuddi held the land as tenant under the Plaintiffs' vendors, and that subsequently the Defendants themselves held the land as tenants under the said vendors. The Plaintiffs' case is that on their demanding the Defendants to surrender the land, the latter denied the Plaintiffs' title, and thus forfeited the tenant right; and then he adds,—“I therefore find that there was a denial of Plaintiffs' title.” The Defendants appear to have contended before him that the statement in the plaint, and proved in the case, did not amount to a denial of Plaintiffs' title, but only referred to their right to re-enter. With reference to that contention the learned Subordinate Judge says as follows:—

“Reading, however, the statement in the

light of the written statement, in which the Defendants most clearly denied the Plaintiffs' title, and their vendors' title to the land, I can have no doubt that by the previous statement the Defendants meant to deny not the Plaintiffs' right of re-entry only, but also their title to the land itself. That being so, the denial operated as a forfeiture, and the Defendants were therefore entitled to no notice.” He accordingly affirmed the decree of the first Court.

The Defendants have appealed to this Court from the judgment and decree of the Subordinate Judge; and the question which we have to determine in this case is whether the order for *khas* possession was right and proper under the circumstances.

Under Act VIII of 1885, there is no forfeiture arising out of a denial by the tenant of the landlord's title. On this question we need only refer to the case of *Debiruddi v. Ablur Rahim* (1). In that case the tenant had persistently denied the landlord's title, and yet the learned judges held that the Bengal Tenancy Act does not recognize forfeiture on the ground of the denial of the landlord's title. But the present case has arisen in a district where Act VIII of 1885 is not applicable; and the relations of landlord and tenant are still regulated by the provisions of Act VIII of 1869; and although there is no provision in that Act providing that a tenant denying his landlord's title should forfeit his tenancy, it has been held in several cases which have proceeded chiefly upon considerations of the English law, that such a denial would be a forfeiture.

(1) I. L. R. 17 Cal. 19 (1888).

## SHEIKH NIZAMUDDIN v. MONTAZUDDIN.

As at present advised we do not wish to dissent from that view ; and we must, therefore, take it that if the Defendant denied before suit the title of the landlord it must be held that they have forfeited the tenancy. But a penal provision of this character can only be enforced on express denial ; it must not be inferential or proceed upon an *ex post facto* circumstance ; for example, the Subordinate Judge refers to the written statement to explain what transpired previously between the Plaintiffs and Defendant. A denial, however, in the written statement, as has been held in the case of *Prānmath Shaha v. Modhu Khulu* (2) would not operate as a forfeiture. The cause of action must arise before the institution of the suit. The real question for determination, therefore, is whether there was an express denial by the Defendant prior to the institution of the suit. If what transpired before suit is ambiguous in its character, it would be irregular and hardly in accordance with the principles of law to refer to the written statement to explain the intention of the Defendant for that would be proceeding upon a mere inference. The learned pleader for the Appellant desired to refer to the evidence to show that what took place before suit did not amount to denial of Plaintiffs' title. In second appeal we are unable to look into the evidence to see whether there was or was not, an express denial of the landlord's title in the case. Having regard, however, to the circumstances to which we have already adverted, we think this case must be sent back to the lower Appellate Court for the purpose of

coming to a finding on the point of the express denial upon which alone the forfeiture can be based.

The appeal will remain on the file of this Court. The learned Judge will make the return of his finding within a month from the date of the receipt by him of the record.

*Case remanded.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 387 OF 1899.

SRIMATI SARAT KUMARI

DEB, Judgment-debtor,

Appellant,

BANERJEE, J.

BRETT, J.

1900.

NIMAI CHARN DEY

26, November.

SIRCAR and another,

Decree-holders, Auction-purchasers, Respondents.

*Execution sale, application to set aside—Fraud—Irregularity—Code of Civil Procedure (XIV of 1882), secs. 244, 294 and 311—Purchase by the decree-holder benami at a price less than that at which the decree-holder was permitted to bid—Limitation Act (XV of 1877), Sch. II, Art. 178.*

*The purchase of a property at an execution sale by the decree-holder, in the name of another person, at a price less than that at which the decree-holder obtained permission to bid for the said property, constitutes fraud which would vitiate the sale.*

MAHOMED GAZER CHOUDHURY v. RAM LAI SEN (1) referred to.

*Art. 178, Sch. II of the Limitation Act would govern such a case.*

## SRIMATI SARAT KUMARI DEBI v. NIMAI CHARN DEY SIRCAR.

This was an appeal preferred on the 21st of November 1899, against the order of Babu Rajendra Coomar Bose, Subordinate Judge, 2nd Court of Zillah 24-Pergunnahs, dated the 12th of September 1899.

The appeal arose out of an application by the judgment-debtor to set aside the sale of a debt due to him secured by a bond. It appears that in execution of a decree obtained by the Respondent against the Appellant certain debt due to the Appellant and secured by a bond was put up to sale. The Respondent obtained permission to bid at the sale for the bond debt at a price of Rs. 5,000 and upwards. At the sale, however, the debt was purchased by one Sarat Chandra Dey for Rs. 3,000 and odd. The Appellant then made this application alleging that the real purchaser was the Respondent *benami* in the name of Sarat and contended that such purchase was an abuse of the process of the Court and should be set aside. He made the application more than thirty days after sale but within three years from that date.

*Dr. Asutosh Mukerjee, Babus Jnanendra Nath Bose and Biraj Mohun Majumdar* for the Appellant.

*Babus Saroda Charan Mitra and Mahendra Nath Roy* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of an application by the judgment-debtor to set aside the sale of certain immoveable property and of a debt secured by a bond, on the ground of fraud and irregularity. The application was made more than thirty

days after the date of sale but within three years from that date.

The Court below has held that the Petitioner's allegations have not been made out and that the application as regards the sale of the debt secured by a bond is barred by sec. 298 of the Code of Civil Procedure, and it has rejected the application in consequence.

In appeal it is contended on behalf of the judgment-debtor that the Court below ought to have held that the sale, so far as the debt secured by the bond was concerned, was vitiated by fraud; that the decree holder had in fact purchased that property *benami* in the name of Sharat Chandra Dey; that the application so far as this property was concerned was therefore one under sec. 244 of the Code of Civil Procedure, and that it was not therefore barred by sec. 298 of the Code, or by limitation, the period of limitation applicable to such a case being three years as provided in Art. 178 of the second schedule of the Limitation Act.

We may observe that the learned vakil for the Appellant did not press the appeal as regards the immoveable property and the appeal so far as that property is concerned must be dismissed.

For the success of the Appellant in the appeal in respect of the debt secured by the bond it is necessary that it should be established that the sale was vitiated by fraud, and that the purchase had in fact been made by the decree-holder; for it is then only that the case can come under sec. 244, and will be unaffected by sec. 298 of the Code, and governed by Art. 178 of the second schedule of the Limitation Act; and this is how this



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point is sought to be made out in the argument on behalf of the Appellant:— It is contended in the first place that the purchase at the execution sale, though made nominally by Sharat Chandra Dey, was made really by the decree-holder *benami* in the name of Sharat Chandra; and it is then contended that if the purchase was made by the decree-holder *benami*, having regard to the fact that the decree-holder had previously applied for and obtained permission to bid for this bond debt, Rs. 5,000 and upwards, but subsequently succeeded in buying it *benami* for 3,000 and odd rupees, the Court must infer that the decree-holder's purchase was, in the language of Sir Richard Garth in the case of *Mahomed Gae Choudhry v. Ram Lall Sen* (1), "an abuse of the process of the Court" with the object of defrauding the judgment-debtor to the extent of the difference between the minimum price fixed by the Court in its permission to the decree-holder to bid and the price for which the property was actually purchased. The foundation then of the Appellant's contention that the sale was vitiated by fraud lies in the allegation that the purchase was made by the decree-holder *benami* in the name of Sharat Chandra Dey. Let us see if that allegation is made out.

The direct evidence upon this question on the side of the Petitioner may not be sufficient to prove her case. It only goes to show that Sharat Chandra Dey is a friend of the decree-holder and looks after his cases. But that evidence, taken with the evidence adduced on behalf of the decree-holder, is in our opinion, quite

sufficient to prove that the purchase was made by the decree-holder *benami* in the name of Sharat Chandra. For we find that the property, after being purchased by Sharat Chandra, was sold by him, within four months after confirmation of the sale, to the decree-holder's wife and then, shortly after that, was purchased by the decree-holder from his wife; and a few days after his purchase the decree-holder settled with the debtor for five thousand rupees for which he obtained a mortgage bond carrying interest at four per cent. per annum. Nor is this all. Whilst the conveyances from Sharat Chandra to the decree-holder's wife and from the latter to the decree-holder make mention of payment of consideration, the amount of the consideration being the sum of three thousand rupees odd, that is, the amount for which the bond debt was purchased, the decree-holder in his deposition admits that no money was paid by him to his wife for the transfer by her to him; and though he says in one place in his evidence that his wife purchased the bond from Sharat Chandra with the money she had got from her mother, a little later on he is obliged to add "I cannot say myself whether or not any money was paid on behalf of my wife to Sharat on account of the sale of the said bond." Nor is it at all credible that if any money had been paid by the decree-holder's wife for the purchase of this bond, the decree-holder would not have known it! He does not say that his wife made the purchase without his knowledge. On the contrary he admits in his evidence that his wife consulted him. He further says that Sharat Chandra

(1) 1. L. R. 10 Cal. 757 (1884).

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bears no relationship to him or his wife ; and that he does not go into the inner apartment of his house. If then there was a real sale for consideration by Sharat to the decree-holder's wife, it must in all probability have been transacted through the decree-holder himself, and if any money had been paid by the wife to the vendor, the husband must have known it. We may here add that Sharat Chandra is described as being a person who acts as a *dalal* and owns some hackney carriages, that is, two in number. This is the account of his means and position as given by the decree-holder himself. Then we should observe that when the decree-holder was asked the question, "why did you not purchase the bond on the strength of the permission of the Court?" his answer was "the bids did not rise ; if another person would purchase it, a suit was to be brought. On this consideration I did not purchase it." But he did not hesitate to advise his wife to buy, nor did he hesitate himself to purchase or take a transfer of the debt from his wife. It seems to us that the truth is told,—only it is half told—in the first sentence of the answer quoted above "the bids did not rise." The decree-holder, seeing that there were not many bidders, and the bids were not likely to rise, thought it to his interest not to avail himself of the permission of the Court ; for if he did so he would have had to begin with a bid of 5,000 rupees. He thought he might make a profitable bargain by just standing by and purchasing in the name of his friend Sharat Chandra Dey.

Upon the evidence then, taken as a whole, the inference is irresistible that

the bond was purchased by the decree-holder *benami* in the name of Sharat Chandra and that it was purchased *benami* with a view to avoid paying 5,000 rupees or more, and therefore the purchase involved an abuse of the process of the Court and a fraud on the judgment-debtor in depriving the judgment-debtor of the full price which the decree-holder was bound to pay if he wanted the property.

That being so, we think the Appellant's contention is made out, and the appeal as regards the sale of the bond must be allowed and that sale set aside as vitiated by fraud ; but having regard to the fact that the Appellant succeeds only in part, we make no order as to costs.

*Appeal allowed.*

S. C. S.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2039 OF 1898.

BANERJEE, J. BRETT, J. 1900. 13, December.	}	BENI MADHAB MITTER, Defendant No. 2, Appellant, v. PRIYA NATH MANDAL and another, Plaintiffs, Respondents.
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*Arbitration award, if binding on a person not a party to the reference—Civil Procedure Code (Act XIV of 1882), sec. 506—Acquiescence—Conduct of the party.*

*Mere silence on the part of a person, not party to an order of reference to arbitration, and his omission to inform the arbitrators that he was not a party to the reference, cannot make the award of the arbitrators binding on him even though, during the arbitration, he produced,*

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*through a servant, a document before the arbitrators in obedience to a summons and declined to produce others.*

SATURJET PERTAP BAHADOOR SAHI v. DULHIN GULAB KOER (1), UNNIRAMAN v. CHATHAN (2), SHITA NATH BISWAS v. KISHEN MOHUN MOOKERJEE (3), GOVETT v. RICHMOND (4) and TAYLOR v. PARRY (5) referred to and distinguished.

DEEGUMBUR CHATTERJEE v. MUSST. RAM PREA DEBEA (6) approved.

This was an appeal preferred on the 14th of October 1898, against the decree of C. P. Caspersz, Esq., District Judge of the 24-Pergunnahs, dated the 9th of July 1898, preferred on appeal from a decision of Babu Bulloram Mullick, Subordinate Judge, 1st Court of 24-Pergunnahs, Alipur, dated the 25th of June 1897.

In this appeal the question which arose was whether Defendant No. 2 was bound by an award of the arbitrators to whom the case was referred at the instance of the Plaintiff and some Defendants, Defendant No. 2 being no party to the reference. The suit was for the declaration of the rights of the Plaintiff and for recovery of possession of certain lands. The Defendant No. 2 filed a *vakalatnama* but did not contest the suit. The Plaintiff and four out of the ten Defendants applied for the reference to arbitration. The Defendant No. 2 did not join in the award, but he took no objection before the arbitrators and, on being summoned to do so by one of the parties, he produced

a certain document before the arbitrators by one of his servants. Upon the return of the award of the arbitrators, the Defendant No. 2 objected that it was not binding on him, as he was not a party to the order of reference. The lower Appellate Court held that the conduct of the Defendant No. 2 amounted to an acquiescence on his part and the award was accordingly binding on him.

The Defendant No. 2 preferred this second appeal.

*Dr. Rash Behari Ghose and Babu Dwarka Nath Chuckerbarty* for the Appellant.

*Dr. Asutosh Mukerjee and Babu Biraj Mohun Majumdar* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

In this appeal, which arises out of a suit for declaration of title to, and recovery of possession of, certain immoveable property, the question raised on behalf of the Appellant, the Defendant No. 2, is whether the lower Appellate Court was right in holding that that Defendant was bound by the award of the arbitrators, to whom the case was referred, although he was not a party to the reference, by reason of acquiescence.

It is admitted that the Defendant No. 2 did not join in the reference to arbitration that was made in the case. The ground upon which the learned Judge below has held him bound by the award is thus stated in his judgment. "The conduct of the Defendant No. 2, when his advantage was being debated, warrants the conclusion that he consented, as did his sub-tenant, to the arbitration proceedings." Then, after considering

(1) I. L. R. 24 Cal. 469 (1897).

(2) I. L. R. 9 Mad. 451 (1886).

(3) 5 W. R. 130 (1866).

(4) 7 Sim. 1 (1834).

(5) 1 Man. and Grang. 604 (1840).

(6) Marshall's Rep. 517 (1863).

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certain cases presently to be noticed, the learned Judge observes:—"But this Defendant was fully aware of the proceedings, as notice was given to all the pleaders, he sent his servant to produce a document before the arbitrators, and he declined to produce other papers. He awaited the result of the reference, and then preferred an objection to the Court which did not impugn the award on the merits. Such conduct clearly disentitles the Defendant No. 2 to relief."

We are of opinion that the facts referred to in this judgment do not warrant the conclusion that the Defendant No. 2 is bound by the award by reason of his acquiescence in the reference. It is not said that this Defendant did any thing beyond sending his servant to produce a document, and this was done not at the instance of the Defendant himself but in obedience to a summons requiring him to produce the document, the summons being issued at the instance of the Defendant No. 7. It is not shown that Defendant No. 2 took any part in the proceedings before the arbitrator. It is not even suggested that he did. Mere silence on his part, and his omission to inform the arbitrators that he was not a party to the reference, cannot be taken to be sufficient to make the award binding upon him. Of the three cases relied upon by the learned Judge, that of *Saturjet Pertap Bahadoor Sahi v. Dulhin Gulab Koer* (1), was a case in which consent to a reference to arbitration was given by the agent of a party, and it being found that the party had ratified the act of his agent, it was held that he could not question the validity of the award. That

case therefore was different from the present one. As regards the case of *Unniraman v. Chathan* (2), it will be sufficient to say that the learned Judges there, whilst declining to interfere under sec. 622 of the Civil Procedure Code in favour of the party who impugned the award on the ground of absence of consent on his part to the reference, observed: "It is not necessary to say, and we expressly refrain from saying, any thing as to the validity of the award." And the case of *Shitlu Nath Biswas v. Kishen Mohun Mookerjee* (3), is clearly distinguishable from the present, as there all that was held was that a party who was made a co-Plaintiff at his own instance after the suit had been referred to arbitration, could not object to the validity of the award, as he took the position of a co-Plaintiff in the case as it then stood before the arbitrators, and as he made no objection to the arbitration but suffered the arbitrators to give in their award which affected him equally with the other co-Plaintiffs.

Two English cases were relied upon by the learned vakil for the Respondents, namely, *Govett v. Richmond* (4) and *Taylor v. Parry* (5). Those cases in the first place, are not quite in point. Reference to arbitration in a pending suit is governed by certain express provisions in our Civil Procedure Code, one of which requires that all the parties shall give their consent to the reference and that an application for reference to arbitration shall be in writing. In the second place we feel bound to observe

(2) I. L. R. 9 Mad. 451 (1886).

(3) 5 W. R. 130 (1866).

(4) 7 Sim. 1 (1834).

(5) 1 Man. and Grang. 604 (1840).

(1) I. L. R. 24 Cal. 469 (1897).

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with reference to the former of the two cases just referred to that the correctness of the rule therein laid down is open to question and has been doubted by well known writers of text books on the subject. See Russel on Arbitration, 8th Edition, page 317, and Pollock on Contract, 6th Edition page 191. And as for the second case, the facts there were very different from those of the case before us. On the other hand, there is a case in Marshall Reports, page 517, namely, the case of *Deegumbur Chatterjee v. Musst. Ram Prea Debea* (6) which supports to a certain extent the view we take. There the Judge in the Court below referred the case to arbitration after having suggested to the parties that they should do so, and the reference was sought to be supported on the ground that the parties objecting did not oppose it when it was made. The learned Judge thereupon observed:—"We think that the judge took an erroneous view of this matter. A reference to arbitration should proceed on the recorded and expressed consent of both parties, and not in the absence of it."

The judgment of the learned District Judge cannot therefore be supported, and it must be set aside so far as it holds that the Defendant No. 2 is bound by the award.

We are then asked to remand the case for an inquiry into the question whether, although the acts and conduct referred to in the judgment of the learned District Judge may not be sufficient to amount to such an acquiescence as would make the arbitration award binding upon the Defendant No. 2, there were any

other acts and conduct which would support the inference that there was acquiescence on the part of the Defendant No 2; and to allow the Respondents to adduce further evidence on the point. We are unable to accede to this prayer, because no foundation is laid for an application of this sort in the proceedings in the Courts below. When the Defendant No. 2 submitted his petition of objections to the award in the first Court he distinctly stated that there was no notice served upon him, that he never appeared before the arbitrators, and that he was not bound by the award. If the Respondents thought it necessary to adduce evidence to show that the Defendant No. 2 was bound by the award by reason of acquiescence, they ought to have asked the first Court to allow them to adduce such evidence, and even if it could be said that they had no sufficient opportunity of offering evidence before that Court by reason of the extreme view which it took on the question of law, they ought to have asked the lower appellate Court (before which they were Appellants) to take evidence on the point. Even this they omitted to do. That being so, we think they are not entitled to ask us to remand the case for a further enquiry into the question.

The result then is that this appeal must be allowed, and the case as against the Defendant No. 2 will be remanded to the first Court for retrial.

The costs of this appeal will abide the result.

*Case remanded.*

S. C. S.

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM APPELLATE DECREE**

No. 1166 of 1899.

JOGABUNDHU MAJUMDAR,  
Plaintiff, Appellant,  
RAMPINI, J.  
PRATT, J.  
1900.  
14, August. RASHO MONJAN DASSYA,  
Defendant, Respondent.

*Bengal Tenancy Act (VIII of 1885), sec. 167—Annulment of incumbrance, notice for—Notice, contents of—Notice, joint, to several persons.*

*A notice to annul an incumbrance under sec. 167 of the Bengal Tenancy Act is not bad though it does not specify the particulars of the land held by the tenant or the rent payable by him.*

*Such a notice if addressed to several tenants jointly is not bad if it is served in accordance with the prescribed rules.*

This was an appeal preferred on the 19th of June 1899, against the decree of Babu Kali Kumar Basu, Sub-Judge of Birbhum, dated the 20th of March 1899, confirming a decision of Babu Benode Behari Mitter, Munsif of Bolepur, dated the 10th October 1898.

The facts of the case appear from the judgment.

*Babu Jadu Nath Kanjilal* for the Appellant.

*Babu Hari Charn Sarkel* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the Subordinate Judge of Birbhum, dated the 20th of March 1899.

The Plaintiff is the purchaser of a holding containing 21 bighas 2 cottas, and he alleges that after the purchase he served

notice on the under-tenants of the land under sec. 167 of the Bengal Tenancy Act, declaring that their interests in the holding were annulled.

The Munsif and the Subordinate Judge have both held that the notice which the Plaintiff served through the Collector upon the Defendant was invalid in law; and the reasons which the Subordinate Judge gives for coming to this conclusion are that the notice did not specify the area of the land held by the tenants or the amount of rent paid by them, and that the notice was a joint notice to the several tenants. The learned Subordinate Judge says that this is bad in law. He does not, however, specify where the law is to be found according to which notices in this form are invalid. We are not aware of any such law. There is no provision in the Bengal Tenancy Act which prescribes the form of these notices; and we do not think that the Subordinate Judge was justified in introducing into the law a provision not to be found in it. And is there any reason why notices in such cases as the present should specify the particulars required by the Subordinate Judge? The Plaintiff does not want to treat the tenants as tenants any longer. He does not want any rent from them. He only desires to get rid of them. Therefore it seems to us, there was no necessity whatever for specifying in the notice the particulars of the land held by the tenants or the rent payable by them.

The Subordinate Judge has held that a joint notice to several tenants is bad. Why should this be so? There is no provision in the law which says that a joint notice to tenants is bad; and there is no reason why it should be held to be

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during their respective lives. He allowed Rs. 1,000 to be expended for his *shrad* and after other directions the Will runs as follows:—"Subject to the aforesaid bequests and payment of the aforesaid legacies and annuities I dedicate the whole of my estate moveable and immoveable to the *sheba* of the said Thakur. The surplus income of the said estate shall be expended by the *shebait* of the said Thakur for such festivals and other religious purposes as to the said *shebait* shall seem proper and as are enjoined by the shastras." By a codicil, dated the 21st day of March 1893, after reciting that by his Will that he gave and bequeathed the undivided  $\frac{1}{4}$ th share of the house and premises No. 108, Ahiritollah Street in Calcutta, to his wife for her life and after her death to his daughter Sreemutty Rojomoyee Dassee for her life and after the death of the latter to her sons in equal shares the testator by this codicil directed that neither his wife or daughter or grandsons were to have power to alienate by sale, mortgage, gift or otherwise the undivided  $\frac{1}{4}$ th share of this property. By a second codicil, dated the 2nd day of May 1893, he appointed Nittya Lall Dey as executor in place and stead of Kanai Lall Dey.

The present suit was instituted on the 4th September 1894 and subsequently on the 11th September 1894 the Defendant Troyluckho Mohiney Dassee as executrix and *shebait* under the Will instituted a suit against her co-executors for the administration of the estate seeking substantially the same relief as is sought in this action.

A written statement was filed by the Defendant Gopal Chunder Dey, one of the

executors on the 7th December 1894 and in the eighth paragraph of this written statement he says that Sreemutty Rojomoyee Dassee, the daughter of the testator, and the Plaintiff in the present suit who is also the testator's next reversionary heir entitled in reversion after the death of his widow, has also instituted a suit that is the present suit and by her plaint alleges that the attempted dedication of the residue of the testator's property to the worship of the Thakur was not valid and that the direction in the Will to apply the surplus income of the estate to such festivals and other religious purposes as to the *shebait* of the said Thakur should seem proper, is also not valid. Notwithstanding the institution of this present suit by the present Plaintiff I find that a decree was obtained by consent in the action last mentioned which decree is dated the 4th March 1896. This decree after reciting that the Defendant Nittya Lall Dey did not appear either in person or by counsel, directs that the usual enquiries and accounts be made and taken and directed that a scheme should be prepared for carrying out the religious trusts and for the establishment of the Thakur Sree Radha Shamjee and for the erection of a suitable Thakurbaree as in the Will mentioned. It does not appear to have been brought to the notice of the learned Judge who passed the decree that the validity of the religious trusts was disputed by the reversionary heir for if this had been brought to the notice of the Court it is unlikely that a scheme for carrying out these trusts would have been directed in the absence of

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the reversionary heiress and in the absence of any beneficiary under the Will other than the executrix being a party to the suit. It is to be observed that the only parties to this suit are the executrix and executors.

On the 17th January 1898 a Receiver was appointed of the estate.

In the present suit the Plaintiff is desirous of having the opinion of the Court upon the validity of the bequests to which I have referred. It has been contended on behalf of Kanai Lall Dey that the Plaintiff as reversionary heiress notwithstanding that she does take certain other benefits under the Will such as small annuities is not entitled to have the estate administered. Counsel on his behalf has quoted a passage from Walker on Executors in which it is stated that a person who has a mere expectancy is not entitled to obtain a decree for administration.

The paragraph to which I refer is based on the authority of the case of *Clowes v. Hilliard* (1) where Sir George Jessel, Master of the Rolls, held that an administration suit could not be maintained by possible designated next-of-kin. In that case the testator directed that in the event of his daughter dying without issue certain property should pass to the persons who would be entitled under the statute if the testator had then died intestate. An action for administration was brought during the lifetime of the daughter by the persons who were the next-of-kin if the daughter died without issue.

It appears to me that this is an entirely different case from the present

in which the Plaintiff is reversionary heiress and will, if she survives her mother, independent of any other event, become entitled to the estate. In *Clowes v. Hilliard* (1) the Plaintiffs had no interest at all either vested or contingent and it is a rule of Court that in order to maintain an action for administration a Plaintiff must have one or the other. The Master of the Rolls says as follows:—"How can the Plaintiff affirm that on the failure of the daughter's other issue, if the event ever happens, they or any of them will be then alive? They may all be dead. They have in fact neither a present interest nor anything beyond the expectation of a future interest. They have no interest at all either vested or contingent, and it is a rule of this Court that to enable them to sue they must have either the one or the other." Here the Plaintiff has more than the expectancy of a future interest. If not a vested she has a contingent interest.

The question moreover whether the dedication of part of the rents and profits of the estate as also the dedication of the residue to the idol is valid in law is one which concerns her. If these bequests be not valid in law, then the executors by their conduct in obtaining from the Court an order that a scheme should be provided for the purpose of this dedication, was such as to justify her, in my opinion in instituting and prosecuting a suit for the preservation of the property and to prevent waste by allowing the decree to be carried into effect.

Mr. Woodroffe admitted that in the



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case of waste the reversionary heir is entitled to apply to the Court for relief, but he contends that waste is not alleged by the Plaintiff.

It appears to me that if the dedication of the property to which the reversionary heir would become entitled, is contrary to law the proposal to carry out the dedication is such an act as would justify the reversionary heir in seeking the assistance of the Court and having the estate properly administered. If the Plaintiff in this case is not entitled to come to Court no other person is equally interested in seeing that the estate is not wasted.

Mr. Mayne in his work on Hindu Law says it is settled that the next reversioner has such an interest in the estate as will justify a suit when that interest is in danger and this rule is followed in several cases in this Court. One of the latest is that of *Hem Chunder v. Sarnamoye* (2).

I am therefore of opinion that the Plaintiff is entitled to maintain the suit. Then it is argued that already a decree for administration has been made in suit No. 725 of 1894 and that it would be improper to grant another decree for administration. The rule which has been adopted in England in cases where there are two suits instituted for the same or nearly for the same purpose is stated by Lord Romilly, Master of the Rolls, in the case of *Zambaco v. Cassavetti* (3). He says in his judgment at page 443 :—

“Now the two suits are either the same or they are not. In the first place,

assume that they are the same. Then the invariable practice of this Court has been to do this—to say, ‘one decree shall be made in both suits;’ or if a decree has been already obtained, ‘we will stop the first suit if you have got the decree in the second suit first; and we will give the conduct of that decree to the person who first filed the bill.’ That is the practice that, in the absence of special circumstances, I have invariably followed and it is usual for the person who has obtained the decree in the second suit to apply by motion (informing the Plaintiffs in the first suit that a decree has been obtained), for the purpose of stopping further proceedings in the suit which was first instituted. Now not only is that the practice, but it is of frequent occurrence.

“Now suppose the suits are not for exactly the same purpose. Then, when the application is made for the purpose of stopping the proceedings in the first suit, the Plaintiffs in that suit say: ‘the decree that you have obtained will not do; our suit must come to a hearing, because it is for a different purpose, and it is a purpose which must be accomplished.’ Thereupon the Court, if it is of that opinion, allows the cause to proceed, and it comes on to be heard. Then if the two suits are in a great measure connected together, what the Court does is to direct that the second decree which is made in the suit so allowed to proceed to a hearing, and which is in truth the first suit instituted, shall be prosecuted before the same Judge, and in the same chambers, and before the same chief clerk, in which the former decree is prosecuted, in order

(2) I. L. R. 22 Cal. 354 (1894).

(3) L. R. 11 Eq. 439 (1871).

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to avoid all expenses that might possibly be incurred by hearing two suits, that is the regular practice." This rule is as adopted in the later case of *Mellor v. Swire* (4).

It appears to me that this is a convenient rule to follow. The Plaintiff in the present suit was the first to institute an action for the administration of the estate and it appears to me that having regard to the fact that this suit was pending when a second suit was instituted and that the executors had notice that the validity of some of the provisions of the Will were disputed, for this fact is disclosed in the written statement of the Defendant Gopal Chunder Dey filed in suit No. 925 of 1894, the executors ought not to have obtained the consent decree of the 4th March 1896.

I shall adopt therefore the rule thus laid down with some modifications rendered necessary by the circumstances which I shall mention presently. I come now to deal with the questions raised upon the construction of the Will. It is said that the direction to establish a Thakur is invalid and the direction out of the rents and profits of the estate to spend a sum of Rs. 12 for the daily worship of the Thakur as also the dedication of the whole of the residuary estate to the *sheba* of the Thakur, are invalid.

The argument of learned counsel is that according to Hindu law a testator cannot give property to a person who is not in fact or in contemplation of law in existence at the date of the testator's death. That the Thakur in this

case not having been established in the lifetime of the testator was not a juridical person and that the rule of Hindu law which applies to individuals applies to an idol. Whether a gift be in "*presenti*" or in "*futuro*" it is settled that the donee must be a person in existence and capable of accepting the gift at the time it takes effect: *Tagore v. Tagore* (5). That which cannot be done directly by gift cannot be done by the intervention of a trustee: *Krishna Ramani Das v. Ananda Krishna Bose* (6), *Rajender Dutt v. Sham Chund Mitter* (7).

An idol cannot be said to have juridical existence unless it has been consecrated by the appropriate ceremonies and so has become spiritualized. Before this the deity of which the idol is the visible image does not reside in the idol: *Doorya Proshad Dass v. Sheq Proshad Pandah* (8).

The deity no doubt is in existence but there is no personification of the deity to whom a gift can be made. This was so decided in the case of *Upendra Lal Boral v. Hem Chunder Boral* (9), in which it was held that no valid gift can be made to an idol not in existence at the time of the testator's death. The Will in this case is not stated *verbatim* but in the judgment of the Court the following statement of it is made.

"Behari Lal Boral, who was the former owner of the property, made a Will on the 17th Bysack 1280. In it he expressed his intention to establish the service

(5) 9 B. L. R. 399 (1872).

(6) 4 B. L. R. (O. J.) 231 (1869).

(7) I. L. R. 6 Cal. 106 (1880).

(8) 7 C. L. R. 278 (1880).

(9) 2 C. W. N. 295 : s. c. I. L. R. 25 Cal. 405 (1897).

(4) 21 Ch. Div. 647 (1882).

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of an idol, to construct a temple, and to appoint his wife, Atarmoni, to be the *shebait*. In the event of his being unable to effect this, he provided that she shall, by virtue of his Will and in the exercise of powers equal to his own, establish the service of an idol and by making a Will in favour of it manage the properties, construct a temple, and perform the *sheba*. Then there are certain provisions relating to the management and restricting alienation, and authorising her to appoint another person to be the *shebait*. The Will concludes by providing that if Atarmoni died before doing those acts, the heirs of his spiritual preceptor and his family priest and his heirs should maintain the *sheba* and manage the properties."

The learned Judges decided that if there was a gift to the idol it was bad because the Thakur was not in existence at the date of the death of the testator.

At page 407 they say;—"We agree with the learned Subordinate Judge that Behari Lall made no devise of his property to his widow or to the idol, and that his widow succeeded as his heiress. Reading together the Will and the *anumatipatro* it could at the most be said that he gave a life estate to his widow with power to make a gift to an idol to be established by her or that he appointed her executrix with a similar power. It does not seem to us to matter much which view is taken. If there was a gift to the idol, it was bad because there was no idol in existence at the time of his death; if there was a power to make such a gift, the power was ineffective, because, on the authority of *Bai Motivahoo*

*v. Bai Mamoo bai* (10) we think that the power must be to convey to a person who was in existence either actually or in contemplation of law at the death of the testator, and the idol to which the dedication is said to have been made was not then in existence.

"We are unable to agree with the learned pleader for the Appellant that the idol was in existence in contemplation of law. The deity, no doubt, is always in existence, but there could be no gift to the deity as such, and there was no personification of the deity to whom the gift could have been made or who was capable of taking it. We must hold, therefore, that there was no valid gift or dedication to this idol either by Behari Lall directly or by his widow under the powers conferred upon her by the Will."

This is a decision which I am not disposed to dissent from

I do not see any reason why the rule laid down in the *Tagore* case as regards gifts to persons who are not in existence at the time when the gift is made should not be followed in the case of a juridical person such as an idol. The property proposed to be dedicated to the idol would apparently in a case like the present be without an owner until the idol has been spiritualized if this rule did not prevail.

It appears to me therefore that the gift of Rs. 12 for the daily worship of the Thakur is invalid and void and I shall so declare. Also that the proposed dedication of the residuary estate to the *sheba* of the Thakur is bad in law and I shall so declare.

Mr. Woodroffe contends that the direc-

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tion in the Will to establish a Thakur at such place as the executors may think proper is a valid direction and I am unable to disagree with him. There is no rule of law which prevents a Hindu from directing his executor to establish a Thakur and it does not come within the rule to which I have referred which prohibits a gift being made to a person not in existence in fact or in contemplation of law at the date of the death of the testator. I shall accordingly declare that this portion of the Will is capable of being carried into effect and ought to be carried into effect.

Another question has been raised upon the construction of the Will in regard to the bequest of Rs. 40 monthly to the grandsons of the testator. It is said that this bequest is invalid because it does not appear that the objects of the gift are limited to the sons of the testator's daughter living at the date of the death of the testator and so capable of taking effect. The same argument is applied to the gift of the one-fourth share of the house which was given after the death of the testator's daughter to her sons in equal shares. It is argued that the gifts to the sons are invalid inasmuch as the Plaintiff may have sons living at her death who were not in existence at the date of the death of the testator and who therefore would be incapable of taking any gift under the Will and that as the testator clearly intended that all his daughter's sons should take equally this gift fails.

In England it is well settled that where a gift is made to a class of persons some of whom are incapable of taking

the disposition fails as to all: *Leak v. Robinson* (11), *Pearks v. Moseley* (12).

This rule rests upon the ground that the intention of the testator was to benefit all the members of the class equally and that it is impossible to know what shape his wishes would have taken if he had known that they could not be carried out as he intended.

This rule has been applied in this country to the Wills of Hindus and it seems to me consonant with Hindu law and a convenient rule to follow.

The rule applies even though all the members of the class are born before the gift takes effect, if it was antecedently possible that they might have not been so born, and the fact that the gift might have included objects too remote is fatal to its validity, irrespective of the event.

In the case of *In re Dawson* (13), where the invalidity of a disposition turned on the probability that a particular person might have children it was held that evidence was not admissible to show that from advanced age the birth of future children was impossible. I therefore hold that the gifts which I have referred to—to the testator's grandsons are invalid.

The only other question which is brought to my attention is as to the right of the testator to restrain the beneficiaries under the Will from alienating the property given to them by the Will.

This restraint is clearly bad. It requires no authority for the proposition that a restraint upon alienation of pro-

(11) 2 Merivales 363 (1817).

(12) 5 App. Cas. 714 (1880).

(13) 39 Ch. Div. 155 (1888).

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perty is void according to the rules of Hindu law as well as according to the law of England.

I shall therefore make a decree for the administration of the estate and I shall direct an account of the testator's debts, funeral and testamentary expenses, legacies, and an enquiry as to what part of the estate is outstanding and undisposed of.

I shall direct that the accounts and enquiries already had in the pending suit No. 725 of 1894 shall be adopted in this suit so far as applicable; this will save expense and is the proper course to adopt in my opinion under the circumstances of this case. I shall direct that a scheme be framed for carrying out the directions of the testator for the establishment of a Thakur named Sree Sree Radha Shamjee in accordance with the provisions of the Will at such places as may be proper. I shall reserve the costs of this suit.

*Messrs. G. C. Chunder & Co.*, Attorneys for the Plaintiff.

*Messrs. P. N. Sen, A. T. Dey, N. C. Dutt, R. K. Bysack and M. N. Sen*, Attorneys for the Defendants

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER

No. 134 of 1900.

ADHAR MANI DASSI,  
Judgment-debtor,  
Petitioner, Appellant,  
v.

AMEER ALI, J.  
PRATT, J.

1901.

15, July.

MONMOTHA NATH BOSE,  
Auction-purchaser,  
Opposite Party,  
and  
SURENDRA NATH  
MONDAL and another,  
Decree-holders, Re-  
spondents.

*Code of Civil Procedure (Act XIV of 1882), sec. 244—Auction-purchaser—Fraud.*

*When a judgment-debtor applies to have an execution sale set aside alleging fraud on the part of the auction-purchaser who happens to be his agent and such application is opposed by the decree-holder, the question to be determined must be investigated under sec. 244, C. P. C., although no fraud may be alleged as against the decree-holder himself.*

*The fact that the judgment-debtor may be entitled to equitable relief against the auction-purchaser by a regular suit for reconveyance of the property acquired by fraud, does not oust the jurisdiction of the Court to set aside the sale on the ground of fraud under sec. 244, C. P. C.*

*In determining whether an application to set aside a sale comes within the scope of sec. 244, C. P. C., or not, the point to be considered is, whether there is a contest regarding the validity of the sale between the parties to the suit.*

PROSUNNO KUMAR SANYAL v. KALI DAS SANYAL (1), HIRA LAL GHOSH v. CHUNDER

(1) I. L. R. 19 Cal. 683 (1892).

ADHAR MANI DASSI v. MONMOTHA NATH BOSE.

KANT GHOSH (2), KUMBALINGA v. ARIAPUTRA (3) and NEMAI CHAND KANJI v. DENO NATH KANJI (4) *referred to*.

This was an appeal preferred on the 19th of April 1900, against the order of Babu Behari Lal Mullik, Subordinate Judge of Zillah Cuttack, dated the 9th of April 1900.

The facts of the case are fully stated in the judgment.

*Dr. Asutosh Mookerjee* and *Babu Shoroshi Churn Mitter* for the Judgment-debtor.

*Mr. P. O'Kinealy* and *Babu Baido Nath Dutt* for the Auction-purchaser, Respondent.

*Babu Saroda Churn Mitter* for the Decree-holders, Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from the judgment of the Subordinate Judge of Cuttack, rejecting the petition of the judgment-debtor to have a sale held in execution of a decree set aside.

The ground upon which the judgment-debtor's application has been rejected by the lower Court is that it does not fall within the provisions of sec. 244 of the Civil Procedure Code. It appears that the decree-holder Respondents in this case brought to sale certain properties belonging to the Petitioner. On the 9th November 1899 a petition was put in by a person of the name of Matungini Dassi under sec. 311 of the Civil Procedure Code to set aside the sale. Matungini is said to have been a creditor.

The application was rejected and an appeal was preferred by her to this Court and an application made for the stay of sale. This Court dismissed Matungini's appeal on the 27th March 1900.

On the 3rd April 1900 the judgment-debtor put in a petition from which the present appeal arises, and applied under sec. 244 to set aside the sale on grounds to which we shall presently refer. Her allegations were that the sale was brought about fraudulently by a person who acted as her agent; that the property was fraudulently bid for and purchased by him at a very low price; that the real value was a lakh and a half; and that her (the judgment-debtor's) interest was seriously prejudiced by the conduct of Monmotha Nath Bose, her nephew and agent. On the 7th April 1900 the decree-holders put in a petition objecting to the sale being set aside. Among other objections they urged that the matter did not fall under the provisions of sec. 244. The learned Subordinate Judge on the 9th April upheld this objection and rejected the application. Hence this appeal.

On behalf of the Appellant it has been contended that the Court of first instance is wrong in holding that inasmuch as no allegation of fraud was made against the decree-holders, the application did not come within the scope of sec. 244. It has been argued that what is to be borne in mind is the object of the application, so as to consider whether the contest raised upon the application is between the parties to the suit, namely, the judgment-debtor and the decree-holders, and

(2) 3 C. W. N. 403 (1889).

(3) I. L. R. 18 Mad. 436 (1895).

(4) 2 C. W. N. 691 (1898).

ADHAR MANI DASSI v. MONMOTHA NATH BOSE.

that the scope of the application should not be judged by the conduct of an outsider, like an auction-purchaser. In support of this contention the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1) and that of *Hira Lal Ghosh v. Chunder Kant Ghosh* (2) were relied on. On the other side Mr. O'Kinealy on behalf of the auction-purchaser Respondents has contended that in her petition the judgment-debtor makes no allegation as against the decree-holders. Whatever complaint she had is directed against her own agent, her remedy therefore is as against that person, and as she has a right of action against him she ought not to be allowed to come under sec. 244. He has also contended that this is not a matter between the parties to the suit, but between the judgment-debtor and a third party, namely, the auction-purchaser; and that therefore the case falls outside the principles laid down by the Judicial Committee in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1). In support of the contention that the judgment-debtor Appellant has a right of action the case of *Kumbalinga v. Ariaputra* (3) was referred to.

It is unnecessary for us to enter upon a discussion of the right which the judgment-debtor may have against her agent. There can be no question that if she likes she may proceed against him to have the benefit of any property which he might have acquired with money paid to him by the judgment-debtor or otherwise, acting as an agent

on her behalf. But that is not the remedy which the judgment-debtor seeks in the present application. What she seeks now is to have the sale set aside, in the result of which application the decree-holders are materially interested, and as a matter of fact in the Court of first instance they objected to the sale being set aside on several grounds. The question therefore is whether, fraud being alleged against the auction-purchaser alone, and it not being asserted or alleged that there was any collusion between him and the decree-holders, the matter comes within the scope of sec. 244. Cl. (c) of that section provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be decided by the Court executing the decree and not by a separate suit. The Judicial Committee of the Privy Council in the case referred to pointed out that it was of the utmost importance that all objections to execution sales should be disposed of as cheaply and speedily as possible; and they added that "their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of sec. 244; and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is not a party to the suit is intended in the result has never been held as a bar to the application of the section." This passage has been construed in several recent cases in this Court. In

(1) I. L. R. 19 Cal. 688 (1892).

(2) 3 C. W. N. 403 (1899).

(3) I. L. R. 18 Mad. 436 (1895).

ADHAR MANI DASSI v. MONMOTHA NATH BOSE.

the case of *Nemai Chand Kanji v. Deno Nath Kanji* (4) a similar question was raised, whether, the allegation being that the sale process, &c., had been fraudulently suppressed by the action of the auction-purchaser, the matter fell under the provisions of sec. 244, so as to give a right of a second appeal; and the learned Chief Justice said as follows:—“The first question is, Does a second appeal lie? It is difficult to say that the application is one entirely within sec. 311. Fraud is charged, the judgment-debtor's case is fraud, something more is alleged than a material irregularity in publishing or conducting the sale, and that being so, we think the case is within sec. 244, although the question is one between the judgment-debtor and the auction-purchaser who was not the decree-holder.” In that view of the matter the case was remanded to the lower Court. The same question in another form came up before the learned Chief Justice and Mr. Justice Banerjee in *Hira Lal Ghosh v. Chunder Kant Ghosh* (2) cited by the pleader for the Appellant. In that case the sale having been set aside, an appeal was preferred by the auction-purchaser; the Respondent (judgment-debtor) objected that no appeal lay: And dealing with that objection the learned Chief Justice said as follows:—“To appreciate whether a case is or is not within sec. 244 we must consider what the application was, and whether, at the time it was made, it was an application under that section. It was an application by the judgment-debtor against the decree-holder and the

auction-purchaser, whose purchase had been confirmed, to have the sale set aside. The question was one between the parties to the suit in which the decree was passed, viz., the judgment-debtor and the decree-holder, relating to the execution of the decree, and was undoubtedly an application under that section.” Mr. Justice Banerjee also observed as follows:—“In answer to the objection it is urged by the learned vakil for the Appellant, that the question whether a second appeal lies, or not, will have to be determined, not by considering who the Appellant is, but by considering what the nature of the question is, that was raised in the Court below and has been determined by the order appealed against.” And further on he adds:—“Now the question that has been determined by the lower Appellate Court is that the sale of the judgment-debtor's property is liable to be set aside, it is not clearly stated on what grounds, but evidently it would seem on the ground of fraud. That being so, the order appealed against has determined a question which is either mentioned or referred to in sec. 244, and which is not specified in sec. 588.” For the learned Judge adds, “the question whether the sale should be set aside or should be allowed to stand, is a question that arose as between the judgment-debtor and the decree-holder, and was a question relating to the execution of the decree.”

We have given our best consideration to the arguments of the learned counsel for the auction-purchaser Respondents, and we see no reason to take a different view from that expressed in the cases decided in this Court, and to which reference has

(2) 3 C. W. N. 403 (1899).

(4) 2 C. W. N. 691 (1898).



ADHAR MANI DASSI v. MONMOTHA NATH BOSE.

been made. We think that in judging of the question whether an application to set aside a sale comes within the scope of sec. 244 or not, the point to be considered is whether there is a contest regarding the validity of the sale between the parties to the suit. The mere fact that the sale is impugned upon the ground of some act done by another person, whether it be the auction-purchaser or an outsider who may take some action for the purpose of helping the decree-holder or otherwise, does not affect the determination of the question lying at the root of the matter. In the present case the allegation is that the auction-purchaser fraudulently brought about the sale. The decree-holder in the first Court opposed the application for setting aside the sale on the grounds contained in the petition of objection. The contest regarding the sale is therefore between the judgment-debtor and the decree-holder, and the question, therefore, relating to the execution of the decree, is strictly between the parties to the suit, and consequently falls, in our opinion, under the provisions of sec. 244. We hold that the Subordinate Judge was wrong in refusing to enter upon an investigation of the allegations made by the judgment-debtor. We accordingly set aside his order dated the 9th April 1900 with costs, and send back the case to be dealt with by him according to law.

We assess the hearing fee at five gold mohurs.

The record will be returned to the lower Court at once.

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*Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 86 of 1901.

KHIRODE SUNDARI DEBI  
and anr., Judgment-  
debtors, Appellants,  
v.

MACLEAN, C. J.

BANERJEE, J.

1901.

27 & 28, August.

JNANENDRA NATH PAL  
CHAUDHURI, Auction-  
purchaser, and ors.,  
Opposite Party,  
Respondents.

*Code of Civil Procedure (Act XIV of 1882),  
secs. 2, 244—Decree—Order—Fraud—Auction-purchaser—Confirmation of sale.*

*An order determining any question referred to in sec. 244, C. P. C., is a decree under sec. 2, C. P. C.; when therefore an appeal is preferred against such an order, it is sufficient to attach to the memorandum of appeal a copy of the order itself and it is not necessary to attach to the memorandum, a copy of the decree, even though such a decree may have been drawn up. In the case however of a suit or proceedings which have the character of a suit (e.g., contentious probate proceedings, &c.) it is necessary to file a copy of the decree.*

*A judgment-debtor is entitled, by an application under sec. 244, C. P. C., to have an execution sale of his properties set aside if he alleges and proves fraud on the part of the decree-holder though no fraud is alleged or proved against the auction-purchaser who is a stranger to the suit.*

PROSUNNO KUMAR SANYAL v. KALI DAS  
SANYAL (1), NEMAI CHAND KANJI v. DENO  
NATH KANJI (2), HIRA LAL GHOSH v.

(1) I. L. R. 19 Cal. 633 (1892).

(2) 2 C. W. N. 691 (1898).

**KHIRODE SUNDARI DEBI v. JNANENDRA NATH PAL CHAUDEHURI.**

**CHUNDER KANT GHOSH (4) and DURGA CHARAN v. CHANDRA NATH (3) followed.**

*When during the pendency of an application under sec. 244, C. P. C., to set aside an execution sale, the sale is confirmed, such confirmation is no bar to the maintenance of the application, even though the auction-purchaser is a stranger to the suit.*

*The decision of the Privy Council in PROSUNNO KUMAR SANYAL v. KALI DAS SANYAL (1) must be taken to have overruled in effect the Full Bench case of MOHENDRA NARAIN CHATURAJ v. GOPAL MONDUL (5).*

**BIHUBAN MOHAN PAL v. RAJAH PEARY MOHUN MUKERJEE (6) followed.**

This was an appeal preferred on the 8th of March 1901, against the order of L. Palit, Esq., District Judge of Zillah Jessore, dated the 31st of January 1901, reversing the order of Babu Srigopal Chatterjee, Officiating Subordinate Judge of that district, dated the 16th of August 1901.

The facts of the case appear fully from the judgment.

*Dr. Asutosh Mookerjee, Babus Hara Prosad Chatterjee and Biraj Mohan Majumdar for the Appellants.*

*Mr. J. T. Woodroffe (Advocate-General) and Babu Upendra Gopal Mitter for the Respondents.*

The JUDGMENTS OF THE COURT were as follows:—

**MACLEAN, C. J.**—This is an appeal from an order of the District Judge of Jessore, dated the 31st of January 1901,

(1) I. L. R. 19 Cal. 683 (1892).

(3) 4 C. W. N. 541 (1899).

(4) 3 C. W. N. 403 (1899).

(5) I. L. R. 17 Cal. 769 (1890).

(6) 3 C. W. N. 399 (1899).

by which he decided that the present application to set aside a sale could not be entertained under sec. 244 of the Code of Civil Procedure, but that a regular suit must be instituted for that purpose. The question is whether that view is correct.

A preliminary objection has been taken that the appeal is irregular because no copy of the order accompanied the memorandum of appeal when it was presented, and, consequently, that the provision of Rule 2 of Chap. IX of the rules relating to appeals from appellate decrees, has not been complied with. In support of such preliminary objection reliance has been placed upon an unreported decision of my colleague and myself of the 25th of June 1901 in appeal from original decree No. 354 of 1899.

The cases, however, are distinguishable. This is an appeal from an order made under sec. 244 of the Code, and, under sec. 2 of the Code, the order itself is the decree and no other decree is necessary, and a copy of this order did accompany the memorandum of appeal. It is none the less the order, because the reasons for which it is made are contained in the same document.

In the unreported case the order appealed against was made in certain probate proceedings, and under sec. 83 of the Probate and Administration Act, V of 1881, the proceedings are to take, as nearly as may be, the form of a suit according to the provisions of the Code of Civil Procedure, and those provisions necessitate that a decree shall be drawn up, as separate from the judgment. The appeal in the unreported case was from a decree in a proceeding tantamount to

## KHIRODE SUNDARI DEBI v. JNANENDRA NATH PAL CHAUDHURI.

a suit, the present appeal is from an order under sec. 244. The preliminary objection must be overruled.

On the merits, the question is whether the case comes within sec. 244 of the Code. *Prima facie* it does. It is an application made by the judgment-debtors against the decree-holder and the auction-purchaser to set aside the sale on the ground of fraud.

It is too late after the decision of the Judicial Committee of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1), to contend that the introduction of the auction-purchaser into the proceeding is a bar to the application of the section. It is said that this case is distinguishable because the purchaser here was in truth a *benamdar* for some one who was the real purchaser. But that case is not set up in the petition of the present Appellants nor in the objections on the other side, though somehow or other some evidence was given upon the point. The Judge in the Court below said the section did not apply because the question of *benami* could not be gone into, in the absence of the alleged real purchaser. But both sides have stated before us at the bar that the question of *benami* does not properly arise on this proceeding, and so it might be eliminated. I therefore do not see why the case is not within the section. If the Appellants were contending that the sale ought to be set aside by reason of the fraud of the real purchaser (assuming that the purchase was *benami*) who is not a party to the application, he might find himself in a difficulty. But he is not: he says it is

sufficient if he prove fraud on the part of the decree-holder. I think he is right in his contention; there are several cases which point to such conclusion. I may refer to *Nemai Chand Kanji v. Deno Nath Kanji* (2) and *Durga Churn v. Chandra Nath* (3), whilst *Hira Lal Ghosh v. Chunder Kant Ghosh* (4) is a clear decision on the point. I have heard no argument to-day against the soundness of that decision, which appears to me to be right.

I should mention that in the present case the sale was not confirmed until after the present application had been made. It was confirmed in effect pending the present application, which was summarily rejected by the first Court, a decision which was reversed on appeal, and the case was remanded to the first Court. It was between the first hearing and that on appeal that the sale was confirmed, but I do not think that confirmation under such circumstances can avail the purchaser.

The case must go back to the District Judge to be tried upon the merits, that is whether there was any fraud on the part of the decree-holder, the Appellants not seeking to go into any question of fraud on the part of the alleged real purchaser if the transaction were *benami*. The Appellant is entitled to his costs 5 gold mohurs.

BANERJEE, J.—I concur with the learned Chief Justice in thinking that the case must be remanded to the lower Appellate Court for trial of the appeal before that Court on the merits. With reference to

(2) 2 C. W. N. 691 (1898).

(3) 4 C. W. N. 541 (1899).

(4) 3 C. W. N. 403 (1899).

(1) L. L. R. 19 Cal. 683 (1892).

KHIRODE SUNDARI DEBI v. JNANENDRA NATH PAL CHAUDHURI.

the preliminary point raised in the case, I wish to add this, that this is an appeal from an order referred to in sec. 244, but not specified in sec. 588 of the Code of Civil Procedure. That being so, the order is itself a decree within the meaning of the term as defined in sec. 2 of the Code; and as the memorandum of appeal is accompanied by a copy of the order, that is quite enough, and it was not necessary for the Appellant to file with the memorandum of appeal a copy of any formal decree, if such a decree had been drawn up by the Court below.

It was argued by the learned Advocate-General for the Respondent that, even in the case of an order, sec. 2 of the Code makes a distinction between an order and a judgment, defining an order as being a formal expression of any decision of a Civil Court which is not a decree as above defined, and defining a judgment as being a statement given by the Judge of the grounds of a decree or order and that may be passed. A judgment is no doubt what states the reasons for the decision whether the decision result in the making of an order, or a decree: but before the preliminary objection can succeed, it must be shown that the order must be a separate document, in the case of an appeal from an order and distinct from the judgment. In the present case, what has been filed with the memorandum of appeal contains the reasons for the order, as well as the order itself; and there is no provision in the Code requiring a Court, when deciding any matter which is other than a regular suit, to draw up a formal order in addition to and distinct from the document containing the reasons for the

order followed by the order itself. The only provision in the Code for the drawing up of two separate documents, the one containing, principally, the reasons for the decision, and the other, principally, or solely, the formal expression of the relief granted, or other determination of the case, is what is to be found in Ch. XVII which bears the heading, "Of judgment and decree," and which relates only to a regular suit. Those being the provisions of the Code, I do not think that any order separate and distinct from what has been filed in this case was necessary to be filed along with the memorandum of appeal.

As for the unreported case, upon which reliance was placed for the Respondent, that was an appeal from an order in a probate proceeding; and it being a contentious proceeding, by virtue of sec. 83 of the Probate and Administration Act, V of 1881, the proceeding took the form of a suit according to the provisions of the Civil Procedure Code; and that being so, a formal decree, in addition to the judgment, had to be drawn up as required by Ch. XVII of the Code. And what was held in the unreported case was, that, in an appeal in such a case, it was necessary that the memorandum of appeal should be accompanied by a copy of the decree.

On the merits, the question that arises in the case is, whether the Court of Appeal below was right in dismissing the application of the Appellant before us, the judgment-debtor, on the ground that that application did not come within the scope of sec. 244 of the Code of Civil Procedure, and that the relief which the judgment-debtors asked for could be obtained by them only by a regular suit.

KHIRODE SUNDARI DEBI v. JNANENDRA NATH PAL CHAUDHURI.

Now, the case of the judgment-debtor was, that the sale of the property in execution of the decree obtained against them was vitiated by the fraud of the decree-holder and also of the auction-purchaser. The auction-purchaser named in the petition is the person who, at the time of the sale, was declared to be the purchaser. But in the course of the evidence adduced on behalf of the judgment-debtors, as appears from the judgment of the first Court, it was sought to be made out that the fraud on the part of the auction-purchaser consisted in the fraudulent action of the agent of a person of the name of Nuffer Chunder Pal Chowdhury, who, it was alleged, was the real purchaser. The first Court found in favour of the allegations of the judgment-debtor; it found that Nuffer Chunder Pal Chowdhury was the real purchaser, and that the sale was vitiated by the fraud of the decree-holder and also of the auction-purchaser, Nuffer Chunder Pal Chowdhury: and it set aside the sale.

Against the order of the first Court an appeal was preferred by the auction-purchaser named in the proceeding of the Court. His case both before the lower Appellate Court and the first Court was a denial of fraud, and a denial of the fact that any person other than himself was the real purchaser. I should add that the application of the judgment-debtor was opposed in the first Court by the decree holder as well. When the appeal came on for hearing before the learned District Judge, without going into any question of fact, the learned Judge held that the application of the judgment-debtors could not be enter-

tained, because the question of *benami* as between the auction-purchaser on the record and the alleged actual purchaser was a question which could not be gone into under sec. 244, and, furthermore, because it was a question which could not be gone into in the absence of the alleged real purchaser who was not brought before the Court; and the question for consideration in this appeal is, whether the lower Appellate Court was right in throwing out the application of the judgment-debtors upon these two grounds.

The learned vakil for the Appellants contends that the question of *benami*, namely, the question whether the auction-purchaser on the record was the real auction-purchaser or only a *benamdar* for some other person who was the real auction-purchaser is one that does not arise in this case, because he contends that it is enough for the success of the Appellants if they can show that the sale is vitiated by the fraud of the decree-holder; he is content to rest his case upon the allegation that the sale is vitiated by the fraud of the decree-holder, quite irrespective of the question, whether or not, there was any fraud on the part of the auction-purchaser.

This raises the question whether the case of fraud on the part of the decree-holder being established is enough to entitle a judgment-debtor to an order for reversal of an execution sale vitiated by such fraud. Upon that question, I think the answer ought to be in favour of the Appellants' contention. The sale in execution of a decree is brought about by the instrumentality of the Court, the Court being set in

KHIRODE SUNDARI DEBI v. JNANENDRA NATH PAL CHAUDHURI.

motion by the decree-holder. If the decree-holder is guilty of fraud in the conduct of the sale, the process of the Court must be held to have been abused by him in bringing about the sale; and it cannot be said that a sale obtained through the abuse of the process of the Court by the fraud of the decree-holder who set the Court in motion should be upheld merely because the auction-purchaser is innocent of the fraud. The auction-purchaser, of course, is entitled to have the purchase-money paid by him refunded by the decree-holder: but he cannot insist upon a sale brought about by fraud practised upon the Court and by the decree-holder being maintained.

The view I take is in accordance with that taken by this Court in the case of *Bhuban Mohan Pal v. Rajah Peary Mohun Mukerjee* (6). That being so and the objection on the ground of the alleged real auction-purchaser not being before the Court being thus obviated, the question remains, whether the case comes within the scope of sec. 244 of the Code. Upon that question also the answer must, I think, be in favour of the Appellants.

Great reliance was placed by the

(6) 3 C. W. N. 399 (1899).

learned Advocate-General who appeared for the Respondent upon the Full Bench decision of this Court in the case of *Mohendra Narain Chaturaj v. Gopal Mondul* (5), as showing that in a case like the present, sec. 244 of the Code does not apply. But that case must be taken to have been, in effect, overruled by the decision of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1), in which their Lordships of the Judicial Committee say:—"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of sec. 244, and that when a question has arisen as to the execution discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result has never been held as a bar to the application of the section."

*Appeal allowed:*

*Case remanded.*

J. B.

(1) I. L. R. 19 Cal. 683 (1892).

(5) I. L. R. 17 Cal. 769 (1890).

## BRINDABUN GHOSH v. THE EMPEROR.

He was unable to say whether copies had been affixed at the Katcharies and Thanas as prescribed, as that was a matter concerning the Collector's office. There was other evidence of a similar character.

We are not prepared to say that it is immaterial in the case of a prosecution under sec. 76 (6) that the provisions of secs. 6 and 80 have not been complied with. Now, compliance with such provisions would be most material on the question of punishment.

The rule, it is to be observed, is in terms based upon the ground "that the proclamation was not duly made in the terms of sec. 80 of Act II, B. C. of 1882." By "proclamation" as here used, we understand the notification referred to in sec. 6. The Act nowhere requires the publication of any proclamation though curiously sec. 80 provides for the mode in which every proclamation required to be issued shall be published.

It is not necessary to decide on the evidence whether there had been a sufficient compliance with the provisions of secs. 6 and 80, but there certainly is a considerable body of evidence tending to show that the requirements of the law have been observed. In dealing with the rule we are bound by the finding of the Deputy Magistrate that this notification was duly published.

Under these circumstances we think that the order of the Deputy Magistrate was right and that the rule must be discharged.

*Rule discharged.*

## PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD MACNAGHTEN.	}	NIDHA SAH and
LORD LINDLEY.		another,
SIR ANDREW SCOBLE.		v.
SIR ARTHUR WILSON.		MURLI DHAR
SIR JOHN BONSER.		and others.
1902.		
3, December.		

*Construction of deed—Right of lessor to enter, on expiration of lease—Contract—Breach—Misrepresentation—Estoppel—Mortgage-deed.*

*An instrument purporting to be a mortgage with possession for 14 years which however did not secure the payment of any money or the performance of any engagement and which did not expressly or by implication provide for redemption, and under the terms of which no accounts were to be rendered or required—was not a mortgage-deed but was simply a grant of land for a fixed term, free of rent, in consideration of a sum made out of past and present advances.*

*One I. L., representing himself to be the absolute owner of certain villages, executed such an instrument in respect of these in favour of I. S, but not having absolute title to all of them failed to put I. S. in possession of the entirety of the premises comprised in the instrument. At the expiration of 14 years, the representatives of I. S. refused to give up possession on the ground that owing to I. L.'s misrepresentations they had been unable to recoup themselves the money they had advanced. The representatives of I. L. brought this suit to recover possession. Upon the contention, raised for the Defendants, that I. L. having failed to give I. S. possession of the entire pro-*

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*party, as he had stipulated to do, the Plaintiffs could not be allowed to enforce the contract as against the Defendants :*

*Held—That the Plaintiffs were not seeking to enforce that contract. They relied on their proprietary rights, and in the absence of some stipulation in the instrument, either express or implied, depriving the Plaintiffs of their rights to recover possession, the Plaintiffs were entitled to a decree.*

This was an appeal against a decision of the Judicial Commissioner of Oudh which confirmed a decision of the Subordinate Judge of Bahraich. The suit was brought by the Plaintiffs as representatives of one Indarjit Lal, deceased, to recover from the Defendant the villages of Ilaka Dewasiapur at the expiration of 14 years, for which period they had been mortgaged to him as security for his debt. The Defendant pleaded that the mortgagor had misrepresented the nature of his interest in some of the villages and had wrongly deprived him of possession of others. Both Courts found that this defence was true in fact but worthless in law, and that the Defendant was bound to give up the villages unconditionally at the end of his term, being left to a suit for damages in respect of the wrongful acts complained of. The questions in this appeal were purely questions of law.

On the 10th July 1876, Indarjit Lal executed to the Defendant Ishri Sah the document upon which the rights of the parties depend. It recites a debt of Rs. 11,530-8-0 as due to the mortgagee. It then proceeds, "that in consideration of the debt hereinbefore mentioned, I mortgage with possession to Ishri Sah

village Dewasiapur, together with all the villages therein included that are in my absolute proprietary possession and enjoyment up to date" for a period of 14 years from F. 1284 (4th September, 1876) to F. 1297. The names of the villages, 12 in number, are set out in the Schedule. The document then proceeds to specify the position of the title to these villages. Four of them, viz., Har Chanda, Aghapur Badainpur, Surjana, and Chak Meerpur, were under mortgage to certain persons who are named. These he was to redeem out of moneys, part of the Rs. 11,530, which were left in his hands for that purpose. Two others, viz., Jamaluddinpur and Bilnapara, were mortgaged to one Suraj Bali Singh for a term, at the expiration of which he was to take possession. As to two others, viz., Harrajpur and Chandidaspur, which were in the occupation of the mortgagor's sons, he was not to have actual possession, but was to retain an annual sum of Rs. 325. Indarjit was to get the name of Ishri Sah recorded in column 9 of the Revenue Register, "and having come into possession of all the villages hereby mortgaged, the said Sah shall for the said period pay the Government revenue, the Patwari cess, the Chaukidari rate, and any other expenses relating to Courts, out of the income of the estate, and shall appropriate the balance towards payment of the money secured under this document." The mortgagor stipulated on his own part that, "I, this declarant, and my heirs, shall not in any way interfere with the said estate until the expiration of 14 years, the term of this mortgage bond, and shall not approach the bound-



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aries of the estate." "I, the declarant, shall not mortgage or sell the mortgaged villages to anybody during the term of this mortgage." "The mortgagor shall have no right to the profits of the estate during the term of the mortgage bond. On the other hand, in Jeth-Khali-fasal of the year in which the term of the mortgage expires, I, the declarant, shall come in possession of the mortgaged villages without settlement of accounts respecting the money entered in the document, the mortgagee and his heirs shall have no valid objection."

The Schedule is headed, "specification of villages of Ilaka Dewasiapur which were put in possession of the mortgagee as security for the debt, Rs. 11,530-8-0, as shown in this document."

The above-mentioned sum appears to have been made up in this way: Rs. 6,966-8-0 due by Indarjit to Ishri Sah; Rs. 4,250 to be paid to mortgagees, and a cash balance for costs of registration, &c.

After the expiration of the 14 years, Murlī Dhar, eldest son of Indarjit Lal, who was then dead, applied that the name of Ishri Sah should be struck off the column of mortgagees. This was resisted by Ishri Sah on the ground that he had not been put into possession of all the villages specified in the mortgage, and the application was refused, the Petitioner being referred to a civil suit. This led to the present suit for restitution of the land under the terms of the mortgage. Relief claimed was redemption of the mortgage and re-transfer and re-delivery. The defence was that the mortgagor had broken his contract by not allowing him possession of all

the villages out of which he was to realise his debt. He said that the mortgagor had taken possession of two villages, and that others had been recovered from him by persons of whose claim he had no notice under the mortgage agreement.

On the 25th October 1893, the Subordinate Judge pronounced his judgment as follows:—

"The mortgagor's sons were to obtain (1) Harrajpur asli and (2) Chandidaspur, paying the Government revenue only to Defendant. Defendant was to hold definitely for 14 years and after that mortgagor was to take up possession without any accounts of the money entered in the deed, or of the profits enjoyed by the mortgagee. Mortgagor was to be responsible for claims by third persons, excepting the claims of the previous mortgagees mentioned. So far the conditions were clear and straightforward. But there is no mention in this deed that the mortgagor was to obtain (1a) Dewasiapur and to recover (7) Mohanmadpur after 2½ years.

"There is no mention of mortgagor's life-tenure of (6) Bilnapara, nor of his interest in (9) Dikauli Patti Ratan Singh, and (11) Aghapur Badainpur as merely that of a mere mortgagee. All these villages are described as mortgagor's proprietary villages. The document appears to have been carefully framed, and the omission to give a true description of the mortgagor's tenure of the last three villages cannot be overlooked. Perhaps Defendants knew that (9a) Deokali Patti Ali Hamid was a mortgage tenure (document 22), but there is no evidence of Defendants pre-

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vious knowledge of the mortgagee tenure in villages Bilnapara (6) and (9) Dikauli Ratan Singh and (11) Aghapur Badainpur. It is true the Judicial Commissioner in two suits between the parties (document 2) held it 'proper' to presume that Defendant knew that Bilnapara was a life-tenure; and (document 4) that he would not believe Defendant's assertion that he did not know that Indarjit's tenure of Aghapur Badainpur (document 10) was that of a mere mortgagee. But in my humble opinion Plaintiffs were estopped from proving Defendant's previous knowledge of these tenures after the express declaration in the deed, dated 10th July, 1876, that all these villages were the proprietary villages of Indarjit, thus inducing Defendant to believe in that tenure and acting on that belief. But in respect of Dewasiapur and Mohammadpur, Plaintiffs have not proved any subsequent agreement, and it is admitted that such agreement was held invalid. The more I read the document and the subsequent litigation, the more I am inclined to think that Plaintiffs have not dealt honestly with Defendant.

"As a fact Defendant has never had possession of Dewasiapur, and Plaintiffs father took possession of Mohammadpur in Rabi 1286 Fasli, and Defendant has not had it for  $11\frac{1}{2}$  years of the stipulated period of 14 years. Plaintiff's father, Indarjit, the original mortgagor, dying, the Muafi Bilnapara was resumed by the grantor in 1290 Fasli, and Defendant has not had it for 8 years of the stipulated period. The proprietors of Patti Dikauli Ratan Singh redeemed the mortgage of that Patti in 1290 Fasli,

and Defendant has not had it for 8 years of the stipulated period. Similarly they redeemed Aghapur Badainpur in 1293 Fasli, and Defendant has not had it for 5 years of the stipulated period. That there was a subsequent agreement a month after the mortgage in respect of Dewasiapur and Mohammadpur is not now denied, but when Defendant sued for arrears of rent of those villages, Plaintiffs opposed the claim, even asserting that the mortgage had never taken effect. See documents Nos 4 (second), 16 (first and second), and A 5. The agreement is not before me and I can only hold on the deed, dated 10th July, 1876, that Plaintiffs have retained the villages without right to do so. The decisions in the rent suits are not binding, they only show that Defendant failed to realise rents from Plaintiffs, in one case because it was held that Dewasiapur had been given for maintenance, and in the other because the agreement was inadmissible in evidence. Defendant is to blame for not trying to recover these two villages in the Civil Court, and this omission on his part must go against him."

He then held that under the mortgage-deed the Plaintiffs were entitled to get back the land at the end of the 14 years and that the Defendant's only remedy was by suits within the period of limitation. He found that the Defendants had paid off all the mortgages except one for Rs. 250 due to Moti Ram in respect of Chak Mirpur. He also found that the mesne profits for the 2 years since 1297 Fasli amounted to Rs. 1,930-11-6.

In the result of this judgment he

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decreed in favour of the Plaintiffs for redemption and possession of the villages, and for Rs. 2,180-11-6 in cash. "Bearing in mind how dishonestly Plaintiffs have dealt with Defendants I allow no costs to Plaintiffs, and direct that each party will bear his own costs."

Against this decree and judgment the Defendants appealed to the Judicial Commissioner's Court in Oudh, and the Plaintiffs filed objections to the order as to costs.

The Judicial Commissioners dismissed the appeal with costs.

*Mr. Mayne* for the Appellants urged that the Court was wrong in holding that the Plaintiffs could deprive the Defendant of the benefits of his contract and enforce against him its burden.

No one appeared for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN BONSER.—On the 10th of July 1876 one Indarjit Lal, representing himself to have absolute proprietary rights in certain villages, executed an instrument purporting to be a mortgage of them with possession to one Ishri Sah "for a period of 14 years from 1284 Fasli to 1297 Fasli" by which it was provided that on the expiration of the term the mortgagor "shall come in possession of the mortgaged villages without settlement of accounts . . . that on the expiration of the term . . . the mortgagee shall have "no power whatever in respect of the said estate . . . and after the expiration of the term this mortgage deed . . . shall be returned to the mortgagor without his account-

ing for (paying) the mortgage money secured under this document."

This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances.

It appears that the so-called mortgagor had not absolute proprietary rights in all the villages and that the mortgagee did not get the full benefit purported to be given him by the mortgage.

At the expiration of the 14 years the representatives of the original mortgagee refused to give up possession of such of the mortgaged property as the mortgagee had been able to get possession of on the ground that, owing to the misrepresentations of the mortgagor, they had been unable to recoup themselves the money they had advanced, and they claimed the right to hold the property until they had so recouped themselves.

The Respondents, who are the representatives of the mortgagor, then brought the action out of which this appeal arises to recover the property.

The Subordinate Judge made a decree in favour of the Plaintiffs, but deprived them of costs on the ground that the mortgagor had not "dealt honestly" with the mortgagee, and that decree was

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affirmed by the Court of the Judicial Commissioner of Oudh.

It was contended before their Lordships that the mortgagor having broken his part of the contract by failing to give the mortgagee possession of the entirety of the premises comprised in the mortgage ought not to be allowed to enforce the contract as against the mortgagee, but the answer to this contention appears to their Lordships to be that the Plaintiffs are not seeking to enforce the contract; they rely on their proprietary right, and it is for the Appellant to shew some stipulation either express or implied in the mortgage deed which deprives the Plaintiffs of the right to recover possession. This the Appellant cannot do and their Lordships will therefore humbly advise His Majesty that the appeal be dismissed. As there was no appearance by the Respondents it will not be necessary to make any order as to costs.

Solicitors: *Messrs. Young, Jackson, Beard and King* for the Appellants.

*Appeal dismissed.*

C. W. A.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 930 OF 1900.

BANERJEE, J. GEIDT, J. 1903. 7, January.	}	KEAMUDDI, Defendant No. 5, Appellant, v. HARA MOHAN MONDUL and ors., Plaintiffs, Res- pondents.
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*Limitation—Alternative plea of limitation and tenancy.*

*It is open to a party to plead tenancy and limitation in the alternative.*

JONARDON MUNDUL v. SAMBHU NATH MUNDUL (1) *explained.*

DINOMONEE DEBIA v. DOORGA PERSHAD MOJOOMDAR (2) *relied upon.*

*Where Plaintiff and Defendant both claimed under the same landlord, and Defendant further took a plea that Plaintiff's suit was barred by limitation, the lower Appellate Court found Plaintiff's title proved and that Defendant's alleged tenancy was not proved and refused to go into the question of limitation raised by the Defendant:*

*Held—That the question of limitation must be decided.*

This was an appeal filed on the 6th of June 1900, against the decree of Babu Bhuban Mohan Ghosh, Additional Sub-Judge of Faridpur, dated the 1st of March 1900, reversing the decree of Babu Ashutosh Ghosh, Munsif of Bhanga, dated the 13th October 1898.

Plaintiffs brought a suit to recover possession of certain land upon establishment of their title. The title set up by them was that of tenancy under certain *maliks*. It was alleged that they had been put in possession but were subsequently dispossessed by the Defendants. The defence was that the suit was barred by limitation, that the Defendants had been in possession all along as tenants under the same *maliks* and that the Plaintiff's allegation of possession and subsequent dispossession was false and the lease set up by the Plaintiffs collusive.

The first Court dismissed the suit, but on appeal the lower Appellate Court

(1) I. L. R. 16 Cal. 806 (1889).

(2) 21 W. R. 70 (1873).

**KRAMUDDI v. HARA MOHAN MONDUL.**

found in Plaintiffs' favour upon the question of title. It also disbelieved the evidence of title as tenants set up by the Defendants and without going into the question of limitation it gave the Plaintiffs a decree. The Defendant appealed.

*Babu Brojo Lal Chuckerbutty* for the Appellant.

*Babu Sarat Chandra Khan* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

In this appeal which arises out of a suit brought by the Plaintiffs-Respondents to recover possession of certain land, upon establishment of their title, two questions arise for determination, *first*, whether the lower Appellate Court was right in giving the Plaintiffs a decree without disposing of the plea of limitation raised: and, *second*, whether the Court below was right in holding the proper custody of the *amalnamah*, relied upon by the Defendants, had not been satisfactorily proved, when the document was produced by the Defendants, whose title-deed it was and when they adduced evidence to show that it was in their custody.

The learned vakil for the Appellant, the Defendant No. 5, contends that both these questions ought to be answered in the negative and the case sent back to the lower Appellate Court for a proper determination of the question of limitation and of the question of the genuineness of the *amalnamah*.

We are of opinion that the Appellant's contention is correct. The title set up by the Plaintiffs is that of tenancy under certain *m aliks* created in the year 1297,

that is, within twelve years before the institution of the suit; and they allege that they were put in possession and were subsequently dispossessed by the Defendants.

The defence was that the suit was barred by limitation, that the Defendants had been in possession all along as tenants under the same *maliks* and that the Plaintiffs' allegation of possession and subsequent dispossession was false and the lease set up by the Plaintiffs collusive.

The first Court found in favour of the Defendants upon the question of title as well as upon the question of possession, and dismissed the Plaintiffs' suit.

On appeal by the Plaintiffs, the lower Appellate Court has found in their favour upon the question of title. It has also disbelieved the evidence of title as tenants set up by the Defendants; and, then, without going into the question of limitation, which it considers as not arising in the case, it has given the Plaintiffs a decree. The view of the learned Subordinate Judge upon the question of limitation is that it does not arise, because both the Plaintiffs and the Defendants claim to be tenants under the same *maliks*, and, if that is so as the possession of the Defendants cannot be adverse to the common landlord, it can neither be adverse to the Plaintiffs, who derive title from that landlord; and, in support of this view, he has referred to the case of *Jonardon Mundul v. Samblu Nath Mundul* (1).

Now, it is quite true that if the Defendants were, as they alleged, tenants of the common landlord, their possession

(1) I. L. R. 16 Cal. 806 (1889).

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could not be adverse to the common landlord; but according to the finding arrived at by the lower Appellate Court, that alleged tenancy has not been proved. If that is so, the Defendants were trespassers, and, as they have pleaded limitation, it remains to be seen whether they had acquired a title by adverse possession or whether the Plaintiffs or their predecessor in interest, the common landlord, had possession within twelve years before the institution of the suit in order to prevent its being barred by limitation. That it is open to a party Defendant to plead tenancy and limitation in the alternative is settled by the decision of a Full Bench of this Court in the case of *Dinomonee Debia v. Doorga Pershad Mojoomdar* (2). As for the case of *Jonardon Mundul v. Sambhu Nath Mundul* (1) relied upon in the judgment of the lower Appellate Court, what was held in that case was that the whole question between the parties, who claimed to hold under the same common landlord, was whether the title of the Plaintiffs or that of the Defendants was to prevail; and as that question had been left undetermined, the case was remanded to the lower Appellate Court for retrial. It cannot therefore help the Plaintiffs-Respondents, in the present case, where it has been found that the alleged tenancy of the Defendants has not been proved. If the case of *Jonardon Mundul v. Sambhu Nath Mundul* (1) goes further, as the learned vakil for the Respondents contends, and lays down the broad rule that, wherever a Defendant sets up a tenancy, he is precluded

from availing himself of the plea of limitation, even though the plea of tenancy be found against him, we must say we are unable to follow that case to that extent, it being opposed to the Full Bench decision in the case of *Dinomonee v. Doorga Pershad* (2) cited above. The question of limitation must therefore be decided. It was argued for the Plaintiffs-Respondents, that there is a finding in the judgment of the lower Appellate Court which disposes of the question of limitation, that finding being embodied in these words in the judgment appealed against: "The Plaintiffs have proved their possession by payment of rent." We are unable to accept this contention as correct. If the lower Appellate Court had found that the Plaintiffs had proved their actual possession after taking their lease, then, as that possession must have been possession within twelve years, it would have been sufficient to save their suit from being barred by limitation; but the finding does not amount to a finding that the Plaintiffs have proved actual possession. It only amounts to this, that the Plaintiffs have paid rent and that is the way they have proved their possession. That cannot be sufficient: for mere payment of rent to their lessor would not show that they had possession of the land.

Then, upon the second question, the lower Appellate Court says this, speaking of the *amanamahs*: "These documents are purported to be more than 30 years old but their proper custody has not been proved." The learned Subordinate Judge does not explain what he

(1) 1 L. R. 16 Cal. 806 (1889).

(2) 21 W. R. 70 (1873).

(2) 21 W. R. 70 (1873).

**RAMESWAR SINGH v. JOGI SAHOO.**

*Magistrate and yet convicted the accused on a charge of assault :*

*Held—That this was not a proper way of dealing with the case and the accused ought not to have been convicted of an offence which did not form the subject-matter of complaint, specially when all the other matters relating to the event were found to be false or not proved.*

This was a rule issued on the 26th of April 1900, against the order of the Assistant Magistrate of Monghyr, dated the 3rd of April 1900, which order was, on appeal, modified by W. H. Vincent, Esq., Sessions Judge of Bhagnulpur on the 19th April 1900.

The facts of the case appear from the judgment.

Mr. W. Jackson, Moulvie Mahomed Yusuff and Babu Mgnmatha Nath Mitter for the Petitioners.

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows :—

The original complaint in this case was that the complainant had been forcibly taken to the zemindar's *cutchery*, and there compelled to pay money and otherwise ill-treated and beaten. The Magistrate, at a later stage of the case, disbelieved the entire complaint and drew fresh charges of wrongful confinement and assault and he convicted the accused thereon, notwithstanding the protest of the accused that they had not an opportunity of properly defending themselves on this new case and of examining two other witnesses. On appeal, the Sessions Judge went even further than the Magistrate, for, he disbelieved the entire complaint originally made even up to the

wrongful confinement of which the Magistrate had convicted as the last vestige of the occurrence complained of. The Sessions Judge then proceeded to consider the charge of assault and he has affirmed the conviction and sentence for this offence which, he finds, took place after the complainant was released from the confinement of which he complained and which was found to be unproved. The Magistrate's judgment does not state the nature of the assault for which he convicted the accused or when it took place but the Sessions Judge finds that an assault was committed after the entire occurrence complained of.

We think that this was not a proper way of dealing with the case and that the Sessions Judge on appeal should not have convicted of an offence which did not form the subject-matter of the complaint, more particularly when he had already found that all the other matters complained of were either false or unproved. Under these circumstances we set aside the conviction and the sentence.

S. C. S. *Rule made absolute.*

**[APPEAL FROM ORIGINAL CIVIL JURISDICTION.]**

No. 15 of 1900.

MACLEAN, C. J.	}	SREEMUTTY MOKHODA
PRINSEP, J.		DASSEB, Plaintiff,
HILL, J.		Appellant,
1901.		v.
6, February.		NUNDO LAL HALDAR
		and others, Defendants,
		Respondents.

*Hindu Law—Bengal School—Maintenance—Daughter, sonless, widowed—Marriage, effect of, on the status of a daughter.*

SREEMUTTY MOKHODA DASSEE v. NUNDO LAL HALDAR.

*A widowed daughter-in-law is not bound to reside in the house of her father-in-law.*

RAJAH PIRTHEE SINGH v. RANEE RAJ KOWAR (1) followed.

*When a Hindu maiden marries, she becomes incorporated into her husband's family and it is to that family that she must, in the first instance, look for her maintenance on becoming a widow.*

*A widowed daughter is not, any way, entitled to maintenance from her father's heir, who has succeeded to his estate, unless and until it can be satisfactorily shewn that she is unable to obtain maintenance from the family into which she has married; even then, however, is doubtful if she can succeed against her late father's estate.*

BAI MANGAL v. BAI RUKHMINI (2) referred to.

*When an offer has been made by her late father's heirs to provide her with a home and food and raiment, she is not entitled to a separate maintenance from him apart from his house and in a house of her own.*

Quære—*Whether under certain circumstances there is or is not a legally enforceable right by which a widowed daughter's maintenance can be claimed as a charge on her father's estate in the hands of his heirs.*

KHETRAMANI DAS v. KASHINATH DAS (3) and BAI MANGAL v. BAI RUKHMINI (2) referred to.

This was an appeal preferred on the 18th of May 1900, against the decision

(1) 20 W. R. 21 (1873).

(2) 1. L. R. 23 Bom. 291 (1898).

(3) 2 B. L. R. A. C. 15 (1868).

of Ameer Ali, J., dated the 23rd March 1900.

This was a suit by a daughter, who was a sonless widow, against the heir of her deceased father, for a declaration that she was entitled to separate maintenance during her natural life out of her late father's estate. The facts of the case as well as the judgment of Ameer Ali, J., are fully reported in 4 C. W. N. 669. There was practically no dispute in the case as to the facts except as to the indigency of the Plaintiff. It may here be mentioned that the present representative of her father-in-law's family offered her a home and food and raiment and a similar offer was made, during the trial of the case before Ameer Ali, J., by the Defendant, but she desired a separate maintenance.

Mr. R. Mittra and Mr. B. C. Chatterji for the Appellant.

Mr. W. C. Bonnerjee and Mr. S. P. Sinha for the adult Respondents.

Mr. B. Chakravarti and Mr. B. C. Mitter for the minor Respondents.

THEIR LORDSHIPS delivered the following judgments:—

MACLEAN, C. J.—The point we have to decide upon this appeal, is, whether, or not, an indigent daughter, who is a sonless widow, is entitled to maintenance out of her father's estate which has descended to his heir. The suit is one by a sonless widow against the heir of her deceased father, who, as such heir, acquired his property, for a declaration, in effect, that she is entitled to separate maintenance during her natural life out of her late father's estate.

Except as to the indigency of the



## SREEMUTTY MOXHODA DASSEE v. NUNDO LAL HALDAR.

Plaintiff, there is virtually, no dispute of fact in the case, and no dispute that, at the time when the succession opened out, the Plaintiff was a sonless widow.

The facts as to the pedigree, and relating to the other historical portion of the case, have been, admittedly, stated with accuracy by the Court below, and there appears to be no necessity to re-capitulate them.

Upon the evidence, I think, it is, at least, doubtful, whether the Plaintiff is in the destitute condition she describes, but I will assume, for the purposes of my decision, that she is in such circumstances. In this connection, it is important to observe that Tulsī Das Dutt, who is now, apparently, the head of her late father-in-law's family, has offered her a home and food and raiment, and that a similar offer was made, during the trial of the case in the Court below, by the Defendant Nundo Lal Haldar, who, I understand, is her first cousin on her father's side and the present head of her late father's family. These offers have been refused by the Plaintiff, and it is reasonably apparent that what she really wants, is, not only separate maintenance for herself, but, in effect, maintenance for herself, and her three grandchildren who are living with her. The question is, whether she is entitled to such separate maintenance out of the estate of her late father, which has descended upon, and is now in the possession of his heir.

We have listened to a very learned and interesting argument from the counsel for the Appellant, the Court below having dismissed the suit, without costs; but I scarcely think it is necessary to pursue

that argument in detail, or to deal, in detail, with the various texts and authorities which have been cited to us, as I think that the case is virtually concluded by authority. It may be taken, no doubt, in accordance with the view expressed by the Privy Council in the case of *Rajah Pirthee Singh v. Ranee Raj Kowar* (1), that a person situated as is the present Plaintiff, is not bound to live in the house of her father-in-law; but that is a very different proposition from that for which the Plaintiff is now contending. The authorities appear to me to establish that when a Hindu maiden marries, she becomes, if I may use the expression, incorporated into her husband's family, and that it is to that family she must, in the first instance, look for her maintenance on becoming a widow, and that, any way, she cannot be regarded as entitled to demand successfully maintenance from her father's heir, who has succeeded to his estate, unless and until it can be satisfactorily shown, that she is unable to obtain maintenance from the family into which she has married. It is, perhaps, not clear—in fact there is distinct authority the other way, see *Bai Mangal v. Bai Rukhmini* (2), whether, even in such an eventuality, she can succeed as against her late father's estate, but the facts of this case do not make it necessary for us to decide that particular point. In the case now before us, the Plaintiff has failed to show her inability to obtain maintenance from her husband's family, and having failed to show this, I do not appreciate how, under the Hindu Law

(1) 20 W. R. 21 (1873).

(2) I. L. R. 23 Bom. 291 (1898).

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of the Bengal School, she can successfully claim maintenance out of her deceased father's estate; and even as against her father's estate, I do not think that when an offer has been made by his heir to provide her with a home, and food and raiment, she can, successfully, maintain that she is entitled to separate maintenance apart from his house, and apparently, in a house of her own. It seems to me that the present case is more than covered by the case of *Bai Mangal v. Bai Rukhmini* (2). Although the judgment there was delivered by a Judge of great knowledge and experience in Hindu Law, it may be a matter of consideration hereafter whether, having regard to the dicta of Peacock, C. J., in the case of *Khetramani Dasi v. Kushinath Das* (3), Mr. Justice Ranade has not gone a little too far in saying that there is no legally enforceable right by which a widowed daughter's maintenance can be claimed as a charge on her father's estate in the hands of his heirs. But as I have already observed it is unnecessary, in the circumstances of this case, to decide that question to-day. I may add that I see no reason why, upon this particular point, we should say that there is any distinction between the law on this side of India and that on the Bombay side.

On these grounds, it seems to me that the view taken by the learned Judge in the Court below is right, and that the appeal must be dismissed with costs.

As regards the cross-objections I see no reason why the Plaintiff should be exempted from the payment of the costs

of the suit, and the cross-objection must succeed to this extent. The suit must be dismissed with costs.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

*Messrs. N. C. Bural & Co.*, Attorneys for the Appellant.

*Messrs. Swinhoe & Co.*, and *Messrs. Ghose and Kar*, Attorneys for the several Respondents.

*Appeal dismissed.*

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2599 of 1898.

BANERJEE, J. BRETT, J. 1900. 19, December.	SARODA SUNDARI DASSI and others, Defendants, Appellants, KRISTO JIBAN PAL, Plaintiff, Respondent.
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*Hindu Law—Hindu widow—Alienation, power of, over immoveable property—Bequest by husband—Will, construction of—Grant of absolute power, express or implied—Restrictions imposed upon power of alienation—Indian Succession Act (X of 1865), sec. 82.*

*Though a mere gift of immoveable property by a Hindu husband to his wife, does not carry with it the power of alienation, yet where any such property is given by the husband to the wife with express power of alienation, or when this power is implied by the grant, she would acquire an absolute power of disposal over the property; and when the gift is made by a Will, the legatee is entitled, under the provisions of sec. 82 of the Indian Succession Act, to the whole interest of the testator unless it appears from the Will*

(2) 1 L. R. 23 Bom. 291 (1898).

(3) 2 B. L. R. A. C. 15 (1868).

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*that only a restricted interest was intended to be given.*

*Where a Will does not in express terms convey any estate of inheritance to a Hindu widow, still the widow will be entitled to alienate the property at her pleasure if there is no restriction imposed by the terms of the Will, so far as the power of alienation is concerned.*

*Upon a construction of the Will in this case which provided as follows :—“ If neither of them (the wives) have any children then both my wives will enjoy and appropriate at their will the entire property moveable and immoveable in equal shares in full proprietary right. In the absence of one, the other will similarly enjoy and appropriate at her will the entire aforesaid property in full proprietary right. In the event of her death, my next reversionary heir will have such moveable and immoveable property as will remain : ”*

*Held—That an absolute power of alienation was intended to be conferred on the widows.*

**LALIT MOHAN SINGH v. CHUKKUN LAL ROY (1), LALA RAMJLWAN v. DALKOER (2), and RAJNARAIN BHADURI v. KATYAYANI DEBI (3) referred to.**

This was an appeal preferred on the 20th of December 1898, against the decree of W. Teunon, Esq., District Judge of Murshidabad, dated the 19th of September 1898, reversing the decree of Babu Jogendra Natli Ghosh, Munsif of Berhampore, dated the 28th of January 1898.

This was a suit for a declaration that an alienation of certain property by Defendant No. 2, was not valid after the lifetime of that Defendant. The Defendant No. 2 was one of the widows of Krishna Chaitanya Pal and claimed the right to alienate the property under his Will. That Will was in the following terms :—

“The testator of this Will is Krishna Chaitanya Pal, son of Bissambhar Pal, deceased, of Jitpur, Station Jalangi, District Murshidabad. It is to the effect following:—Both my married wives are alive, the first Saroda Sundari Dasi, and the second is Nutumoni Dasi. I have no children. I am at present 36 years of age. Both my wives as well as myself are in the enjoyment of sound health. It is quite probable that I might beget children hereafter. It is also probable that I shall have no children at all. Human frame is but frail and there is no knowing when, where, how and under what circumstances I am to die. It is therefore prudent to provide for the future now. I therefore execute this Will and desire that if there be any issues by both or either of my wives then such children will have all my property after my death. If there be any children by one of my wives then the other will be allowed to remain with the family and will be given proper care and attention. She will be given her meals and clothing and the reasonable costs of *bratas*, pilgrimages etc., will be borne by the estate. If on account of ill-feelings with the wife or her children it be necessary for the other to separate, then, in conformity with the income of the estate at the time, this other will

(1) 1 C. W. N. 387 : s. c. I. L. R. 24 Cal. 834 (1898).

(2) I. L. R. 24 Cal. 406 (1898).

(3) 4 C. W. N. 337 (1900).

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get a fair amount of cash and will be entitled to a fixed monthly allowance. She will also be allotted a habitable pucca room on the first floor of the house as also a cook-room. Her ornaments as well as the brass and metallic utensils fit for her use as also the wooden furniture bed, etc., will be retained and enjoyed by her. On her death the children of the other wife will come by all the property left behind by her after having duly performed her *sradh*. If neither of them have any children then both my wives will enjoy and appropriate at their will the entire property moveable and immoveable in equal shares in full proprietary right. In the absence of one the other will similarly enjoy and appropriate at her will the entire aforesaid property by virtue of her full proprietary title thereto. In the event of her death my next reversionary heir will have such moveable and immoveable property as will be left behind by her. But such heir will have the property after having regularly performed the *sradh* of the said deceased at a reasonable cost. If the said wives die childless before me then I will make other arrangements. If I do not or cannot do so, then after my death the entire property will revert to the said heir. This will be enforced and be operative as regards all such moveable and immoveable property as the pucca buildings, thatched houses, all sorts of rent-free and rent-paying lands, gardens, trees, money-lending business, cash, gold mohurs, gold and silver utensils, etc., of various metals, lawzima (things) made of silk, wool, cotton, glass and wood situate in Jitpur and Kaliaupur in this district in

Baliadanga in District Nuddia, and in Bibigunge in District Dinagepur and all valuable things and dues from whatever source and in whatever manner existing which I might produce or acquire hereafter. The provisions of this Will will not come into force during my lifetime. After my death and after the performance of my *adya sradh* and *sapindakaran* the provisions of this Will will come into force as regards the remaining property. My first wife Saroda Sundari Dasi understands business affairs better than my second wife Nutumoni. Moreover the former is more advanced in age. Therefore so long as both the wives live together the younger will be under the guardianship of the elder. I presume that under these arrangements Saroda Sundari will in no way injure Nutumoni. If however she does, then Nutumoni will enjoy and appropriate half the property independently of the other. If however either of them becomes unfaithful and ceases to be a chaste woman then she will be deprived of all property and be ejected (from the house). With these stipulations I execute this Will. The 16th Baisakh 1285, B. S."

*Babu Sib Chandra Palit* for the Appellants.

*Dr. Anutosh Mukerjee* and *Babu Biraj Mohan Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In this appeal, which arises out of a suit brought by the Plaintiff-Respondent, to obtain a declaration that an alienation of certain property by Defendant No. 2 was not valid after the lifetime of that Defendant, and for other

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reliefs, the only question that arises for determination is, whether, upon a proper construction of the Will of the late Krishna Chaitanya Pal, the husband of the first two Defendants, those Defendants have an unlimited power of alienation over the property in dispute. .

The first Court answered that question in the affirmative and dismissed the suit. The lower Appellate Court, on appeal by the Plaintiff, has taken a different view, and reversed the decree of the first Court; and hence this second appeal.

The rule of law applicable to a case of gift of immoveable property by a Hindu husband to his wife is, that, though a mere gift of immoveable property does not carry with it the power of alienation, yet, where any such property is given by the husband to the wife with express power of alienation, or where this power is implied by the grant, she would acquire an absolute power of disposal over the property; and where the gift is by Will, sec. 82 of the Indian Succession Act, which applies to the Will of a Hindu, will entitle the legatee to the whole interest of the testator, unless it appears from the Will that only a restricted interest was intended to be given. The question then is whether by the terms of the Will in this case a restricted interest was intended to be given to the widows of the testator, or whether they have the unqualified power of alienation that they contend for. The portion of the Will that bears upon this question runs thus:—"If neither of them have any children then both my wives will enjoy and appropriate at their will the entire property moveable and immoveable in

equal shares in full proprietary right. In the absence of one, the other will similarly enjoy and appropriate at her will the entire aforesaid property in full proprietary right. In the event of her death my next reversionary heir will have such moveable and immoveable property as will remain." These several provisions of the Will, the learned vakil for the Appellant contends, give an absolute power of alienation to the widows; and he lays particular stress upon the words "enjoy and appropriate," and, "full proprietary right," and also upon the words "as will remain" in the clause relating to the gift over to the reversionary heir of the testator. On the other hand, the learned vakil for the Plaintiff-Respondent, contends that although the words "in full proprietary right," may imply the giving of absolute power of alienation to the widows, yet the clause in which these words occur does not stand alone, and that the subsequent clauses providing for the right of survivorship among the widows, and containing the gift over to the reversionary heir of the testator imply a restriction of the right of the widows. It is quite true that the Will does not in express terms convey any estate of inheritance to widows, as the words in the clauses referred to go to show, but although that may be so, still the widows will be entitled to alienate the property at their pleasure if there is no restriction imposed by the terms of the Will, so far as the power of alienation is concerned.

We are of opinion that regard being had to the words used in the first clause, namely, that the widows "will enjoy

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and appropriate at their will the entire property moveable and immoveable in equal shares in full proprietary right," and also to the qualifying words used in the last clause quoted above, which imply, that the reversionary heir is to take, not the estate left by the testator, but only so much of it "as will remain," after the death of the widows, the natural inference is that an absolute power of alienation was intended to be conferred on the widows. The view we take is in accordance with that taken in the cases of *Lalit Mohan Singh v. Chukkun Lal Roy* (1), *Lala Ramjiwan v. Dalkoer* (2), and *Rajnarain Bhaduri v. Katyayani Debi* (3).

The result is that the decree of the lower Appellate Court must be set aside and that of the first Court restored with costs in this Court and in the Court of Appeal below.

*Appeal allowed.*

H. P. C.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1384 of 1898.

UMESH CHUNDER DEY

and others, Plaintiffs,

GHOSE, J.

Appellants,

PRATT, J.

v.

1901.

SHARDESSUR CHUNDER

8, January.

[and another, Defendants, Respondents.

*Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata.*

(1) 1 C. W. N. 387 : s. c. I. L. R. 24 Cal. 534 (1898).

(2) I. L. R. 24 Cal. 406 (1898).

(3) 4 C. W. N. 337 (1900).

*Where a certain matter was not really dealt with and decided in a previous suit although an issue was raised in regard to that matter, a subsequent suit involving the same matter would not be barred by reason of the previous suit.*

This was an appeal preferred on the 18th of July 1898, against a decision of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 25th of April 1898, confirming a decree of Babu Girish Chunder Chowdhury, Subordinate Judge of that district, dated the 17th of June 1897.

This was a suit for an account of a certain business from the Defendant who was alleged to be the servant of the Plaintiff and for the recovery of what might be found due from him on the taking of such accounts. The Plaintiff also claimed to recover the outstandings of such business on the ground that there was a contract between the parties under which the Defendant was liable to pay the same to the Plaintiff with liberty to collect them himself afterwards.

It appears that the Plaintiff had previously brought a suit against the Defendant, in which he had alleged that the Defendant had entered into an agreement with him to carry on certain business in copartnership; that in terms of the said agreement, the Plaintiff was to supply the capital and the Defendant to manage the same and that the profits were to be divided in equal shares between the two partners. He further alleged that according to the agreement, when the business was wound up, the sums due from the debtors to the business should be included in the share of the profits found to be due to the

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Defendant; he prayed that the partnership business might be wound up, that an account may be taken of the partnership business on the footing of the said agreement and that the Defendant might be ordered to pay to him what might be found due to him on the taking of such accounts. The Defendant denied that he was a partner in the business which he had been managing: he said that he had been managing the business, not as a partner, but as an agent of the Plaintiff and he also raised an issue as to the terms of the contract which was entered into between the parties at the time when the business was set up. The issues framed in that case will be found set out in their Lordships' judgment below. The Subordinate Judge found that there was no agreement by which the Defendant had agreed to take over all the outstanding balances, and that the Defendant was a servant or agent and not a partner and he dismissed the suit. It was argued before him that even if the Defendant be found to be a servant, he was liable to render an account to the Plaintiff and the suit should not, therefore, be dismissed. But the Subordinate Judge refused to order an account against the Defendant as a servant on the ground that the Plaintiff could not be allowed to change the character of his suit. He did not deal with any of the other issues raised by him. The present suit was dismissed on the ground that it was *res judicata* by reason of the judgment in the previous suit.

*Babus Lal Mohan Das and Sarat Chunder Dutt* for the Appellant.

*Dr. Anutosh Mukerjee and Babu Joy Gopal Ghose* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for an account and for recovery of such sums of money as upon the taking of such account may be found due to the Plaintiff from the Defendant, the latter being regarded as the Plaintiff's servant.

The suit has been dismissed by both the Courts below upon the ground that it is barred by *res judicata* by reason of a previous judgment between the parties. That judgment was, however, passed in a suit in which the Plaintiff claimed, in the first place, the winding up of a partnership business, the Defendant being regarded as a co-partner in the business, which was being managed by him; in the second place, for an account being taken from the Defendant, he being regarded as the managing partner; and in the third place, for the recovery of such sums of money as might upon the taking of an account from the Defendant be found due to the Plaintiff. The Defendant denied that he was ever a partner in the business which he had been managing: he said that he had been managing it not as a partner, but as an agent of the Plaintiff, and he also raised an issue as to the terms of the contract which was entered into between the parties at the time when the business was set up.

The Subordinate Judge, who had to deal with that case in the first instance, laid down the following issues:—

"First—Whether the Plaintiff and Defendant were members of a partnership? If so, what were the terms of the contract of the partnership business, and whether the plaint has been properly drawn up?

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"Second—Whether the Defendant is liable to the Plaintiff for accounts?

"Third—Whether the Defendant was the Plaintiff's servant remunerated by a share in the profits?

"Fourth—What payments, if any, have been made by the Defendant for which the Plaintiff has not given him credit?

"Sixth—What other relief is the Plaintiff entitled to?

"Seventh—Is the suit barred by limitation?"

The Subordinate Judge, however, as we understand his judgment, confined his attention to the first of these issues, and he held that the Plaintiff and Defendant were not partners, and that one of the terms of the contract between the parties was not, as it was alleged by the Plaintiff, that the Defendant should take over, at the time of the dissolution of the partnership business, all the outstandings; and being of opinion that the Defendant could not be sued in the capacity of a partner, he dismissed the suit.

It would appear that at the conclusion of the trial the Plaintiff asked that an account might be decreed against the Defendant, he being treated as a servant which he alleged himself to be. With reference to this matter the Subordinate Judge made the following observations:—

"It was argued that the Defendant would be liable to render accounts to the Plaintiff even if he be a servant instead of a partner, and that consequently the suit should not be dismissed. But the Plaintiff cannot be allowed to change the character of his suit or to succeed upon a case different from the one stated in his plaint. The observations made in the

case of *Ramdoyal v. Junmejoy* (1) show that such a course would be very unusual. Sec. 53 of the Civil Procedure Code prohibits the amending of a plaint so as to convert a suit of one character into a suit of another and inconsistent character."

So that it is perfectly clear that the Subordinate Judge meant to deal with the first issue only and not with any of the other issues raised in the case between the parties, he being of opinion, as just shown, that to regard the Defendant as a servant and to call upon him to render an account in that capacity would be to convert a suit of one character into a suit of a wholly different character.

The whole question raised in this appeal, to our minds, turns upon the consideration of the question, what was the true subject-matter of the previous suit, and what is the subject-matter of the present suit. Now the true subject-matter of the previous suit was, as we understand it, the winding up of the partnership business, though the suit was composed, as it were, of three different component parts; the first being the dissolution of the partnership business, the second the calling upon the Defendant for an account in respect of such partnership business, and the third being the recovery from the Defendant of such sums of money as upon the taking of account might be found due to the plaintiff. Now, it is quite clear that it is the first component part which was dealt with by the Subordinate Judge in that suit; and if that is so, it can hardly be said that the matter involved in the present suit was really



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dealt with and decided in the previous suit.

We think, upon these grounds, the judgments of the Courts below, as they stand, cannot be supported; and the case should be sent back to the Court of first instance for trial upon the merits. But it should be understood, and in this respect the learned vakil for the Appellants concedes in favour of his adversary, that it must be taken, that it was found in the previous suit, that one of the terms of the contract which was entered into between the parties at the time when the business was set up, was not, as alleged by the Plaintiff, that the Defendant should, upon the closing of the business, take over all the outstandings. So far as this matter is concerned, it must be taken to be finally concluded by the judgment in the previous suit.

The Appellants are entitled to their costs in this Court and in the lower Appellate Court, the costs of the Court of first instance will abide the result. The Court-fee paid upon the appeal to this Court will be refunded to the Appellants.

S. R. D. *Case remanded.*

S. C. S. \*

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM ORDER

No. 6 OF 1900.

RAJAH SOURINDRA

MOHAN TAGORE,

Defendant, Appellant,

v.

RANI SHIROMONI

| and others, Petitioners,

Respondents.

RAMPINI, J.

PRATT, J.

1900.

9, August.

*Civil Procedure Code (Act XIV of 1882),  
sec. 372—Appeal—Substitution of proprietors*

*after discharge of an encumbered estate—Chota Nagpur Encumbered Estates Act (VI of 1876, B. C.).*

*An appeal lies against an order directing substitution of parties under sec. 372, C. P. C.; such an order amounts to an order disallowing objections to substitution.*

*In a case where the suit was brought by a manager appointed under the Encumbered Estates Act (Act VI of 1876), the proprietors of the estate are entitled to be substituted on the record after the discharge of the manager whose interest devolves upon them within the meaning of sec. 372 of the Code of Civil Procedure.*

This was an appeal preferred on the 3rd of January 1900, against the order of Babu Triguna Prasanna Basu, Subordinate Judge of Zillah Bankura, dated the 26th of September 1899.

The facts of the case appear from the judgment.

On the case coming on for hearing, a preliminary objection was taken by Babu Digambar Chatterjee on behalf of the Respondents that no appeal lay in this case. Sec. 588, cl. 21 of the Code of Civil Procedure allowed an appeal only against orders disallowing objections under sec. 372 and no appeal was provided for against orders for substitution under sec. 372.

*Dr. Rash Behary Ghose* (with him *Babus Lal Mohan Dass and Charu Chunder Ghose*) for the Appellant.—I submit there is an appeal in the present case. We objected to the substitution of the Ranis under sec. 372 and the lower Court overruling our objections ordered the substitution of the Ranis. I am appealing therefore against the order of the lower Court disallowing my objections

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to the substitution of the Ranis under sec. 372, C. P. C. As regards the merits, I contend in the first place that no such substitution as has been ordered in the present case could take place. It may be that so long as the estate was under the charge of a manager appointed under the Encumbered Estates Act (Act VI of 1876) the manager was alone competent to sue. His position was only analogous to the case of an agent of the party entitled. See Kerr on Receivers, pp. 153, 157, and *Wilkinson v. Gangadhar* (1). But in order that the Ranis can sustain a claim for substitution in the place of the manager it must be made out that there has been a "devolution of interest" upon them as contemplated in sec. 372, C. P. C. The words "devolution of interest" have acquired a fixed meaning, and the cases in England show that they apply to cases of devolution of interest by death, see the cases collected in the Annual Practice, p. 216. [RAMPINI, J.—The Code of Civil Procedure does not prevail in England and we can only interpret the terms of sec. 372 as we find them.] Where the words in the Code of Civil Procedure and in the English Statute are identical, I submit that the Courts in India would, in the absence of a decided case on the point, naturally hesitate before refusing to accept the interpretation which has been put upon them in the English Courts. Secondly, I contend that the Privy Council having directed the manager to continue in his office, the order directing the substitution of the Ranis was clearly erroneous, and lastly, it is submitted that the Appellant having purchased the interests of the Ranis, no substitution could take place.

(1) 6 B. L. R. 486 (1871).

*Babu Digambar Chatterjee* (with him *Babu Joy Gopal Ghosha*) for the Respondents.—The manager having been discharged there was a devolution of interests upon the Ranis within the meaning of sec. 372 of the Code of Civil Procedure and the order of their Lordships of the Privy Council directing the manager to continue in his office not having been filed in the present record it could not be operative.

*Dr. Rash Behary Ghose* in reply.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

This is an appeal against an order of the Subordinate Judge of Bankura, dated the 26th of September 1899.

The facts of this case are these:—A suit for arrears of rent was brought by one Bishnu Churn Kabiraj, the manager of the Dholbhoom Encumbered Estate, against the Defendant, Rajah Sir Sourindra Mohan Tagore. During the pendency of the suit the estate in question was released from the management of Babu Bishnu Churn Kabiraj; and an order was passed by the Deputy Commissioner, directing the proprietor of the property to take over charge of it. The question then arose as to who was to carry on the suit against Rajah Sir Sourindra Mohan Tagore. The Ranis of Rajah Ram Chunder Deo and Dhubal Deo applied to be made Plaintiffs under sec. 372; and an order was passed to that effect by the Subordinate Judge.

The Defendant, Rajah Sir Sourindra Mohan Tagore, now appeals to this Court and contends that the Subordinate Judge was not right in disallowing his objections to the substitution of the Ranis as Plaintiffs in this suit.

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A preliminary objection has been taken to the hearing of this appeal on the ground that there is no appeal from an order passed under sec. 372 of the Code of Civil Procedure, and that the provisions of sec. 588, cl. 21, C. P. C., only allow an appeal against an order disallowing objections. That may be so. But we think that the order of the Subordinate Judge disallowing the objections is practically the same as his order substituting the Ranis as Plaintiffs; and therefore we do not think that the Appellant is prevented from appealing to this Court by the somewhat ambiguous terms of cl. 21 of sec. 588, C. P. C.

Three pleas have been urged by the learned pleader for the Appellant (1) that the provisions of sec. 372, C. P. C., are not applicable to the facts of this case; (2) that there is a Privy Council order directing that the manager of the Dholbhoom Encumbered Estate should continue in the management of the estate; and (3) that Rajah Sourindra Mohan Tagore purchased the interests of the three Ranis and therefore the suit cannot proceed at their instance.

As to the first of these contentions we would say that we think that the provisions of sec. 372, C. P. C., are applicable to this case. It is true that there has been no assignment of interest. But it appears to me that there has been a devolution of interest pending the suit. Under the provisions of sec. 16 of Act VI of 1876, so long as the property remains under the management of the manager the proprietor cannot sue or recover rents. The manager only can do so; and now that the manager has been removed, it seems to us that there

has been a devolution of the right to realize and recover rents from the manager to the proprietor of the estate.

The learned pleader for the Respondent argues that the words "devolution of interest" in sec. 372, C. P. C., apply to devolution of interest by death; and he cites some English cases to show that this is the interpretation put in England upon these words. But the Code of Civil Procedure does not prevail in England; and we must interpret its terms as best we may without reference to English cases. In our opinion the words "devolution of interest" in sec. 372 are not used in a technical sense; because the latter part of the section speaks of such interest coming to a person, "either in addition to or in substitution for the person from whom it has passed, as the case may require." From the use of the word "come" in the latter part of the section, it would appear that the words "devolution of interest" in the first part of the section do not mean only devolution by death.

Then, with regard to the second contention of the learned pleader for the Appellant, it appears that the Subordinate Judge in his judgment says that their Lordships of the Privy Council have by an interlocutory order passed in the case of *Mohesh Chunder Dhal v. Sutrugan Dhal* (2) directed that the Dholbhoom estate should continue to be under the management of the manager. But we do not think that we are entitled to refer to the Calcutta Weekly Notes for such an order, or to take cognizance of such an order as is said to have been passed, on the report of the Calcutta

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Weekly Notes. No copy of any such order has been filed in the record: and we cannot act upon the order unless it is so filed. We are entitled to refer to reports of cases as precedents; but if an order is meant to be operative in a particular case, that order must be produced and filed in the record of that case.

Then, with regard to the Appellant's third plea it appears to us that the Subordinate Judge has only made the three Ranis provisional Plaintiffs. For he has, subsequent to the order making the Ranis Plaintiffs, framed three issues in the case, which are to be found at page 20, of the paper-book of appeal from original order No. 348 of 1899. These are:—  
 "Fifth, whether Rani Shiromoni has sold her rights to the Zemindari to the Defendant, and whether she is entitled to any one. Sixth, whether the suit can proceed at the instance of the other two Ranis. Seventh, whether the Ranis Padmabati and Churamoni have relinquished their rights to the Zemindari in favour of Rani Shiromoni, and whether the latter has sold the same to the Defendant."

Now, we do not understand that the Subordinate Judge has by his order meant to exclude the Defendant from giving evidence in support of these issues; and certainly the order of the Subordinate Judge must not be considered as having that effect. These issues must be tried in the course of the trial; and should it appear that the interest of the three Ranis has passed to the Defendant, their names must be removed from the category of Plaintiffs; or if the interest of any one of the Ranis has passed to the Defendant her name must

be removed therefrom. In the meanwhile the order of the Subordinate Judge making the Ranis provisional Plaintiffs appears correct.

This appeal therefore fails and we dismiss it with costs, which we assess at five gold mohurs and which are to be divided equally between the two sets of Respondents.

C. C. G.

*Appeal dismissed.*

## [CIVIL APPELLATE JURISDICTION.]

## LETTERS PATENT APPEAL

No. 28 of 1899.

RAJAH PEARY MOHUN  
 MUKHERJEE, Plaintiff,  
 (Appellant in second  
 Appeal), Appellant,

MACLEAN, C. J.  
 BANERJEE, J.

1900.

21, August.

BADAL CHUNDER BAGDI  
 and others, Defendants,  
 (Respondents in second  
 Appeal), Respondents.

*Bengal Tenancy Act (VIII\* of 1885), secs. 22 (1), 85, 167—Purchase of a raiyati holding by a landlord in execution of a decree for rent—Annulment of incumbrance—Notice, if necessary.*

*An under-raiyati lease if created by an instrument which is not registered is invalid under sec. 85 of the Bengal Tenancy Act, and a landlord purchasing the holding of the raiyat in execution of a decree for arrears of rent is entitled to take khas possession by ejecting such under-raiyat without annulling the same by a notice under sec. 167. The rights under such an under-raiyati lease are not protected by sub-sec. 1 of sec. 22 of the Act.*

This was an appeal preferred on the 28th of April 1898, against the decree of the Hon'ble Charles Henry Hill, one of the Judges of this Court, dated the

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29th of March 1899, in Appeal from Appellate Decree No. 420 of 1898, against the decree of Babu Abinash Chunder Mitter, Sub-Judge, 2nd Court, of Zillah Hooghly, dated the 12th of January 1898, affirming the decree of Babu Nalini Nath Mitter, Munsif, 1st Court, of Howrah, dated the 31st of March 1897.

This was a suit to obtain *khas* possession of some land. The Plaintiff alleged that it formed part of an occupancy holding of a tenant under him, that it had been sold in execution of a decree for arrears of rent and had been purchased by him. The Defendant claimed to be an under-raiyat under the Plaintiff's tenant. The lease by which the Defendant had acquired the under-raiyati interest was not a registered document. The Plaintiff also had not given notice of annulment under sec. 167 of the Bengal Tenancy Act.

*Babu Shyama Prosonno Majumdar* for the Appellant.

*Babu Boido Nath Dutt* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

BANERJEE, J.—This is an appeal under sec. 15 of the Letters Patent against a decision of Mr. Justice Hill confirming the judgments of the Courts below by which the Plaintiff's suit for *khas* possession of some land has been dismissed. The Plaintiff sued for *khas* possession of the land in dispute on the allegation that it formed part of the occupancy holding of one Mohesh Chunder Ghose under the Plaintiff, that that holding having been sold in execution of a decree for arrears of rent, was purchased by the Plaintiff,

and that the Plaintiff was entitled to *khas* possession of the land as the Defendant had no right to the same.

The defence, so far as it is necessary to consider it now, was that the land was held by the Defendant as an under-raiyat under Mohesh, and that the Defendant had acquired a right of occupancy in the same.

Both the first Court and the learned Subordinate Judge, on appeal, held that the suit was liable to dismissal, as the Plaintiff, even if he was entitled to set aside the undertenancy of the Defendant, could not succeed in this suit, as he did not proceed in accordance with the provisions of sec. 167 of the Bengal Tenancy Act; and Mr. Justice Hill has confirmed their judgments, holding that though, by sec. 85 of the Bengal Tenancy Act, the sub-lease granted by Mohesh to the Defendant was invalid, and though by sec. 22 of the Act, upon the purchase of the occupancy holding by the Plaintiff, who was the sole landlord, the occupancy holding became merged in the Plaintiff's Zemindari right, still such merger could not affect the rights of the Defendant, and that it was therefore necessary for the Plaintiff, if he wanted to annul those rights, to proceed in accordance with the procedure prescribed by the Bengal Tenancy Act.

It is contended on behalf of the Plaintiff-Appellant, that this view is incorrect, and that the effect of sec. 85 of the Bengal Tenancy Act is to make the sub-letting, which was otherwise than by a registered instrument and was without the landlord's consent, altogether invalid as against the landlord, and if that was so there were no rights in the sub-lease, as

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such, which could come within the reservation contained in the concluding words of sub-sec. 1 of sec. 22 of the Act.

I am of opinion that this contention is sound. It is true that sub-sec. 1 of sec. 22 concludes with these words:—“nothing in this sub-section shall prejudicially affect the rights of any third party;” but that can only mean rights such as are valid. Here, the right which it is contended was protected by that provision, is expressly declared by sec. 85 of the Act to be invalid as against the landlord. Therefore we must hold that there was no right in the sub-lease, as such, which could have subsisted, and which can stand in the way of the landlord recovering *his* possession. The necessity of following the procedure prescribed by sec. 167 of the Bengal Tenancy Act for annulling an incumbrance arises only where the incumbrance is a subsisting one, and, but for the annulment which that section contemplates by the purchaser at a sale for arrears of rent, would be valid. Here, the sub-lease which would otherwise have come within the definition of an incumbrance, was invalid from the beginning as against the landlord; and for the landlord it was not necessary to annul that which was never operative against him. If a third party had purchased the right of occupancy at the sale for arrears of rent, it would have been necessary for such third party to follow the procedure prescribed by sec. 167 of the Tenancy Act. I am therefore of opinion that the decision appealed against must be reversed.

But then it is contended for the Defendant-Respondent, that, in addition to his right under the sub-lease, he set up a

right of occupancy which he alleged he had acquired, and which an under-raiyat may acquire, having regard to the provisions of sec. 183 of the Bengal Tenancy Act, as explained by illustration 2 to that section; and as the Courts below have not, in the view they took of the case, thought it necessary to determine the question whether the Defendant has acquired such a right of occupancy, the case ought to be remanded to the Court of first instance in order that that question may be decided. We think that effect ought to be given to this contention on behalf of the Respondent. The result is that the judgments and decrees appealed against must be set aside and the case sent back to the first Court in order that it may determine the question whether the Defendant has acquired a right of occupancy. The parties will be at liberty to adduce fresh evidence upon that question. The costs will abide the result.

MACLEAN, C. J.—I have only one word to add. The appeal might, to my mind, be disposed of upon this short ground:—It is clear that the Defendant was claiming as a sub-lessee, not as an occupancy raiyat; but as the instrument creating the sub-tenancy was not registered, it was not valid under sec. 85 of the Bengal Tenancy Act as against the landlord. That ought to end the case. Then it is said that, inasmuch as, here, the interest of the landlord and of his tenant became united in the same person, *viz.*, the superior landlord, the Defendants' rights are saved under sec. 22 of the Bengal Tenancy Act. The answer is that he had no rights, and there was nothing to be saved.

*Appeal allowed: Case remanded.*

S. C. S.

[ORDINARY ORIGINAL CIVIL  
JURISDICTION.]

SMALL CAUSE COURT TRANSFER

: SUIT No. 14 OF 1900.

STANLEY, J.	}	BHUPUTRAM and aurs.,
1900.		v.
21, December.		HARI PRIO COACH and ors.

*Hundi—Shahjoge hundi—Endorsee for realization—Endorsement, effect of such—Maintainability of a suit by such endorsee for realization—Delivery, title by—Negligence—Payment to wrong person—Forged signature—Hundi made over to servant for realization, effect of—Estoppel.*

A hundi payable to shajoge (to the respectable holder) was endorsed by the drawer "hundi sent for realization by (A (drawer) to B of Calcutta (Plaintiffs)," and sent by him to the Plaintiffs. The Plaintiffs handed the hundi to one S, the Plaintiffs' jemadar, who had been in the habit of taking hundis on their behalf for acceptance and payment, to be taken by him to the Defendants for acceptance. S took the hundi to the Defendants but subsequently, one R, who had no authority from the Plaintiffs to receive payment, acting on information either from S or some other source, represented himself to the Defendants as a jemadar of the Plaintiffs, wrongfully obtained the hundi from the Defendants, forged the Plaintiffs' signature to it and obtained payment. The Defendants, before such payment, had made no enquiries as to the position or respectability of R and paid the hundi on the faith of the forged signature :

**Held**—That such an endorsement coupled with the delivery of the hundi entitles the Plaintiffs to sue for and receive payment of the hundi from the acceptors, though as between the drawer and the Plaintiffs

the latter are mere agents or parties with a defeasible title.

Such an endorsement is in the nature of a restrictive endorsement, giving the endorsee the right to receive payment of the hundi and if necessary to sue the acceptor for the amount, but not to transfer his rights as endorsee to anybody else ; any defence which would be available to the acceptor against the drawer would be available against the endorsee.

A hundi payable shajoge is only payable to the respectable holder and is not the same as a hundi payable to bearer.

THAKURDASS P. FUTTEH MULL (1) referred to.

The hundi continued to be shajoge even after such endorsement.

GONES DASS v. LUCHMI NARAYAN (3) referred to.

That the Plaintiffs are entitled to claim the amount of the hundi from the Defendants, unless they were guilty of such negligence or carelessness as would estop them from disputing the validity of the payment to R.

That even if S colluded with R and fraudulently obtained payment from Defendants, there was no negligence on the part of the Plaintiffs in entrusting the hundi to S. Even if such an act was negligent, the negligence was not so immediately conducive to the payment of the hundi as to estop the Plaintiffs from saying that R had no authority from them to receive payment and that the payment has not been made to them.

ROBERTS v. TUCKER (4), BANK OF IRELAND v. TRUSTEES OF EVANS CHARITIES

(1) 7 B. L. R. 275 (1871).

(3) I. L. R. 18 Bom. 570 (1893).

(4) 16 Ad. and El. p. 580 (1851).

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IN IRELAND (5), *ARNOLD v. THE CHEQUE BANK* (6), *MAYOR, ETC., MERCHANTS OF THE STAPLE OF ENGLAND v. BANK OF ENGLAND* (7), and *BANK OF ENGLAND v. VAGLIANO BROS.* (8) *referred to.*

*Quære—Whether such a hundi would not, before acceptance, pass merely by delivery to a respectable holder.*

*GOURSIMULL v. DHANSUK DAS* (2) and *THAKURDASS v. FUTTEH MULL* (1) *referred to.*

This was a suit for the recovery of a sum of Rs. 1,150, being the amount of a *hundi* drawn by one Gitaram Issuri Persad on the Defendants' firm of Sristidhur Coach, and endorsed over by the drawer in favour of the Plaintiffs for realization. The *hundi* was in the following terms:—"This auspicious letter is written to Bhai Babu Sristidhur Coach of the good and prosperous place Calcutta from Ooroya by Gitaram Issuri Persad whose salutations please accept. Further we draw upon you 1 *hundi* for Rs. 1,150, (in letters eleven hundred and fifty), half of which is five hundred and seventy-five, full double whereof is to be paid in favour of ourselves here *miti* 14th of the dark side of the moon in Pous. Pay at sight (lit. on arrival) the value (thereof) *shahjoge* (to the respectable holder) in company's coin, after making due inquiries as usual in *hundi* transactions. *Hundi* drawn on *miti* 14th of the dark side in Pous, Sumbut year 1956." On the *hundi* was the following endorsement by the drawer, *viz.*, "*Hundi*

sent for realization by Gitaram Issuri Persad to Bhai Binjram Bhupatram of Calcutta."

The allegations and contentions of the parties will be found fully stated in the judgment.

*Mr. S. P. Sinha* and *Mr. J. G. Woodroffe* for the Plaintiffs.

*Mr. Garth, Mr. Chakravarti* and *Mr. Knight* for the Defendants.

The JUDGMENT OF THE COURT was as follows:—

STANLEY, J.—This action was brought in the Small Cause Court to recover the sum of Rs. 1,150, being the amount of a *hundi* drawn by the Defendant Gitaram Issuri Persad on the Defendants' firm of Sristidhur Coach and alleged to have been endorsed over to the Plaintiffs for collection, as also interest due thereon. Upon the application of the Defendants, Hari Prio Coach, Suttya Prio Coach and Dharino Prio Coach, who are the members of the firm of Sristidhur Coach the action was transferred to the High Court under the provisions of sec. 39 of Act I of 1895.

The Plaintiffs' cause of action as stated in the Small Cause Court is as follows:—They allege that Gitaram Issuri Persad drew the *hundi* the subject-matter of this suit on Sristidhur Coach payable to themselves at sight which they despatched to the Plaintiffs in account with them; that the *hundi* was sent by the Plaintiffs to the firm of Sristidhur Coach for acceptance in the usual way by their jemadar Sahadeb on the 2nd of January 1900; that the *hundi* not having been returned to the Plaintiffs accepted, Sahadeb was sent to enquire why the

(1) 7 B. L. R. 275 (1871).

(2) 7 B. L. R. 289 foot-note (1865).

(5) 5 H. L. Cas. 389 (1855).

(6) 1 C. P. D. 578 (1876).

(7) 21 Q. B. D. 160 (1887).

(8) L. R. (1891) App. Cas. 107.



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*hundi* had not been returned accepted and also to get the same back accepted; and that the Defendants' firm informed Sahadeb that the *hundi* had been paid to a person who had called for such payment and the Defendants declined to pay the amount of the *hundi* or to return the *hundi* to the Plaintiffs.

The Defendant Issuri Persad filed a written statement in which he admits the drawing of the *hundi* and sending of the same duly endorsed to the Plaintiffs in order that the amount of it might be credited to his account with the Plaintiffs. He alleges that the Plaintiffs have refused to credit him with the amount of the *hundi*. He submits that the Plaintiffs have no cause of action against him and that the suit should be dismissed as against him with costs.

The Defendants, Hari Prio Coach, Suttia Prio Coach and Dharmo Prio Coach, filed their petition for transfer of the action to the High Court on the 9th of March 1900. In the petition they allege that they in the usual course of business paid the *hundi* in full to one Rampal whom they describe as the jemadar, Rampal who presented the *hundi* for payment. Further in the 6th paragraph of the petition they deny liability to the Plaintiffs "inasmuch as they say the claim of the Plaintiffs has been satisfied."

When the case was opened by the Plaintiffs' counsel, counsel on behalf of the Defendant Gitaram Issuri Persad contended that there was no issue raised in the pleadings in which his client had any interest and that the action should be dismissed as against him. The other Defendants acquiesced in this view and

the Plaintiffs' counsel not raising any objection, I at this stage, with a view to saving unnecessary costs, dismissed the action as against Gitaram Issuri Persad. I shall hereafter describe the other Defendants as the Defendants. The *hundi* is in the following terms:—"This auspicious letter is written to Bhai Babu Sristidhur Coach of the good and prosperous place Calcutta from Ooroya by Gitaram Issuri Persad whose salutations please accept. Further we draw upon you 1 *hundi* for Rs. 1,150, (in letters eleven hundred and fifty), half of which is five hundred and seventy-five, full double whereof is to be paid in favour of ourselves. Here *miti* 14th of the dark side in Pous. Pay at sight (lit. on arrival) the value (thereof) *shahjoge* (to the respectable holder) in company's coin after making due enquiries as usual in *hundi* transactions. *Hundi* drawn on *miti* 14 of the dark side in Pous, Sumbut year 1956."

It has on it the following endorsement in the handwriting of Gitaram Issuri Persad, viz., "*Hundi* sent for realization by Gitaram Issuri Persad to Bhai Binraj Bhupatram of Calcutta." There is also endorsed upon it the acceptance of Sristidhur Coach under date the 20th of Pous 1306 and underneath the acceptance the signature "Binraj Bhuputram," also over a receipt stamp written "Received in full Rampul Ram." The signature Binraj Bhuputram is a forgery.

There was no jemadar of the name of Rampal in the employ of the Plaintiffs and the person to whom payment was made is entirely unknown to the Plaintiffs and was in no way authorised by them to receive payment. According to the

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Plaintiffs' case the *hundi* was delivered by them to their jemadar one Sahadeb for presentation for acceptance to the Defendants and was left with the Defendants for acceptance by Sahadeb on the same day. On the following day Sahadeb by direction of the Plaintiffs went to the Defendants' *guddi* in order to obtain the *hundi* accepted when he was informed that it had already been paid.

There appears to be no doubt but that the Defendants paid the amount of the *hundi* to the man who described himself as Rampul but what has become of the money or of Rampul there is no evidence. The question now is upon whom the loss is to fall.

In addition to the defence of the Defendants that they have paid the *hundi* the Defendants' counsel at the hearing raised a defence on a point of law. They submit that the Plaintiffs are merely the agents of the drawer and cannot sue in their own names; that the endorsement made upon the *hundi* by the drawers, viz., "*Hundi sent for realization by Gitaram Issuri Persad to Bhai Binraj Bhuputram of Calcutta*" coupled with the delivery of the *hundi* by the drawer to the Plaintiffs does not entitle the Plaintiffs to maintain the action. The endorsement is, as I have said, in the handwriting of Gitaram Issuri Persad and undoubtedly was written with the object of enabling the endorsees to enforce payment of the *hundi*. Is then such an endorsement followed by delivery of the *hundi* sufficient to entitle the endorsees to maintain an action in their own name for recovery of the amount of the *hundi*?

Is the endorsement on and delivery of the *hundi* to the Plaintiffs a valid

endorsement as against the acceptor? As between the drawer and the Plaintiffs the Plaintiffs are no doubt mere agents or parties with a defeasible title but does not the delivery of the *hundi* to the Plaintiffs coupled with the endorsement entitle the Plaintiffs to sue for and recover payment of the *hundi* from the acceptors?

Now in the first place I may observe that the Defendants themselves treated the Plaintiffs as the legal holders of the *hundi* for they accepted the *hundi* on presentation by the Plaintiffs and their case on the merits is that they paid the amount of it to the Plaintiffs; for this is the only construction which I am able to place on the language of their defence in which they state that they have in the usual course of business paid the *hundi* in full to the jemadar Rampul who presented the *hundi* for payment and follow this up by denying liability to the Plaintiffs inasmuch as the claim of the Plaintiffs has been satisfied.

The intention of the drawer in making the endorsement and delivering the *hundi* to the Plaintiffs was clearly to pass the right of dealing with the *hundi* to the Plaintiffs. The drawer in his written statement alleges that he sent the *hundi* duly endorsed to the Plaintiffs in order that the amount of it might be credited to his account with the Plaintiffs. The endorsement appears to me to be in the nature of a restrictive endorsement giving the endorsee the right to receive payment of the *hundi* and if necessary to sue the acceptor for the amount but not to transfer his rights as endorsee to anybody else.

In the case of such an endorsement:

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any defence no doubt which would be available to the acceptor against the drawer would be available also against the endorsee. There is however no such defence here suggested.

In the case of *Thakurdas v. Futteh Mull* (1) the effect of a similar endorsement was considered by the Appellate Court. There the following endorsement was on the *hundi*, viz., "*Hundi sold by Duberam Amir Chand to Bhai Muta-ulla Mull Thakur Dass.*" "*Hundi sent by Muta-ulla Mull Thakur Dass to Bhai Urjun Das Hazari Mull for realization.*"

In delivering the judgment of the Court, upholding the endorsement as a good special endorsement of the *hundi*, Phear, J., says, at p. 303, "Returning then to the case before us, it seems to me that, in considering the right to a *hundi*, we are as much bound to put a reasonable construction upon the words of an endorsement or an acceptance as upon any other part of the document; and when a *hundi*-maker or rightful owner of a *hundi* payable in terms to the *shajog*, endorses it as sold or sent to A, he obviously means to pass the right of dealing with the *hundi* to A alone."

It may be open to doubt whether a *hundi* such as the *hundi* in question in this suit would not pass, at all events before acceptance, by delivery merely to a respectable holder. In the case of *Goursimull and another v. Dhansuk Das and another* (2), reported in the notes to *Thakurdas v. Futteh Mull* (1), Sir Barnes Peacock, C. J., expressed an opinion that the *hundi* in

that case would pass at any rate prior to acceptance by delivery. The facts of that case were shortly as follows:—The Plaintiffs being holders of a *hundi* sent it to their *kuti* in Calcutta without endorsement. The *hundi* was lost or stolen on the way and came into the Defendants' hands as endorsees, the endorsement of the Plaintiffs having been forged. The Defendants without notice of the forgery paid full consideration for the *hundi*. It was held on appeal, reversing the decision of the Court below, that the Plaintiffs were not entitled to recover the *hundi* from the Defendants. It does not appear from the report of this case whether or not the *hundi* was a *shahjoge hundi* but the Court appears to have stated as its opinion that a *hundi* payable to *shahjoge* would pass by delivery merely, without regard to the authenticity or otherwise of any special or restrictive endorsement which might be upon it. In the case of *Thakurdas v. Futteh Mull* (1), to which I have already referred, the *dictum* of Sir Barnes Peacock, C. J., to which I have alluded was relied on by the Defendants' counsel, but the Court said that it was not clear how that expression of opinion was pertinent to the case before the Court and that it supposed that the Court never meant to lay down that under the Hindu law every one who took the *hundi* even though he obtained it by fraud would be treated as a *shahjoge*.

In the case of *Gones Dass Ram Narayan and others. v. Luchmi Narayan and others* (3) the nature of a *hundi* payable to a *shahjoge* was considered.

(1) 7 B. L. R. 275 (1871).

(2) 7 B. L. R. 289 foot-note (1865).

(1) 7 B. L. R. 275 (1871).

(3) I. L. R. 18 Bom. 570 (1893).

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There the Plaintiffs having bought at Sholapur a *shahjoge hundi* drawn upon the Defendants at Bombay endorsed it to Ramrukh Ramkissen and sent it by post to him for collections. It was stolen in the course of transmission and the name of Ramrukh Ramkissen was expunged and another name, that of Dwarkidas Lalji, was substituted. The *hundi* was presented for payment to the Defendants in Bombay by a person giving his name as Dwarkidas Lalji and the Defendants paid it without enquiring as to the responsibility or position of the person to whom they paid it. It was held that the Defendants were guilty of conversion of the *hundi* and were liable to the Plaintiffs the lawful holder in trover and it was further held that the *hundi* continued to be *shahjoge* after being endorsed to a particular person.

The Plaintiffs in the case before me are admittedly a respectable and well-known firm in Calcutta. To them the *hundi* was admittedly delivered by the drawer. If a *shahjoge hundi* passes by delivery alone the Plaintiffs were unquestionably the holders of the *hundi* and as such would be entitled to sue. The endorsement in their favour strengthens their position.

The Defendants have neglected the directions contained in the *hundi* to pay to the *shahjoge* and have paid the amount of the *hundi* to a person who was not *shahjoge* and who had no authority whatever from the Plaintiffs to receive payment. They made no enquiry whatever as to the position or respectability of Rampal and paid the *hundi* to him on the faith of the forged signature of the Plaintiffs. It seems to me that under

these circumstances unless the Plaintiffs have been guilty of such negligence or carelessness in the transaction as would estop them from disputing the validity of the payment made to Rampal they are entitled to succeed in this action.

• As the respectable holders of the *hundi*, though no doubt only agents for collection, the Plaintiffs have in my opinion a right to maintain this action. There appears to me to be no substance in the point of law which has been raised at the trial, namely, that the Plaintiffs being merely agents for the drawer of the *hundi* are not entitled to maintain this action.

This question of the right of the Plaintiffs to sue was not raised by the Defendants in the petition which they filed. It is wholly inconsistent with their conduct in this transaction in accepting the *hundi* on presentation of it made by the Plaintiffs and with their defence that the Plaintiffs' claim had been satisfied. I do not question the right of the Defendants to rely at the trial upon any infirmity which might be discovered in the Plaintiffs' title but in the circumstances of this case if they intended to rely upon this point of law the Defendants ought in my opinion to have raised the question in their petition. It may probably be that the point was only discovered after the petition was filed. The defence which was filed forced the Plaintiffs to proceed with the action so as to have a determination of the issue raised by the Defendants, namely, whether or not the payment of the *hundi* made by the Defendants to Rampal was a good payment to the Plaintiffs. If payment was made to them as alleged by the

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Defendants then the Plaintiffs would be liable to the drawer for the amount of the *hundi* and would be bound to credit the amount to him. If, on the other hand, the *hundi* was not paid it remained the duty of the Plaintiffs as endorsees for collection if not to enforce payment of the *hundi* at least to return the *hundi* to the drawer.

I come now to deal with what appears to me to be the substantial question in the case, namely, whether or not the payment of the *hundi* to Rampal operated as a discharge to the Defendants from all liability in respect of the *hundi*.

The *hundi* according to its tenor was payable at sight *shahjoge* (to the respectable holder) "after making due enquiries as usual in *hundi* transaction." A considerable amount of evidence was given on the part of both the Plaintiffs and the Defendants as to the practice prevailing in Calcutta in regard to the payment of *hundis*. The evidence was most discrepant. In fact it appeared to me that almost as many different practices prevailed as there were witnesses deposing to the practice.

One witness on the part of the Plaintiffs, namely, Buldeo Dass gave evidence to the effect that if the man who brings the *hundi* for acceptance and afterwards for payment be not known to the acceptors, the acceptors before payment require that the man who applies for payment shall be identified. Another of the Plaintiffs' witnesses, Ram Chandra, deposed that it is not the practice to accept *shahjoge hundis* if the person bringing it be not known to the acceptors. If the man bringing it be not known to the acceptors the acceptors send over a

man of their firm to the payee's firm to see that the amount of the *hundi* is credited to them. But even if payment be made in the *guddi* of the acceptors' firm to a person who is unknown to the acceptors' firm that, this witness says, would be a good payment because a man from the acceptors' firm had been to the payee's firm with the accepted *hundi*.

On the part of the Defendants Bhuban Mohun Ghose who is employed in the Defendants' firm, deposed that if a man brings a *hundi* for acceptance from a firm well-known to the acceptors and the same man comes for payment no enquiry is usually made about the man. It is not usual with his firm, he said, to make enquiry and is not, he thinks, usual with many firms. If his firm have already received advice from their *beparee* of the drawing of *hundi* and the *hundi* is subsequently brought for acceptance from a firm of which his firm knew nothing he says that his firm make no enquiry; that it is usual to accept a *hundi* presented by a firm of whom his firm knew nothing at all if his firm have already received advice from their *beparee* of the drawing of the *hundi*. If they have not received such advice they keep back the acceptance until they have received advice. Various other practices were deposed to but it is not necessary for me, having regard to the view which I have formed in this case, to comment on them.

The *hundi* in this case was payable to the *shahjoge*. It was not paid to the *Shah* but to a person who had no connection in any way with the *Shah*. The position of Rampal was no better than

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that of a thief who had stolen this *hundi*. He had wrongfully got possession of it.

If a *shahjoge hundi* were *hundi* payable to bearer quite independently of the endorsements on it there would be much to be said in favour of the Defendants' contention that payment to Rampal was a good payment, but it appears to me impossible to hold that a *hundi* which is payable to the *shahjoge* is equivalent to a *hundi* payable to bearer. According to the tenor of the instrument such a *hundi* is only payable to the respectable holder.

In the case to which I have already referred, *Thakurdas v. Futteh Mull* (1), it was held that in the case of a *hundi* specially endorsed and especially accepted as was the *hundi* in the present case there was nothing to show that by Hindu law such a *hundi* would pass as one payable to the holder without endorsement. Phear, J., says in his judgment: — "It may well be that, according to Hindu customary law, A can transfer his right to a third person B by word of mouth or mere delivery, notwithstanding that the special endorsement to himself is in writing, but there is no evidence before us to suggest that, after the special endorsement to A, the *hundi* can be validly transferred to B otherwise than by A, or by A's authority. It seems to be only common sense that the term "*shahjoog*" should be subordinate to the directions of "the successive owners, and should mean the right men to be paid," according to the tenor of the document, which must include both the endorsement and acceptance. I certainly

am not aware of any rule of Hindu law, customary or otherwise, which would have the effect of making the word "*shahjoog*" mean payable to bearer, quite independently of the endorsements. If there were such a rule in practice, endorsements would be useless, and would, I suppose, very soon be dropped altogether. Also, I know of no principle of mercantile expediency, having the force of law or otherwise, which would be served by our disregarding the direction of the endorser, and treating a specially-endorsed and specially-accepted *hundi* as if it were an English negotiable instrument made payable to bearer, and as such part of the currency of the country. On the contrary, as it appears to me, expediency is all the other way."

This seems to me to be a reasonable and correct view of the matter and I adopt it.

But it is contended on the part of the Defendants that the *hundi* was paid by them under circumstances which estop the Plaintiffs from denying that the payment made to Rampal operated as a valid payment to them; that there was such negligence on the part of the Plaintiffs in their dealing with the *hundi* as disentitles them to succeed in this action.

Let us see then what are the true facts connected with the payment of the *hundi*. The evidence on this head is conflicting. The Plaintiffs' case is that they sent their jemadar Sahadeb to the Defendants with the *hundi* for acceptance and that he according to the usual custom left it with the Defendants, that on the following day Sahadeb was again sent by the Plaintiffs to the Defendants to obtain a return of the *hundi* accepted

(1) 7 B. L. R. 275 (1871).

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when he was informed that the amount of the *hundi* had already been paid ; that he returned to the Plaintiffs and informed them of this, whereupon Megraj the Plaintiffs' cashier and one Chuggan Mull who is the *moonib gomastha* of Teluck Chand Neem Chand, and in no way connected with the parties to this suit at the request of Senji Ram the Plaintiffs' *gomastha* went over to the Defendants' *guddi* and made enquiry as to the alleged payment. In the course of the interview it is said that Bhuban in reply to Chuggan Mull said he did not know the person to whom he had made payment and that Chuggan said if you did not know the man, why did you make payment to him. Bhuban said he was a tall dark man.\* Chuggan said if you were making payment to a new man you ought to have sent a man of yours to Baijuath's *guddi* and made payment there ; they said we saw the *hundi* and made payment. \*

After this interview on the same afternoon according to the Plaintiffs' case the Defendants' cashier Kailash Chandra Nandi and their *moonib gomastha* came over to the Plaintiffs' *guddi* to make enquiry as to the matter. The cashier said that he had made payment. He was asked if he had made payment to Sahadeb and on his replying in the negative all the employees of the Plaintiffs' firm were made to stand before him and he was asked if he had made the payment to any of them. He replied 'no.'

The Defendants deny that this meeting ever took place. According to them the incident is a pure fabrication.

The Plaintiffs' witnesses gave their

evidence in a fair and straightforward way and I have no reason to think that they falsely concocted this evidence.

The Defendants' account of the matter is that the *hundi* was brought to the Defendants' firm for acceptance by a man who gave the name of Rampal and not by the Plaintiffs' jemadar Shahadeb ; that Bhuban Mohun Ghose asked "whose *hundi* is this ?" Rampal said "this *hundi* has come to Binraj Bhuputram. Bhuban then asked Rampal his name. He said Rampal. Bhuban then asked him from whose *guddi* he came. He said from Binraj Bhuputram.

The Defendants' witnesses say that the same man returned on the following day for payment of the *hundi* and that Bhuban asked him who he was when he replied Rampal a jemadar of Binraj Bhuputram and said that he came for payment of the *hundi* he had left the previous day ; that Bhuban thereupon accepted the *hundi* and gave it to Rampal and that Rampal went away and in about a quarter of an hour or half an hour returned with the *hundi* signed and asked for payment and payment was made and he went away ; that shortly after this Sahadeb the Plaintiffs' jemadar came to the Defendants' *guddi* and asked the question. 'Has the payment of our *hundi* been received ?' To which Bhuban replied "yes, your jemadar Rampal has taken the money away" and thereupon Sahadeb went away.

The evidence given by the parties as to the details of the transaction is, as I have said, conflicting. One or other party must be speaking what is false.

That the *hundi* was handed by the Plaintiffs to their jemadar Sahadeb to

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take to the Defendants' firm for acceptance, I have no doubt. Rampal was not in their service at all and was not known to the Plaintiffs and it is not likely that the Plaintiffs would have entrusted to a stranger a valuable document. If Rampal did present the *hundi* for acceptance I am satisfied that he did not obtain it from the Plaintiffs but that he got it in some improper way, it may be, from Sahadeb. It appears that Sahadeb left the service of the Plaintiffs a few months after this transaction and that he has been recently convicted of embezzling money from his employer. He is at present undergoing a sentence of two years' imprisonment in respect of this offence.

It does not appear to me to be a matter of much importance whether it was Sahadeb as it is alleged by the Plaintiffs or Rampal as is alleged by the Defendants who left the *hundi* with the Defendants for acceptance. I shall however deal with this matter.

Sahadeb has been examined and he states that the *hundi* was handed to him by Seuji Ram, the Plaintiffs' *gomastha*, and that he took it over to Bhuban Mohun Ghose. The following day he says that about 4 o'clock in the afternoon Seuji Ram asked him to get over the *hundi* and that he went to the Defendants' *guddi* for it when he was informed by Bhuban that he had already made payment. Sahadeb then returned to his masters' *guddi* and reported the matter.

The Defendants admit that Sahadeb came to their *guddi* on the day on which payment was made to Rampal but they say that he did not ask for payment of

the *hundi* but simply made enquiry if the money had been paid. Why Sahadeb should come and make this enquiry it is difficult to see. If he, in league with Rampal, had set himself to embezzle the money and had handed over the *hundi* to Rampal for that purpose it is difficult to conceive that he would have gone to the Defendants' firm and have asked if the money had been paid or taken away. If he wished to allay suspicion as to his own guilt in the transaction his request would surely have been for a return of the *hundi* accepted by the Defendants. He would not stultify himself by asking if the *hundi* for payment of which he had come had already been paid. I am not disposed to believe this portion of the Defendants' evidence nor do I think that the evidence of the Defendants' witnesses that Rampal was the person who left the *hundi* for acceptance is reliable.

According to the evidence of the Defendant Hari Prio Coach, when Sahadeb went over to the Defendants' *guddi* in the company of Chugun Mull and Megraj, Sahadeb stated that he had left the *hundi* for acceptance. This accords with Sahadeb's evidence. Bhuban denies that there was any conversation about Sahadeb leaving the *hundi* for acceptance. Kailash Chandra Nandi, the Defendants' cashier, is silent as to this conversation. That it took place I have no doubt. Again Bhuban says that the name of the person who presents a *hundi* for acceptance to the Defendants' firm is generally entered in a book or written on a piece of *challan paper*, and kept with the *hundi*. He says that in this case the name of Rampal was written on a piece of



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*challan paper*. It would have been interesting to have seen this piece of paper but strange to say it is not forthcoming. Bhuban says that it was thrown away. This is a little remarkable. One would have expected that if there had been any memorandum made as to the person who left the *hundi* for acceptance it would under the circumstances have been carefully preserved. According to Bhuban it was thrown away. This witness as also Kailash Chandra Nandi deny that they went over to the Plaintiffs' *guddi* in reference to the payment of the *hundi*, but the evidence satisfies me that they did so.

Seuji Ram says that Bhuban came over to the Plaintiffs' *guddi* and asked if they had received payment of the *hundi*. On Seuji Ram saying "no," Bhuban desired him to report the matter to the local Thanna and to the Currency Office, but he declined saying that the Plaintiffs had not received payment and why should they do that. Seuji Ram is corroborated as to this interview by Megraj and by Ram Chunder, as well as by Sahadeb. The matter is not perhaps of much importance; it seems however to shew a disinclination on the part of Bhuban to the making of an admission of any matter which might suggest anxiety on his part as to the propriety of the payment made to Rampal.

The evidence given by Hari Prio Coach and the witnesses Bhuban Ghose and Kailash Chandra Nandi as to what occurred when the *hundi* was presented for acceptance and afterwards for payment did not seem to me to be altogether trustworthy. There was a sameness in

the evidence of these witnesses which savoured as it seemed to me of tutoring.

The conclusion which I have come to upon the evidence is that the *hundi* was handed by the Plaintiffs to Sahadeb to be taken by him to the Defendants for acceptance and that Sahadeb did take it to the Defendants for acceptance; that subsequently acting on information either obtained from Sahadeb or from some other source Rampal by misrepresenting himself to be a jemadar of the Plaintiffs wrongfully obtained the *hundi* from the Defendants, forged the Plaintiffs' signature to it and obtained payment and disappeared with the money.

The question then is on which of the parties is the loss to fall. The *hundi* is a *hundi* payable to the respectable holder after making due enquiry. Was it paid by the Defendants to the Plaintiffs or if not actually paid to the Plaintiffs was it paid by the Defendants to Rampal under such circumstances as would stop the Plaintiffs from denying the validity of the payment. The *hundi* was undoubtedly not paid to the Plaintiffs. It was paid to a total stranger upon a forged signature of the Plaintiffs. Is there then an estoppel by negligence on the part of the Plaintiffs? Are the Plaintiffs through any negligence on their part precluded from setting up the forgery and want of authority of Rampal?

In the case of *Robarts and ors. v. Tucker* (4) in the Exchequer Chamber it was held that a banker cannot debit his customer with the payment made to one who claims through a forged endorsement and so cannot give a valid discharge for the Bill unless there be

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circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the endorsement or equivalent to an admission of its genuineness inducing the banker to alter his position so as to preclude the customer from showing that it was forged. In delivering the judgment of the Court Baron Parke says:—

“If this were the ordinary case of an acceptance made payable at bankers’, there can be no question that making the acceptance payable there is tantamount to an order, on the part of the acceptor, to the banker to pay the bill to the person who is according to the law merchant capable of giving a good discharge for the bill. Therefore, if the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine endorsement. And, if the bill is originally payable to bearer, or if there is afterwards a genuine endorsement in blank, it is an authority to pay the bill to the person who seems to be the holder. The bankers cannot charge their customer with any other payments than those made in pursuance of that authority. If bankers wish to avoid the responsibility of deciding on the genuineness of endorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker.”

In the case of the *Bank of Ireland v. Trustees of Evans Charities in Ireland* (5), the trustees of a charity incorporated by Act of Parliament and having a common seal possessed stock in the public funds

which stock was registered in the Bank of Ireland. The Secretary of the trustees was allowed to have the seal in his possession. Five several powers of attorney prepared in different years, sealed with the seal of the trustees, the due affixing of which was attested by witnesses who attested, but without any fraudulent intention, what was not true, the seal having been affixed by the unauthorized act of the Secretary alone, were presented to the Bank and the stock was transferred. The fact of the Secretary’s misconduct was subsequently discovered and he was indicted and convicted—a power-of-attorney was then duly executed whereby the trustees authorised their attorney to transfer the stock but the Bank refused to make the transfer. In an action by the trustees against the Bank on their refusal, the Judge who tried the action told the jury that, if under these circumstances the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the Bank. It was held that this direction was wrong.

Baron Parke, whose view was adopted by the learned Lords who delivered the judgment of the House of Lords, laid it down as the opinion of himself and the other Judges that the negligence which would deprive the Plaintiffs of their right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself. He expressed his concurrence in the judgment of the Irish Exchequer Chamber in which this proposition was expounded. Baron Parke says:—“If such negligence” that is the negligence charged in that case, “could disentitle the Plaintiffs,

(5) 9 H. L. Cas. 389 (1855).

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to what extent is it to go? If a man should lose his cheque-book, or neglect to look the desk in which it is kept and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with the payment. It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself and to cause the trustees to be parties to misleading the Bank in making the transfer on the forged power-of-attorney."

In the case of *Arnold & Co v. The Cheque Bank* (6) it was held that negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it.

Lord Colbridge, C. J., in delivering the judgment of the Court says:- "There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief." To the same effect is the judgment of the Court of Appeal in the case of the *Mayor, etc., Merchants of the staple of England v. Bank of England* (7). The decision in these cases does not appear to me to be affected by the judgment of the majority of the learned Lords in the more recent case in the House of Lords of the *Bank of England v.*

*Vagliano Bros.* (8). The judgment in this case seems to have rested entirely on the fact that there was no real drawer or payee, nor any person, payment to whom or to whose order would have enabled the acceptor to charge the supposed drawer. Lord Halsbury, L. C., in his judgment expressly recognizes the propriety of the decision in *Roberts v. Tucker* (4). He says: "I am not intending to throw any doubt upon the propriety of the decision in *Roberts v. Tucker* (4); nor am I prepared to assent to the proposition that it is a harsh decision. A customer tells his banker to pay a particular person, the banker pays some one else, and it would seem to follow as a perfectly just result that the banker should be called upon to make good the amount he has so erroneously paid. But what relation has such a decision to a case where a thing which bears the form and semblance of a known commercial document like a Bill of Exchange gets, by the act of the customer into the hands of the banker, where there is no real drawer, no real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who in the proper and ordinary sense of the word is a payee at all?"

Now, assuming in the case before me that Sahadeb colluded with Rampal and handed him the *hundi* for the purpose of enabling Rampal to forge the signature of the Plaintiffs and so obtain payment of the *hundi*, can it be said that it was negligence on the part of the Plaintiffs to entrust the *hundi* to Sahadeb and if

(6) 1 C. P. D. 578 (1876)

(7) 21 Q. B. D. 160 (1887).

(4) 16 Ad. and El., p. 560 (1851).

(8) L. R. (1891) App. Cas. 107.

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it was negligence to do so, can it be said that such negligence was the proximate cause of the loss? Sahadeb had been in the service of the Plaintiffs as jemadar for some months prior to this transaction. He had been in the habit of taking *hundi*s on behalf of the Plaintiffs for acceptance and payment and so far as appears was an honest and respectable man. There had been nothing in his conduct to excite suspicion as to his trustworthiness. I am unable to say that it was a careless or negligent act on the part of the Plaintiffs under the circumstances to entrust the *hundi* to him. But assuming that it was a careless or negligent act on the part of the Plaintiffs, was it a direct and immediate consequence of that carelessness or negligence that Sahadeb should combine with Rampal to commit and should commit or aid in the commission of a forgery and that the Defendants should be thereby induced to pay the *hundi*? The answer must be given I think in the negative. The proximate cause of the loss would be, I would say, the crime of Sahadeb and Rampal. It could not be truthfully said that the crime of these two men was itself the natural or necessary or immediate consequence of the Plaintiffs' negligence. If then there was any negligence on the part of the Plaintiffs in their dealings with the *hundi* it was not in my opinion negligence so immediately conducive to the payment of the *hundi* to Rampal as to estop the Plaintiffs from saying that Rampal had no authority from them to receive payment and that the payment has not been made to them.

Contrary to the express direction on

the *hundi* the Defendants without making any enquiry paid, not the *shahjoge*, but a stranger who had no authority whatever to receive payment and who forged the signature of the Plaintiffs. This was an overtrustful and rash act on their part for which they must abide the consequences. For these reasons I am of opinion that the Plaintiffs are entitled to recover from the Defendants the amount of the *hundi* and I shall give judgment accordingly for the principal sum claimed. The Defendants must pay the Plaintiffs' costs of this action to be taxed on scale No. 2.

Mr. J. C. Dutt, Attorney for the Plaintiffs.

Mr. M. M. Chatterjee and Messrs. Swinhoe & Co, Attorneys for the Defendants.

*Suit decreed.*

S. R. D.

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM APPELLATE DECREE**

No. 1201 of 1898.

MACLEAN, C. J.	}	MAHOMED ALI HOSEIN,
BANERJEE, J.		Plaintiff, Appellant,
BRETT, J.		v.
1901.	}	MIR NAZAR ALI and ORS.,
20, February.		Defendants, Respondents.

*Evidence Act (I of 1872), sec. 92—Conduct, evidence of, to vary the meaning of a deed—Mortgage—Sale, out-and-out—Indian Law Reports Act (XVIII of 1875), sec. 3—Unreported cases—Reports, authorized.*

*Oral evidence as to the acts and conduct of the parties is admissible to show whether a certain deed is, as it purports to be, an out-and-out sale or a mortgage.*

**PRIYA NATH SHAHA v. MADHU SUDAN BHUYA (2) followed.**

(2) 2 C. W. N. 562 : s. & L.L. R. 25 Cal. 603 (1898).

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*Oral evidence of the intention of the parties is, however, not admissible.*

BALKISHEN DAS v. LEGGE (1) followed.

*A High Court judgment is none the less an authority because it has not been reported.*

*Sec. 3 of Act XVIII of 1875 was framed to constitute a monopoly, if the Judges so desired, for the authorised Law Reports; it does not prevent the Court from looking at an unreported judgment.*

MAKBUL AHMED v. RAKHAL DAS HAZRA (3) dissented from.

This was an appeal from a decision of Babu Bipro Das Chatterji, Subordinate Judge of Murshidabad, dated the 22nd March 1898, modifying a decision of Babu Kapali Prasanna Mukerji, Munsif of Kandi, dated the 16th August 1897.

This appeal arises out of a suit brought by the Plaintiff for redemption of 4 bighas of *ayama* land mortgaged to Defendant No. 5 by Defendant No. 1 for Rs. 91 by a deed of mortgage, dated 6th Kartic 1293, whereby the said Defendant No. 5 was put in possession of the land in lieu of interest, and the time fixed for the payment of Rs. 91 was Magh 1294.

Plaintiff's case is, that Defendant No. 4, wife of Defendant No. 1, became the owner of the land before the said mortgage; that she sold it to Defendant No. 6, the brother of Defendant No. 1, on the 8th Aswin 1294 by a *kobala* for the sum of Rs. 180, out of which she took Rs. 89 in cash and Rs. 91 was made payable by Defendant No. 6 to Defendant No. 5 on account of the

aforesaid mortgage; that on the 29th Aswin 1296 Defendant No. 6 sold it to Plaintiff No. 1 for Rs. 189 by a *kobala* wherein Defendant No. 6 stated that he had paid off the abovementioned sum of Rs. 91 to Defendant No. 5 in Magh 1294 and obtained possession of the land, that it appears subsequently that Defendant No. 6 did not pay that sum of Rs. 91 to Defendant No. 5; that Nayan Sheikh, (whose legal representatives are the Plaintiffs Nos. 2 to 5) as lessee under Defendant No. 6 and subsequently under Plaintiff No. 1, brought a suit for recovery of possession of the land against the Defendants Nos. 1 to 5, which was dismissed by the High Court, in special appeal, holding that Nayan Sheikh was never in possession and was not entitled to possession until the mortgage debt of Defendant No. 1 to Defendant No. 5 is satisfied; and so the present suit has been brought on the deposit of the said debt of Rs. 91 into Court.

The defence *inter alia* was, that though the deed of the 8th Aswin 1294 executed by Defendant No. 4 in favour of Defendant No. 6 purported to be an out-and-out sale yet it was really a deed of conditional sale, that is, a *kut kobala*; that though by that deed the sum of Rs. 91 payable by Defendant No. 1 to Defendant No. 5 was made payable by Defendant No. 6, still at the latter's request Defendant No. 1 paid that sum to Defendant No. 5 in Jeyt 1296; who having then prepared the land for cultivation granted a *kabuliyat* on the 25th Jeyt 1296 to Defendant No. 1 and remained in possession of the land till the end of that year; that Defendant No. 1 has also paid to Defendant No. 6 the sum of Rs. 89, which

(1) 4 C. W. N. 153. s. c L. R. 27 L. A. 58 (1899).

(3) 4 C. W. N. 732 (1900).

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Defendant No. 4 had received under the *kut kobala* of the 8th Ašwin 1294; and that from the commencement of 1297 Defendant No. 1 is in possession of the land through his lessees the Defendants Nos. 2 and 3.

*Moulvie Zakadur Rahim Zakad* for the Appellant.

*Babu Dwarka Nath Chuckerbutty* for the Defendants.

THEIR LORDSHIPS' JUDGMENTS WERE AS FOLLOWS:—

MACLEAN, C. J.—The main objection to the decree appealed against is, that the Court below was wrong in admitting oral evidence to show the real intention of the parties to the *kobala* in question, or in other words, to show that the *kobala* in question was not intended, as it purported, to be an out-and-out sale, but only a *kut kobala* or mortgage. If the evidence had been so directed, I should have held, having regard to the decision of the Privy Council in the case of *Balkissen Das v. Legge* (1)—that the Court below was wrong in admitting it. But, here, it is reasonably clear that the evidence which was admitted, was evidence as to the acts and conduct of the parties, and this Court, following many other cases, has decided in the Full Bench case of *Priya Nath Shaha v. Modhu Sudan Bhugina* (2), that such evidence is admissible. There is a passage in the opinion of the Board in the Privy Council case to which I have referred, which would appear to give support to this view, for there their Lordships say,

“the case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.” The distinction between evidence as to the mere intention of the parties to the deed, and as to the acts and conduct of the parties has been recently pointed out in an unreported case decided by Mr. Justice Bamerjee and Mr. Justice Brett on the 12th of December last in Special Appeal No. 2633 of 1898.\* This disposes of the first point.

The second point is that the Plaintiff being a *bona fide* purchaser for value without notice is entitled to rely on the *kobala* alone, and is not affected by any oral agreement between the Defendants Nos. 4 and 6 changing the nature of the transaction between them. But no issue has ever been raised on this point. The Plaintiff might have raised such an issue but he has never raised it, and not having raised it, I do not see how we can fairly go into such a question now in second appeal. I may remark that there is a passage in the judgment of the Subordinate Judge to the effect that his opinion tended to the conclusion that the purchase by the Plaintiff No. 1 from the Defendant No. 6 was a collusive transaction. The point of being a purchaser for value without notice has never been raised, and I am not disposed to remand this case at this late stage for an issue to be raised as to it.

I cannot however part with this case without taking the opportunity of expressing

(1) 1 C. W. N. 153; S. C. L. R. 27 I. A. 58 (1899).

(2) 22 C. W. N. 562; S. C. L. R. 25 Cal. 603 (1898).

\* To be reported shortly.—Ed.

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ing my dissent from the view taken by Mr. Justice Rampini and Mr. Justice Pratt in the case of *Makbul Ahmed v. Rakhal Das Harra* (3), where they held that they were not bound to receive or treat as an authority binding on them an unreported case or ruling, basing that view upon sec. 3 of Act XVIII of 1875. That section was framed to constitute a monopoly, if the Judges so desired, for the authorized Law Reports; it only says that no Court shall be bound to hear cited the "report" of any case, etc.; it does not prevent the Court from looking at an unreported judgment of other Judges of the same Court. This has always been done and can and ought to be done. A judgment is none the less an authority because it has not been reported, otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter. I therefore respectfully dissent from the view on this point expressed in the case reported in Calcutta Weekly Notes, Vol. 4, page 732.

BANERJEE, J.—I am of the same opinion. I only wish to add, with reference to the first point raised in the case, that I adhere to the view expressed by me in my judgment in Special Appeal No. 2633 of 1898, in which it has been pointed out that the Full Bench decision in *Prigya Nath Shaha v. Madhu Sudan Bhayya* (2), has not been in any way overruled by the decision of the Privy Council in *Balkissen Das v. Legge* (1).

(1) 4 C. W. N. 153 : s. c. L. R. 27 I. A.

58 (1899)

(2) 2 C. W. N. 562 : s. c. I. L. R. 25 Cal. 603 (1898).

(3) 4 C. W. N. 732 (1900).

BRETT, J.—I agree with the learned Chief Justice.

*Appeal dismissed.*

S. R. D.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 924 OF 1899.

PRINSEP, J.	TEKAIT KUNJ BEHARI
STANLEY, J.	NARAIN DEO, Petitioner,
	v.
1900.	BHIKO SINGH, Opposite
9, June.	Party.

*Penal Code (Act XLV of 1860), sec. 188—Disobedience of an order of a public servant lawfully promulgated—Order under sec. 144, Cr. P. Code, interfering with the exercise of private rights of individuals, if lawful—Magistrate, jurisdiction of, to pass such orders.*

*If a Magistrate apprehends a breach of the peace he can restrain temporarily the exercise by any private person of his lawful rights to prevent such breach of the peace, by making an order under sec. 144, Cr. P. Code; and disobedience to such an order amounts to an offence under sec. 188, I. P. Code.*

BYCUNTRAM SHAHA ROY (1) followed.

This was a rule issued on the 15th of December 1899, against the order of the Joint-Magistrate of Giridih, dated the 31st of July 1899, which order was, on appeal, affirmed by the Judicial Commissioner of Chota Nagpur on the 21st of August 1899.

The facts of the case material to this report appear from the judgment.

*Mr. P. L. Roy and Babu Atulya Churn Bose* for the Petitioner.

No one appeared to shew cause.

(1) 10 B. L. R. 448 (1872).

## TEKAIT KUNJ BEHARI NARAIN DEO v. BEIKO SINGH.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner has been convicted under sec. 188, I. P. C., for disobedience of an order under sec. 144, C. Cr. P. The objection taken before us is that that order was passed without jurisdiction and that, therefore, it was not an order by a public officer lawfully empowered to promulgate the order which the Petitioner was bound to obey and that consequently the conviction and sentence are bad. The order is to the effect that whereas a riot is likely to take place in taking or removing crop and other properties in Pachari claimed by Tekail Tadal Narain Singh, "you are hereby ordered not to interfere either personally or by means of others with the things abovementioned. You are directed not to interfere with those things."

It is objected by Mr. Roy who appears for the Petitioner that that order is not a lawful order because it is an interference with the exercise of the private rights of the Petitioner. We think it unnecessary to do more than refer to the judgment of the Full Bench in the case of *Bycuntram Shaha Roy* (1) in which this very point was argued and it was held that if the Magistrate apprehended a breach of the peace, he could restrain temporarily the exercise by any private person of his lawful rights to prevent that result. In that particular case, however, the order was of a permanent character and, therefore, on that ground it was held to be a bad order. The terms in which the learned Chief Justice expressed himself in that judgment apply equally to the present case and it is

unnecessary to refer to any further cases on the subject in which those principles may not have been completely followed. In the present case, the object of the Magistrate was to prevent a breach of the peace and it is sufficient to say in this respect that what has since taken place has amply justified the Magistrate's intervention. The rule is, therefore, discharged.

H. P. C.

Rule discharged.

## [CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 840 OF 1900.

AMEER ALI, J.	}	BROJA RAKHAL MOZUM-
STEVENS, J.		DAR, Appellant,
1900.	}	v.
27, November.		THE EMPRESS,
		Respondent.

*Criminal Procedure Code* (Act V of 1898), ss. 423, 439—High Court, power of, to deal with accused person not appealing—Conviction, setting aside of, of accused not appealing while dealing with an appeal on behalf of persons appealing.

The High Court has power under sec. 439 of the Code of Criminal Procedure, in a proper case, to deal with the case of accused persons not appealing against their conviction, while considering and trying the appeal preferred by some other persons; and cl. (5) of the section does not in any way affect the jurisdiction vested in the High Court to deal with their case.

This was an appeal preferred on the 27th of September 1900, against the conviction and the sentence passed by the Sessions Judge of Dinajpur on the 17th of September 1900.

The facts of the case, so far as they are material to this report, appear fully from the judgment.

(1) 10 B. L. R. 443 (1872).



## BROJO BAKHAL MOZUMDAR v. THE EMPRESS.

Mr. K. N. Chaudhuri (with him Babu Dwarka Nath Mitter) for the Appellant.— I submit that it is a fit case in which your Lordships should consider the case of Ananta Dobe, who has not appealed, in the exercise of the power vested in you by sec. 439 of the Criminal Procedure Code. This is a case in which both the accused persons should be acquitted. \*

Babu Shrivish Chunder Chaudhuri (Assistant Government Pleader) for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Appellant in this case has been convicted by the Sessions Judge of Dinajpur under secs. 330 and 347, I. P. C., and sentenced to eighteen months' rigorous imprisonment under each of the sections or to an aggregate sentence of three years' rigorous imprisonment. There was another person prosecuted along with him who has been sentenced to six months' rigorous imprisonment under each of the sections. He, however, has not appealed and we shall have to deal with his case in a different way.

(After commenting on the evidence their Lordships concluded the judgment as follows):—

We consider the story told by the prosecution initially improbable and vitiated by so many circumstances which we cannot accept that we feel bound to set aside the conviction and sentence of the accused Brojo Bakhal Mozumdar and direct that he be released. We make the order accordingly.

As regards the other accused, Ananta Dobe, who has been convicted and sentenced by the Sessions Judge to one year's

rigorous imprisonment in the aggregate under the two sections referred to above and who has not appealed from jail, we asked the learned Government pleader if he had anything to say why we should not set aside the conviction in his case also. This Court has undoubtedly the power under sec. 439, Cr. P. C., to deal with the case and cl. (5) does not in any way affect the jurisdiction vested in us to deal with this particular case. The Government pleader having nothing to say, we, in exercise of the powers vested in us under sec. 439, set aside the conviction and sentence passed on the accused Ananta Dobe and direct that he be also released.

*Appeal allowed: Convictions of both the accused set aside.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 862 of 1899.

PRINSEP, J.	} FAIRWEATHER, Petitioner, ". SURESH CHUNDER DUTT, License Inspector, Howrah Municipality, Opposite Party.
STANLEY, J.	
1900.	
1, February.	

*Bengal Municipal Act (III of 1884), sec. 267, 273—Keeper of hackney carriage—Milkman—License.*

*Where it was found that a person had 7 or 8 ponies and 4 cows and some sheep and let out one carriage and a pair of ponies on a monthly hire and kept the same in her stable, and also kept other ponies for sale and supplied milk to others out of her cows:*

*Held—That the facts found do not render her liable within the terms of sec. 273 of the Bengal Municipal Act.*

**FAIRWEATHER v. SURESH CHUNDER DUTT.**

This was a rule issued on the 4th of December 1899, against the order of the Deputy Magistrate of Howrah, dated 22nd of October 1899, convicting the Petitioner Mrs. Fairweather, under sec. 273, cl. (2) of Act III of 1884, B. C., and sentencing her to pay a fine of Rs. 20 or in default to undergo a sentence of simple imprisonment for twenty days.

The facts of the case are briefly these:—On the 14th August 1899 the Petitioner's husband was summoned to appear before Moulvie Buzlal Karim, first class Deputy Magistrate of Howrah to answer a charge under sec. 273, cl. (2) of Act III of 1884, B. C., for keeping without a license at his place several ponies, cows and sheep. The case was eventually not proceeded with against the Petitioner's husband but the Petitioner was summoned to appear before the Court on the same charge. The Deputy Magistrate found that she kept the animals for purposes of trade and that she came within the category of persons mentioned in sec. 263 of the Act, and accordingly convicted and sentenced the Petitioner as aforesaid.

The judgment of the lower Court was as follows:—

The evidence shows that one Mrs. Fairweather keeps 7 or 8 ponies, about 4 cows, and some sheep for the purpose of trade at a place within the Municipality without taking out a license for 1899-1900. It appears that she took out the license till 1897-98.

The evidence shows that the accused lets out one carriage and a pair of ponies to Mrs. Langer on a monthly hire of Rs. 40 and that the said carriage and the ponies are kept in the stable of the accused. The evidence further shows that the accused keeps the other ponies for sale and the sheep for supplying mutton to gentlemen. She also supplies milk to others out of her cows. Thus it is clear that she has kept these animals for the purpose of trade.

The next question raised by defence is that the accused does not come in the category of persons mentioned in sec. 273 of the Municipal Act. I think she comes within the category as "a keeper of hackney carriage" inasmuch as she lets out the carriage on hire. This being so I think she is bound to take out license under sec. 263 of the Act and as she kept the animals for trade without taking out the required license she is amenable to punishment under cl. 2 of sec. 273 of the Municipal Act.

The Court therefore fines her Rs. 20 (twenty) in default 20 days simple imprisonment besides cost of Rs. 3 to be paid to the Municipality.

*Babu Prosanna Gopal Roy for the Petitioner.*

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows:—

We have had some difficulty in applying sec. 273 of the Bengal Municipal Act to the case before us in which the Petitioner is said to unite in her person the designation of a "milkman and a keeper of hackney carriages."

We are of opinion that the facts found against her do not render her liable within the terms of sec. 273. The conviction and sentence must, therefore, be set aside and the fine, if paid, refunded.

S. C. S. *Rule made absolute.*

C. C. G.

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. No. 938 of 1900.

AMEER ALI, J.	}	JAGAT CHANDRA SARMA,
PRATT, J.		Petitioner,
1901.		v.
7, February.		LAL CHAND DAS,
		Opposite Party.

*Penal Code (Act XLV of 1860), sec. 165, 165—Receiving illegal gratification as a public servant—Gratification received partly on one day and partly on another—Continuous offence—Conviction for separate*

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*offences, if proper—Criminal Procedure Code (Act V of 1898), sec. 421—Summary dismissal of appeal of accused, legality of, on admission of appeal of co-accused.*

*Where a certain sum of money is paid to a public servant as illegal gratification on one day and a certain sum on another day for the same purpose, the offence of receiving illegal gratification becomes a continuous offence and there ought not to be separate convictions for offences under secs. 161 and 165 of the Penal Code for the same offence.*

*The law gives to the Appellate Court the power of dismissing summarily an appeal upon going through the judgment, if the Court is satisfied that there is no sufficient reason shown for the interference of the Appellate Court, and the fact that the Appellate Court admitted one Appellant's appeal does not affect the order summarily dismissing another Appellant's appeal.*

This was a rule issued on the 1st of December 1900, against the order of the Sub-divisional Magistrate of Sunamgunge, dated the 18th of September 1900, which order was, on appeal, affirmed by the Sessions Judge of Sylhet on the 21st September 1900. The facts of the case and the arguments addressed to the Court appear fully from the judgment.

Mr. P. L. Roy and Babu Havendra Narayan Mitra for the Petitioner.

No one appeared to shew cause.

**THE JUDGMENT OF THE COURT** was as follows:—

The Petitioner in this case, Jagat Chandra Sarma, who was head constable in charge of the Police outpost of Juggernathpore, was convicted by the

Sub-divisional Magistrate of Sunamgunge under secs. 161, 165 and 347, I. P. C., and sentenced, under the first-named section, to two years' rigorous imprisonment and a fine of Rs. 200, under the second, to three months' simple imprisonment and, under the third, to nine months' rigorous imprisonment and a fine of Rs. 50; in the aggregate, to three years' imprisonment. The charge against him was that he had accepted certain bribes in the course of his official duty in connection with an investigation into a fishery case regarding which a complaint had been preferred at the outpost and that he had confined certain women of the village for the purpose of extorting money from their relatives. The Sub-divisional officer, in a long judgment in which he reviews the evidence at considerable length, found that the charges aforesaid were made out against the head constable. A person of the name of Chandi Pershad Das was a co-accused with the head constable, and the prosecution alleged that it was through this Chandi that the head constable received the bribes. Chandi was convicted by the Sub-divisional officer under sec. 481, I. P. C., and was sentenced to undergo rigorous imprisonment for 15 months and to pay a fine of Rs. 500. Chandi Persad and the head constable appealed separately to the Sessions Judge. The appeal of the head constable, Jagat Chandra Sarma, was summarily dismissed under the provisions of the Code of Criminal Procedure. The appeal of Chandi Persad was admitted and the learned Judge, after going through the evidence, although he was of opinion that the accused had been rightly

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convicted, thought that the sentence of imprisonment was unnecessarily severe, having regard to the part alleged by the prosecution to have been taken by him. He was accordingly let off with a fine. On the application of the accused Jagat Chandra Sarma, we issued a rule on the 29th November calling upon the Deputy Commissioner to show cause why the conviction and sentence should not be set aside on the grounds set forth in the petition. Mr. Roy has now appeared in support of the rule and we have allowed him to go into the whole case both upon the evidence and the questions of law. His contentions are that the Judge ought to have admitted the head constable's appeal having regard to the fact that he had admitted Chandi Persad's appeal. With regard to that, we observe that the law gives to the Sessions Judge the power of dismissing summarily an appeal upon going through the judgment, if he is satisfied that there is no sufficient reason shown for the interference of the Appellate Court. The fact that the Sessions Judge admitted Chandi Persad's appeal, does not, in our opinion, affect his order dismissing summarily the Petitioner's appeal. It must also be borne in mind that the Sessions Judge in Chandi Persad's case affirmed the conviction and only dealt with the question of sentence and we may presume that, upon going through the judgment as it affected the present Petitioner he did not think it necessary in his discretion to vary the sentence or sentences passed by the Deputy Magistrate. Moreover, upon the rule issued by this Court we have allowed learned counsel for the Petitioner to go into the facts of the case and, therefore,

no question of prejudice arises from the fact that the Sessions Judge did not give an opportunity to the Petitioner to argue his appeal before him.

The next point urged by Mr. Roy is that the sentence under sec. 165 is erroneous inasmuch as the acceptance of the bribe, whether taken partly on one day and partly on another, was a continuous offence and, therefore, there ought not to have been a separate sentence under that section. We will deal with this after disposing of the other questions which have been raised on the Petitioner's behalf, *viz.*, that the evidence in the case consists only of the testimony of accomplices or persons next to accomplices and, therefore, a conviction upon such testimony ought not to be sustained. Another objection is that the charge under sec. 384, I. P. C., having been dismissed, the conviction under sec. 347 was wrong and it is also urged that the Deputy Magistrate was in error in admitting certain proceedings in the fishery case as well as in what is called the obstruction case in the consideration of the other evidence against the Petitioner.

Dealing now with the merits, *viz.*, whether the evidence which has been adduced by the prosecution against the Petitioner consists only of the testimony of accomplices, we find that the Deputy Magistrate has relied upon the statements of three persons whom he considers not to be accomplices in any shape or character, *viz.*, Tara Nath Sen, Jabanulla and Nazib Khan. That evidence has been placed before us and we find that so far as Jabanulla and Nazib Khan are concerned, there is no reason for suggesting that they were in the smallest

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degree concerned with the payment of the bribe or in bringing about the settlement between the villagers and the accused. They cannot, therefore, be regarded as accomplices. Tara Nath may be said to have taken some part in arranging what amounts should be paid by the different villagers but he states in his evidence that, although he took part in that way in what was going on between Chandi Persad and the present accused, he did not concern himself, to paraphrase his language, with the payment of the bribe or otherwise. But however that may be, we are quite clear that Jaban-ullah and Nazib Khan's evidence cannot be impugned on the ground upon which the other evidence in the case is impugned and we think, therefore, that there is no reason for setting aside the conviction on the ground that it is based on the uncorroborated testimony of accomplices. The evidence is that a certain sum of money was paid on one day and a certain sum on another day and we think that there is a great deal of force in the contention of learned counsel that it was a continuous offence. We think, therefore, that the conviction under sec. 165, I. P. C., cannot be maintained.

There can be no doubt upon the evidence that, under the orders of the head constable, a number of women were brought by the constables and detained for a considerable time until Rupnath Das and other villagers had agreed, upon the suggestion of Chandi Persad, to pay a *nazar*, as it is called, to the head constable. We think, therefore, that the conviction under sec. 347, I. P. C., is correct.

Having thus taken the entire evidence in the case into consideration, we are of opinion that the convictions under secs. 161 and 347, I. P. C., must be maintained. We think, however, that the sentence of two years' rigorous imprisonment under sec. 161 is quite sufficient to meet the ends of justice. We therefore remit the sentence of fine under that section.

We are also of opinion that the sentence of six months' rigorous imprisonment under sec. 347 is amply sufficient for the purposes of the case and we accordingly reduce the sentence passed against the Petitioner under that section to six months' rigorous imprisonment and remit also the order of fine under this section. We set aside the sentence under sec. 165. The conviction under both secs. 161 and 347 will be upheld and the Petitioner will be called upon to surrender to undergo the remaining portion of his sentence.

*Rule made absolute in part.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 997 OF 1900.

AMEER ALI, J.	}	LALIT CHANDRA NEOGI
PRATT, J.		and ors., 2nd Party,
1901.		Petitioners.
8, February.		v.
		TARINI PERSAD GUPTA,
		1st Party, Opposite
		Party.

*Code of Criminal Procedure (Act V. of 1898), sec. 147—Easement, right of, obstruction to—Right of way, likelihood of breach of the peace concerning—Exercise of right within statutory period—"Such thing shall be done, &c.," meaning of—Order, form of.*

*Where one party has a right of way over the land of another who obstructs*

**LALIT CHANDRA NEOGI v. TARINI PERSAD GUPTA.**

*such right by erecting certain huts and there is a likelihood of a breach of the peace in consequence of such obstruction :*

Held—*That a Magistrate is competent, under the provisions of sec. 147, Cr. P. Code, to direct that the obstruction be removed.*

PASUPATI NATH BOSE AND ANR. v. NANDO LAL BOSE AND ANR. (1) *followed.*

This was a rule issued on the 13th of December 1900, against the order of Babu Akhoy Kumar Chatterjee, Sub divisional Magistrate of Tangail, dated the 29th of November 1900.

The facts of the case will appear from the following portion of the judgment of the lower Court :—

This case originated with a petition filed by the first party to the effect that the Defendants engaged 200 or 250 *lathials* and 50 or 60 servants and constructed a hut on the path leading from his house to the school, Post office and bazar, etc., and when his men objected to it, they were beaten and driven away. If his men attempt to go to his shop, they will be beaten by the *lathials* of the Defendant and there is a likelihood of the breach of the peace if he tries to exercise his right of easement over this path. The occurrence is said to have taken place on the 5th May 1900. The petition was sent to the Sub-Inspector of Police, Tangail, for enquiry and report and that officer and the Inspector of Police reported on the correctness of the subject-matter of the petition and applied for proceedings under sec. 147, C. P. C., on the 17th May 1900. Proceedings were accordingly drawn up on the 22nd May last.

The second point for determination is whether the Defendant has a right of easement over the road and whether he exercised the same for 8 months prior to the drawing up of the proceedings.

On a full consideration of the evidence and circumstances of this case I am certainly of opinion that the first party were in possession of the right of easement till the 5th May last and I accordingly direct the first party to

exercise their right of easement over the road which has been obstructed until the second party obtains the decision of a competent Court against this order under sec. 147, C. P. C. The second party must remove all obstructions from the road at once.

Against the order of the Deputy Magistrate the Petitioners moved the High Court and obtained the present rule.

*Sir Griffith Evans, Babus Dwarka Nati Chuckerbutty and Brojo Lal Chuckerbutty* for the Petitioners.

*Mr. Pugh and Babu Harendra Narayan Mitter* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

This rule was granted for the purpose of considering the legality of the order made by the Deputy Magistrate under sec. 147 of the Criminal Procedure Code and we have had the opportunity and advantage of hearing *Sir Griffith Evans* on the law and the difficulties created by the imperfect drafting of sec. 147 C. Cr. P. Upon the facts found by the Deputy Magistrate, we see no sufficient reason to differentiate the present case from the case of *Pasupati Nath Bose and anr. v. Nando Lal Bose and anr. (1)* and, as at present advised, we see also no reason for taking the course suggested by learned counsel, *viz.*, to refer the case to a Full Bench. Having, therefore, given the case our best consideration we have come to the conclusion that this rule ought to be discharged and we discharge it accordingly.

*Rule discharged.*

H. P. C.

(1) 5 C. W. N. 67 (1900).

(1) 5 C. W. N. 67 (1900).

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reconsideration of this question, I am clearly of opinion that no second appeal lies in a case of this kind. I was a party to the decision in the case of *Priag Nath Shadoo v. Mura Munda* (3), but the view taken in that case proceeded almost entirely upon what was conceived to be an established course of practice supported by a decision in an unreported case decided by Mr. Justice Tottenham and Mr. Justice Agnew in May 1885, in Second Appeals Nos. 621 to 625 of 1884. That case, however, does not now appear to me on a reconsideration of the question and after hearing what has been addressed to us to-day to have been correctly decided.

I entirely agree with what has fallen from the learned Chief Justice and Mr. Justice Macpherson as to the construction of Act I of 1879 (B. C.), and the effect upon the question now before us of sec. 4 of the Code of Civil Procedure.

RAMPINI, J.—I also consider that no second appeal lies in this case. I would only add to what has been said by the learned Chief Justice and my learned brothers that Act I of 1879 (B. C.) seems to me to contain internal evidence that the provisions of the Code of Civil Procedure are not applicable to cases arising under that Act and that therefore sec. 584 of the Code of Civil Procedure does not apply. I would refer to secs. 47, 49 to 56 and 62 to 67 of the Act which lay down certain procedure for the trial of cases arising under the Act. These sections would be superfluous, if the provisions of the Code of Civil Procedure applied in their entirety to cases arising under Act I of 1879 (B. C.).

(3) L. L. R. 24 Cal. 249 (1896).

I would also refer to secs. 38, 76 and 98 of the Act which make certain provisions of the Code of Civil Procedure expressly applicable. These would be absolutely unnecessary if the provisions of the whole Code applied to cases under this Act. And I may also, in support of this view, point to the title of the Act, which is described as "an Act to amend the procedure in suits between landlords and tenants in Chota Nagpur." Upon these grounds I am clearly of opinion that the provisions of the Code of Civil Procedure do not apply to cases under Act I of 1879 (B. C.).

Moreover, as has already been pointed out by several of my learned brothers, sec. 4 of the Code of Civil Procedure expressly excludes the Code from applying to cases between landholders and their tenants. For these reasons I think that no second appeal lies in this case, and that the cases of *Ramjan Khan v. Raman Chaman* (2), and of *Priag Nath Shadoo v. Mura Munda* (3), so far as they hold that a second appeal lies in cases of this nature arising under Act I of 1897 (B. C.), have not been rightly decided.

S. C. S.

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM ORIGINAL DECREE**

No. 28 of 1899.

MACLEAN, C. J.	}	RAJNARAIN BHADURI
MACPHERSON, J.		& anr., Appellants,
HILL, J.		v.
1900.		KATYAYANI DEBI,
25, January.		Respondent.

*Hindu Law—Will, construction of—Gift to widow of malikatwa as exercised by the*

(2) 11 C. L. R. 480 (1882).

(3) L. L. R. 24 Cal. 249 (1896).

## RAJNARAIN BHADURI v. KATTAYANI DEBI.

testator, in respect of moveable and immoveable property—Stridhan or widow's interest—Hindu Wills Act (XXI of 1870)—The Indian Succession Act (IX of 1865), sec. 82.

Where a Hindu testator by his Will made before the Hindu Wills Act (XXI of 1870) appointed his widow to the *malikatwa*, as exercised by himself, of all his moveable and immoveable property :

Held—That the widow took an absolute interest, and on her death such interest devolved upon her heirs, and not upon the heirs of her late husband.

BEABA TARINI DEBI v. PEARY LAL SANYAL (1), KOONJ BEHARI DHUR v. PREM CHAND DUTT (2), SRIMUTTY SOORJEE MONEY DASSEE v. DENOBUNDHOO MULLICK (3), SHUMSOOL HOODA v. SHEWUKRAM (4) followed.

HARI LAL PRAN LAL v. BAI REWA (5) distinguished and dissented from.

Testator, a childless Hindu, executed a Will in Bengali by which he appointed his widow to the *malikatwa* (ownership) of his moveable and immoveable property as was exercised by himself. The testator died in June 1862, i.e., prior to the Hindu Wills Act which incorporates sec. 82 of the Indian Succession Act (X of 1865). After his death the widow took and remained in possession till her death. On her death intestate, her next-of-kin and sole heir, the Defendant-Respondent in this case took possession of all her properties. Thereupon the Plaintiffs-Appellants, as the reversionary heirs of the testator, brought this suit for the construction of the Will and contended that under it his widow

took only a Hindu widow's life estate in the immoveable property, and that on her death, the Plaintiffs-Appellants became entitled to this property.

The facts material to this report and the Will in question are thus set out in the judgment of the Original Court:—

The main question in this case is whether under the Will of Krishna Lal Bhadury his widow Bhubaneswari Debi took an absolute interest in his immoveable property or merely the ordinary estate of a Hindu widow.

Krishna Lal Bhadury died many years ago leaving an only widow but no issue surviving. He made a Will in Bengali, dated the 2nd of June 1862, of which the translation is as follows:—

“(To) the blessed Srimati Bhubaneswari Debi.

This instrument of *willnamah* (Will) is executed by Sri Krishna Lal Bhadury to the following effect:—I having, by reason of ill health, come to the house of my father-in-law Srijut Nilmani Chakravarti Mohasay at monzah Nabagram in the district of Hughli; (and) not having recovered under various modes of medical treatment (and hence) considering my life to be in peril, I appoint (*literally*, make) my wife Srimati Bhubaneswari Debi to the *malikatwa* (ownership) after my demise, as exercised (*literally*, done) by myself in respect of the family dwelling-house (consisting of) 2 cottahs (and) 6 chataks of land with building purchased in the name of my father Nilmani Bhaduri Mohasay, deceased, at Sutanuti gram in the town of Calcutta and wearing apparel, utensils, etc., whatever there is, (i.e.), in respect of all the properties aforesaid. I of my own free will, make

(1) 1 C. W. N. 578 : s. c. I. L. R. 24 Cal. 646 (1897).

(2) I. L. R. 5 Cal. 684 (1880).

(3) 6 M. 1 A. 526 at p. 550 (1857)

(4) L. R. 2 I. A. 7 at p. 14 (1874).

(5) I. L. R. 21 Bom. 376 (1895).



**RAJNARAIN BHADURI v. KATYAYANI DEBI.**

(this) Will. Finis. Year 1269 twelve hundred and sixty-nine Sal, date 20th Jaistha."

After the testator's death his widow took possession of his property and remained in possession of it until her death on the 17th of January 1898. She died intestate leaving the Defendant Ashutosh Chakerbutty her sole heir. The Plaintiffs are grandsons of Rooder Narain Bhadury who was brother of Joy Narain Bhadury, the grandfather of the testator Krishna Lal Bhadury and as such are the reversionary heirs of Krishna Lal Bhadury. They contend that under the Will of Krishna Lal Bhadury, Bhubaneswari Debi only took the ordinary estate of a Hindu widow in his immoveable property and that upon her death they became entitled to this property as reversionary heirs.

In the Original Court, Stanley, J., held that the Will gave an absolute estate to the widow and dismissed the suit. From that decision\* the Plaintiffs appealed.

*Sir Griffith Evans* and *Mr. Chuckerbutty* for the Appellants.

*Mr. Hill, Mr. A. Chaudhuri, and Mr. M. L. Dutt* for the Respondent.

*Sir Griffith Evans.*—The question in this case is whether the widow had an out-and-out gift or whether the property goes to her husband's relatives after her death. Where under the Hindu law a gift is made by a husband to a wife and the property is immoveable, there is a distinct rule of Hindu law that the wife does not take an absolute estate. After her death the property goes to the heirs of the husband and not to the heirs of the wife.

It has also been established by a series

of decision that in respect of a gift, whether *inter vivos* or by Will, it is necessary for the husband to give her in express terms a heritable right or power of alienation.

In support of his contention he cited :

*Bhaba Tarini Debi v. Peary Lal Sangal* (1), *Koonj Behari Dhur v. Prem Chand Dutt* (2), *Mussumut Kollany Koorer v. Luchmee Pershad* (6), *Colebrooke's Dayabhaga*, Ch. IV, sec. 1, cl. 23 (Ed. 1810), *Dr. Bannerjee's Hindu Law of Marriage and Stridhan*, Lecture VIII, *Narada's text* at p. 323, *Colebrooke's Digest of Hindu Law*, 2nd Vol., p. 515, 3rd Vol., at pp. 575, 576, *texts of Narada and Cātyayāna, Hari Lal Pran Lal v Bai Rewa* (5), *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (7), *Ram Narain Sing v. Peuri Bhugut* (8), *Sreenuttu Pabitra Dasi v. Damudar Jana* (9), *Punchoo Money Dassee v. Troylucko Mohney Dassee* (10).

*Mr. Hill.*—A gift of immoveable property to a wife from a husband ordinarily goes to the husband's heirs, unless it is given with express words, because there the control over the property given continues with the husband in his lifetime. In a gift by Will the husband has no control over the property, and in such a case different considerations prevail. When a gift is made to a woman over which her husband has no control that is a *peculium* or woman's

(1) 1 C. W. N. 578 : s. c. I. L. R.

24 Cal. 646 at pp. 649, 651 (1897).

(2) I. L. R. 5 Cal. 684 (1880).

(5) I. L. R. 21 Bom. 376 at p. 380 (1895).

(6) 24 W. R. 395 (1875).

(7) 9 B. L. R. 377 (1872).

(8) I. L. R. 9 Cal. 830 (1883).

(9) 7 B. L. R. 697 (1871).

(10) I. L. R. 10 Cal. 342 (1884).

\* See I. L. R. 27 Cal. 44.—Ed.

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*stridhan*. In Colebrooke's *Dayabhaga*, Ch. IV, sec. 1, *sloka* 18, *stridhan* is described thus:— . . . . "That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control." In *Bhaba Tarini Debi v. Peary Lal Sanyal* (1) the wife had an absolute interest in the property. In support of his contention he cited Bannerjee's *Tagore Law Lectures* for 1878, 2nd Ed., at p. 322; Siromani's *Commentary on the Hindu Law*, 1st Ed., p. 400; Colebrooke's *Dayabhaga*, Ch. IV, sec. 1, *sloka* 13 (of Yajnyawalkya) to *sloka* 19 and *sloka* 23 (Narada's text); Colebrooke's *Digest of Hindu Law* 627 (1801).

[The CHIEF JUSTICE.—Let us look to the wording of the Will. He gave all the *malikatwa* that he had; he had the dominion and so he gave the power of absolute alienation to his wife. His Lordship referred to *Lalit Mohun Singh Roy and others v. Chukkun Lal Roy* (11), and *Bhujanga Rau v. Ramayamma* (12), where Turner, C. J., says "It is not denied, &c. . . ." and observed that in *Ram Narain Sing v. Peary Bhugut* (8), it was held "that the words of limitation are not necessary, you must construe the Will taking it as a whole and not piecemeal.]

*Mr. Hill*.—Here the clear intention is to give the wife full rights. The same words cover both moveable and immoveable properties, whatever properties he had.

*Sir- Griffith Evans* in reply.—The

*malikatwa* must have been given owing to the fact that in the Supreme Court days the heirs used to get themselves appointed Receivers and the widow used to be put under their control. He cited also the *Tagore Law Lectures*, 1879 (*Lecture VI*:—Hindu Widows' Estate), *Macnaghten's Hindu Law*, Ch. VIII, Case 8 at p. 215 (which showed that the fetter was not removed by the death of the husband), *Mussamut Bhagbutti Dace v. Chowdry Bholanath Thakoor and others* (13) and *Lallu v. Jugmohun* (14).

As to costs where the difficulty was caused by the testator, the costs should come out of the estate: *Tagore v. Tagore* (7) and *Coote's Probate Practice* 502(3), *William Forster Charter v. Charles Charter* (15).

[The CHIEF JUSTICE.—That was the rule in the original case, but never in appeal.]

*Sir Griffith Evans*.—That was so done in the *Tagore* case.

*Mr. Chaudhuri*.—They brought a suit for declaration of their rights pleading intestacy when they were aware of the Will. The difficulty has not been created by the testator, but they want to interpret his words in a different way. The usual rules as to costs should be followed.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—The question which we have to decide in this case is dependent upon the construction of the Will of one Krishna Lal Bhadury who died many years ago leaving a widow surviving him, and no issue.

(1) 1 C. W. N. 578: s. c. I. L. R. 24 Cal. 646 at p. 650 (1897).

(8) I. L. R. 9 Cal. 830 (1888).

(11) 1 C. W. N. 387: s. c. I. L. R. 24 Cal. 834 (1897).

(12) I. L. R. 7 Mad. 387 at 389 (1884).

(7) 9 B. L. R. 377 (1879).

(13) I. L. R. 2 I. A. 256 (1875).

(14) I. L. R. 22 Bom. 409 (1898).

(15) 7 Eng. & Irish App. 364 (1874).

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His will, which was made in Bengali, is dated the 2nd of June, 1862, and is in the following terms:—"I having by reason of ill-health come to the house of my father-in-law," (naming him) "and not having recovered under various modes of medical treatment, and hence considering my life to be in peril, I appoint (literally, make) my wife, Sreemutty Bhambaneswari Debi, to the *malikatwa* (ownership) after my demise as exercised (literally, done) by myself, in respect of the family dwelling-house," (describing it) "and wearing apparel, utensils, &c., whatever there is (i.e.) in respect of all the properties aforesaid, I, of my own free will, make (this) Will."

The question is whether the heirs of the deceased testator who are the Plaintiffs, or the heirs of the widow, who died in January 1898, who are the Defendants, are entitled to this property, and this depends upon the question what was the estate which the widow took, whether she took an absolute interest, or only the interest of a childless Hindu widow. The learned Judge in the Court below has dismissed the suit; hence the present appeal by the heirs of the deceased testator.

It is urged for the Appellants that, although the words of the Will having regard to the true import of the word *malikatwa*, might have conferred upon the widow an absolute interest, had the property been given to her under the Will of a stranger—I should say that the question only arises as to the immoveable property—that when the gift is by a husband to his wife the same considerations do not apply and that she does not, and cannot, take an absolute interest upon the ground that there is a distinct and

binding rule of Hindu law that, unless upon the language of the Will, although the word "malik" or "malikatwa" may be used, an express or an implied power of alienation can be taken as given to the widow, she only takes the limited interest of a childless Hindu widow.

For this proposition the Appellants rely upon the case of *Bhaba Tarini Debi v. Peary Lal Sanyal* (1) which followed the decision in the case of *Koonj Behari Dhu v. Prem Chand Dutt* (2).

I ought to state that, admittedly, the case is not affected by the Hindu Wills Act, or by sec. 82 of the Indian Succession Act.

In the case of *Bhaba Tarini Debi v. Peary Lal Sanyal* (1) the law at p. 649 of the report is laid down as follows:—"If this stood alone" "this" referring to the words in the particular Will which the Judges were then construing,—“and sec. 82 of the Indian Succession Act was not applicable to the case, then as the bequest (which in this respect follows the same rule as a gift) was one of immoveable property by the husband to his wives, they would take a limited estate under the Dayabhaga. They would take the property without having any power to alienate it; and property over which they have not the power of alienation, cannot constitute their Stridhan, or absolute property (see Dayabhaga, Chapter IV, secs. 1, 18, 19 and 23) and must on their death pass to the heirs of her husband (see Colebrooke's Digest, Bk. V, 515, commentary):”—and, later on, at p. 651, the same view is further expressed in the following

(1) 1 C. W. N. 578: a. c. L. L. R. 24 Cal. 646 (1897).

(2) L. L. R. 5 Cal. 684 (1896).

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passage:—"We only wish to observe, with regard to those cases, that an important distinction, which is sometimes lost sight of, may reconcile the apparent conflict in some of them. The rule of Hindu law referred to above is based upon a text attributed to Narada cited in the Dayabhaga, Chapter IV, secs. 1, 23, and is limited to the case of gift of immoveable property to the wife, and it is to this particular case that the decision in *Koonj Behari Dhur v. Prem Chand Dutt* (2) relates."

Taking then the law to be that as stated in the cases I have mentioned, we have to ascertain, whether, upon the construction of the Will, in this case—and accepting as a guide to that question of construction the law as laid down by the Privy Council in the cases of *Srimutty Soorjee Money Dassee v. Denobundhoo Mullick* (3) and *Shumsool Hooda v. Shewukram* (4), an express or implied power of alienation can be regarded as given to the widow. If the gift had stopped at the words, "after my demise," there would be considerable force in the argument of Sir Griffith Evans, that an absolute interest was not conferred: but we must give some effect to the words that follow, "as exercised by myself." Ownership as exercised by myself! What do these words mean? What was the nature of his ownership? It was an absolute ownership, and as incident to it, an absolute power of alienation; and he confers upon his wife the same class of ownership, that is an ownership with power of alienation. In this view, which

I take to be the true one, she takes an absolute interest, an interest which, upon her death, devolved upon her heirs, and not upon the heirs of her late husband.

We have been much pressed with a decision in the Bombay High Court in the case of *Hari Lal Pran Lal v. Bai Rewa* (5), where the language used was somewhat similar to that in the present case. There the Court held that the widow only took a limited, and not an absolute, interest. Whilst entertaining the greatest respect for the decisions of that tribunal, they are not binding upon us and moreover the language of that Will is, in many respects, different from that in the present case. The whole of that Will is not set out in the report, and though no doubt these are the words "Just as I am the owner of the property at present, in the same way my wife, Ujjain is the owner," those words were regarded by the Court as qualified by other provisions in the Will, provisions which we do not find in the Will now before us. But even in that case, the learned Judges expressed doubt as to the conclusion at which they arrived. I am unable to regard that case as governing the present: the two Wills are very different in their language and provisions.

Having regard to the circumstances of the testator in this case at the date of his Will—he had no children and no near relatives—it is not improbable that he should wish to give his wife an absolute interest in the property and in my opinion the language of his Will has done so.

The view taken by the Court below is right, and the appeal must be dismissed with costs.

(2) 1. L. R. 5 Cal. 681 (1897).

(3) 8 M. I. A. 526 at p. 550 (1857).

(4) L. R. 2 I. A. 7 at p. 14 (1874).

(5) I. L. R. 21 Bom. 379 (1895).

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MACPHERSON, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

*Appeal dismissed with costs.*

J. N. D.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER

No. 174 of 1899.

<p>BANERJEE, J. STEVENS, J. 1899. 18, December.</p>	}	<p>KANI BHUSAN ROY CHOWDHURY, Decree-holder, Appellant, v. BAMA SUNDARI DEBI, widow of Chandra Roy Chowdury, Judgment-debtor, Respondent.</p>
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*Costs—Order for costs in remand-order directing 'costs to abide result'—Execution for such costs by successful party when same not specified in decree of Court below—Remand, materials necessary for ascertaining result of, for purposes of awarding costs.*

*Where an appellate Court after setting aside the decree of the lower Court, remanded the case and the order as to costs provided "costs will abide the result :"*

*Held—That if the result of the remand was entirely in favour of the successful party he was entitled as a matter of course to the costs in question, even if the decree of the lower Court after remand did not contain any such direction.*

*That the only materials that should be placed before the Court to determine the result of the remand are the judgment and the decree made in this case.*

This was an appeal, preferred on the 17th of May 1899, against the order of J. Pratt, Esq., District Judge of Zillah 24 Pargunnahs, dated the 4th of February

1899, affirming the order of Babu Rajendra Coomar Bose, Subordinate Judge, 2nd Court of that district, dated the 14th of October 1898.

The facts of the case appear from the judgment.

*Babu Sharat Chandru Roy Chowdhury* for the Appellant.

*Babu Upendra Nath Mitra* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

In this appeal which arises out of an application for execution of decree made by the Appellant, the only question that arises for consideration is whether the decree for costs which the Appellant seeks to enforce is capable of execution.

The decree is a decree of the Appellate Court by which a preliminary decree for partition made by the first Court was set aside and the case was remanded for trial on the merits ; and the order as to costs was in these terms, namely, that "costs will abide the result." The amount of the costs of the Appellate Court is specified in the decree, but the order being that costs will abide the result the decree necessarily left it undetermined as to which party was to pay those costs and which party was to receive them. The Courts below have held that this indefiniteness in the decree as to costs makes it incapable of execution.

The learned vakil for the Appellant contends that though the order was indefinite when first made, it has been rendered definite by the result of the remand ; and as that result has been entirely in the Appellant's favour he is entitled to recover the costs in question.

**FANI BHUSAN ROY CHOWDHURY v. BAMA SUNDARI DEBI.**

We have come to the opinion, though not without some hesitation, that this contention of the Appellant is correct. The decree of the Appellate Court, from the nature of the order made as to costs, could not have been more definite than it is. The only question is whether it was absolutely necessary for the Appellant to have the matter rendered explicitly definite when the case was disposed of by the first Court after remand. That he might have asked that Court when it disposed of the case after remand to make some express order with reference to the costs of the Appellate Court is not disputed; but what the learned vakil for the Appellant in effect urges is that though that might have been done, yet it was not absolutely necessary for the Appellant to do that, and that he would be entitled to the relief he now asks for if he could show that the result of the remand was entirely in his favour, and that he is therefore entitled as a matter of course to the costs in question. If the Appellate Court in its order for costs had left it to the discretion of the first Court to apportion the costs in such manner as it thought proper, the Appellant could not have succeeded in his present contention, because he did not ask the first Court to exercise its discretion and to apportion the costs on the result of the remand. But the Appellate Court left no such discretion to the first Court. It cannot, therefore, be said that it was absolutely necessary for the Appellant to have the matter definitely stated in the decree of the first Court. But here the question arises whether the result of the remand has been entirely in favour of the Appellant as the Appellant contends. Upon

this question the materials placed before the Court are not sufficient to enable it to arrive at any decision; and as it was the Appellant's fault that full and proper materials were not placed before the Court, we think that though he is entitled to succeed upon his contention that the decree is not incapable of execution and may ask us to remand the case the remand must be in terms as to costs. We think it right that the Appellant should pay all the costs that have been thrown away, namely, the costs in the first Court and the costs in this appeal, the lower Appellate Court not having made any order for costs. We would add that the only materials which it would be allowable to the Appellant to place before the Court in order that it may come to a decision upon the question whether the result of the remand was entirely in his favour are the judgments and decrees made in the case.

The result is that the order of the lower Appellate Court will be set aside and the case sent back to that Court in order that it may dispose of the appeal after determining the question we have indicated upon the materials just referred to. The Appellant will have an opportunity of placing those materials before the lower Appellate Court; but it will be a condition precedent to this remand taking effect that the Appellant should pay to the Respondent his costs in this and the first Court.

We assess the hearing fee in this Court at one gold mohur.

*Case remanded.*

J. N. D.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 433 of 1899.

PRINSEP, J.	}	PARMESHWAR SINGH,
HILL, J.		Petitioner,
1899.		v.
14, July.		EMPRESS, on the prosecution of W. A. Cox, Opposite Party.

*Indian Penal Code (Act XLV of 1860), secs. 143, 379—Unlawful assembly and theft—Property in crop grown on another's land on contract to pay latter a certain sum for the crop when grown—Removal of such crop by owner of land.*

*An Indigo Planter agreed with some cultivators that the former would grow rice on their land at his own expense and take the whole crop paying them Rs. 16 for each bigha. The owners of the land cut and carried away the crop so grown :*

*Held—That, on the agreement the crop remained the property of the owners of the land which the factory merely agreed to purchase, and that a removal of the crop did not constitute theft but merely a breach of contract remediable in damages.*

*As the acts did not amount to theft, which was said to be the common object of the accused, conviction for being members of an unlawful assembly cannot stand.*

This was a rule, granted on the 8th of June 1899, against an order of the Deputy Magistrate of Motihari, dated the 8th of February 1899, which order was modified on appeal by the Sessions Judge of Sarun on the 14th of April 1899.

The Petitioner, Parmeshwar Singh, owned some lands which he used for the purpose of growing Indigo for a factory. The Indigo crop having failed, the Petitioner and the party with whom he had previously agreed to grow

Indigo on his land, turned their attention to using the lands for other purposes. The first proposal made by Mr. Cox, the Indigo Planter, was that the tenants, that is to say, the accused and others, should plant rice and give the factory half the produce; and then the factory would pay the tenants the full rate as allowed for Indigo, that is, Rs. 16 per *bigha*. The tenants were unable to accept these terms as they had no seed or money for the purpose of cultivation. Thereupon they agreed that Mr. Cox would plant rice on the land, at the expense of the factory, and take the whole crop paying them Rs. 16 a *bigha*. After this Mr. Cox had the land ploughed and transplanted with paddy and had the field irrigated when it required water. Then on the 25th of November 1899 the accused Parmeshwar and another Ugar Singh with other *raiyats* came to the land and had the paddy forcibly cut and taken away by their coolies.

Upon these facts the Petitioner and Ugar Singh were prosecuted and tried by the Deputy Magistrate of Motihari who, on the 8th of February 1899, convicted the two accused of offences under secs. 143 and 379 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for one month and to pay a fine of Rs. 100, and in default to undergo rigorous imprisonment for a further period of one month.

On appeal to the Sessions Judge of Sarun, that officer, on the 14th of April 1899, set aside the conviction and sentence of Ugar Singh and affirmed the conviction of the Petitioner, Parmeshwar Singh, but altered the sentence to the term of imprisonment already undergone by him and a fine of Rs. 200.

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Thereupon the Petitioner obtained the present rule.

*Babus Dasarathi Sanyal and Lakshmi Narain Singh* for the Petitioner.

No one appeared to show cause.

The following JUDGMENT was delivered by the Court:—

We think that the Sessions Judge has misapprehended the position of the parties, and the conviction and sentence passed against the Petitioners for theft cannot consequently be sustained.

There appears to have been some agreement between the parties in regard to cultivation and the crop raised on certain lands. The lands were admittedly the lands of the accused and they had been used by the accused for the purposes of growing Indigo for a factory. The indigo crop having failed, the parties naturally turned their attention to using the lands for other purposes. Mr. Cox, the indigo planter, explains that the first proposal was that the tenants, that is to say, the accused and others, should plant rice and give the factory half the produce, and then the factory would pay the tenants the full rate as allowed for indigo, that is, Rs. 16 per *bigha*. The tenants were unable to accept these terms as they had no seed or money for the purposes of cultivation. Thereupon they agreed that Mr. Cox would plant rice on the land, at the factory expense, and take the whole crop paying them Rs. 16 a *bigha*. It seems to us that on this agreement the crop remained the property of the tenants as grown on their lands and the factory agreed paying the tenants Rs. 16 per *bigha* for it; and if it should so happen that the tenants cut and carried

away the crop, they would not be guilty of theft, though a suit would lie for damages for breach of contract. The crop, as we understand it, was the property of the accused, which the factory agreed to purchase at Rs. 16 per *bigha*.

We therefore think that the conviction and sentence must be set aside, and we direct that the fine, if paid, be refunded.

The conviction under sec. 143 will also be set aside, as the common object of the assembly was stated to have been theft, which, as has already been stated, could not, under the circumstances, have been committed.

*Rule made absolute; conviction set aside.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 698 OF 1899.

PRINSEP, J.	}	PANCHU SINGH <i>alias</i>
STANLEY, J.		PUNCHANAN SINGH,
1899.		• Petitioner,
30, November.		v.
		UMOR MAHOMED SHEIKH,
		Opposite Party.

*Code of Criminal Procedure (Act V of 1898), secs. 247, 437—Dismissal of complaint in the absence of complainant in a summons case—Acquittal of one of two accused who alone was present—Revival of proceedings by superior Magistrate, order for, against absent accused.*

*Dismissal of a case and the acquittal of one of two accused under sec. 247, C. Cr. P., on the ground of complainant's absence and purporting to be a termination of all proceedings relating to that matter, will operate also against a co-accused whose attendance could not be obtained and against whom the trial did not proceed. The order can be passed under sec. 437 setting aside*



PANCHU SINGH v. UMOR MAHOMED SHEIKH.

*the order and directing the case to be proceeded with against the absent accused.*

This was a rule, issued on the 19th of September 1899, against an order of J. N. Gupta, Esq., District Magistrate of Maldah, dated the 8th August 1899.

*Babu Tarak Nath Chakrabarty* for the Petitioner.

No one appeared to show cause.

The facts of the case, so far as they are material to this report, appear from the judgment.

The JUDGMENT OF THE COURT was as follows:—

There were two persons, Enayetullah and Panchu, accused in the case with criminal trespass and theft. The attendance of Panchu could not be obtained and the trial proceeded against Enayetullah. The complainant being absent, the Magistrate under sec. 247, C. Cr. P., dismissed the case and acquitted Enayetullah. He did not acquit Panchu because Panchu had never been before him but nevertheless he “dismissed the case” by which, we understand, he desired to terminate all proceedings relating to that matter in his Court.

The District Magistrate, however, has considered that the order under sec. 247 dismissing the case should be set aside and the case proceeded with as against Panchu. We are not aware of any authority for this order. It is not an order that could properly be passed under sec. 437, C. Cr. P. We accordingly direct that that order be set aside and that no further proceedings be taken in respect of Panchu.

*Order set aside.*

H. P. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 781 OF 1899.

PRINSEP, J.	}	THAKUR TEWARY,
STANLEY,		Petitioner,
1900.		v.
11, January.		THE QUEEN-EMPRESS,
		Opposite Party.

*Penal Code (Act XLV of 1860), sec. 211—False report by a police-officer—Criminal Procedure Code (Act V of 1898), sec. 195—Sanction.*

*Where a police-officer made a false report regarding a certain offence, which the Magistrate found, after hearing the evidence, to be false, and thereupon sanction was given for the prosecution of the police-officer under sec. 211, I. P. C. :*

*Held—That it could not be said that the police-officer instituted or caused to be instituted any criminal proceedings against any person and therefore the sanction for the prosecution of the police-officer under sec. 211, I. P. C., was bad in law.*

This was a rule, issued on the 7th of November 1899, against the order of the Sub-Divisional Magistrate of Hajipur, dated the 6th of September 1899, sanctioning the prosecution of the Petitioner under sec. 211, I. P. C.

The facts of the case appear from the judgment.

*Mr. Hill, Mr. P. L. Roy and Babu Charu Chandra Ghose* for the Petitioner.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

This is a matter relating to a sanction under sec. 195, C. Cr. P., granted in reference to a prosecution under sec. 211, I. P. C. The Petitioner is a Sub-Inspector

## THAKUR TEWARI v. THE QUEEN-EMPRESS.

of Police and the offence imputed to him consists in his making a false report regarding a certain offence which the Magistrate found, after hearing the evidence, was a false case. Now, the question we have to decide on this rule is whether, on these facts, the Sub-Inspector could be convicted under sec. 211, I. P. C. We are inclined to think that it cannot be properly said that he instituted or caused to be instituted any criminal proceedings against any person. What he did was, as found by the Magistrate, to make a coloured or false report that a certain offence investigated by him was proved and that he did so, it was said, corruptly. Whether the Petitioner should be prosecuted for any other offence under the Indian Penal Code, it is not for us, in the proceedings now before us, to say, for, no one appears against this rule and, therefore, the only question that we have to decide is what orders should be passed in respect of this particular sanction. We do not mean to say that we have not the power ourselves to grant any sanction that may seem proper under sec. 195, C. Cr. P., but it has been held on more than one occasion that, unless an application for such sanction is made—and there is no application for such sanction in this case—no such order can properly be made. We accordingly set aside the order for the prosecution under sec. 211, I. P. C., because in our opinion the facts stated do not amount to that offence. Whether they amount to any other offence, it is not for us to express any opinion *ex parte*. The rule will be made absolute.

*Rule made absolute.*

S. C. S.

## [CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 4 OF 1899.

PRINSEP, J.  
• STANLEY, J.  
1900.  
22, January.

DEPUTY LEGAL  
REMEMBRANCER ON  
behalf of the Govern-  
ment of Bengal,  
Appellant,  
v.  
SENYAT ALI and AMJAD  
ALI, Respondents.

*Bengal Municipal Act\* (III of 1884, B. C.),  
secs. 155, 156—Ferry—Unlicensed boat—Two-  
mile limit—Wrongful restraint—Penal Code  
(Act XLV of 1860), sec. 341.*

*Under sec. 155 of the Bengal Municipal  
Act the farmer of a ferry has a monopoly  
to a distance of two miles from his ferry  
but has no right to interfere with a boat  
plying between one point beyond the two-  
mile limit and another point within the  
said limit.*

*A ferryman has, under no circumstances,  
authority to demand tolls from persons  
who are merely passengers in an unlicensed*

\* SEC. 152.—No person shall be liable to pay any toll for crossing any river or stream at or near a Municipal ferry, unless he avails himself of the means provided by the Commissioners for crossing such river or stream.

SEC. 155.—No person shall keep a ferry-boat for the purpose of plying for hire within a distance of two miles above or below any Municipal ferry without the previous sanction, of the Commissioners, if he plies within the limits of the Municipality, of the Magistrate of the District, if without such limits, or of the Magistrate of the District and the Commissioners, if one of the two banks between which he plies is within, and the other bank is without, such limits.

This section shall not apply to any private ferry which may be in existence at the commencement of this Act.

SEC. 156.—Whoever keeps a ferry-boat contrary to the provisions of the last preceding section, shall be liable to a fine not exceeding fifty rupees, &c., &c.

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*boat ; the remedy lies under sec. 156 against the person who keeps the ferry boat without license.*

This was an appeal, preferred on the 27th of November 1899, against the order of the District Magistrate of Chittagong, dated the 10th August 1899, setting aside the order of the Assistant Magistrate of Chittagong, dated the 17th of July 1899.

The facts of the case appear from the judgment.

*The Deputy Legal Remembrancer (Mr. Gordon Leith) for the Crown.*

The facts of the case material to this report are shortly these :—Certain persons were travelling by *sampan* in a *khal*, which flows into the Kurnfuli river. On that river there is a Municipal ferry plying in the neighbourhood of that *khal*. Complaint was made to the Magistrate by some passengers in a boat going through that *khal* and after entering the Kurnfuli river crossing over to the opposite side, that they had been stopped by the servants of the ferrymen and been made to pay toll under the Bengal Municipal Act as if they had crossed that river in a Municipal ferry-boat.

This case was tried by the Assistant Magistrate of Chittagong, and a question was raised as to whether the terms of sec. 155 of the Bengal Municipal Act (III of 1884, B. C.) in regard to the limits of the ferry would apply to passengers going from a distance of more than two miles through the *khal* into the river so as to convey them to the opposite bank. For the defence it was contended that the passengers had entered the boat within two miles from the mouth of the *khal*, and were, therefore, within the terms of sec. 155 of the Act, and that the servants

of the Municipal ferrymen were justified in doing what they did and were not guilty of any offence. The Assistant Magistrate, however, held on the evidence that the passengers had entered the boat beyond the limits of two miles, that therefore they would not come within the terms of the Municipal Act and consequently the demanding and obtaining payment of tolls from them by the servants of the Municipal ferrymen and their detention until such payments were made constituted the offence of wrongful restraint under sec. 341 of the Penal Code and he convicted the servants of that offence and sentenced them to pay a fine.

On appeal the District Magistrate held that he was bound to follow a judgment in a precisely similar case, delivered by the Sessions Judge in which that officer had held that the crossing of the bar of the mouth of the *khal* so as to enter the Kurnfuli river and to land passengers on the opposite bank constituted a breach of the Municipal Act. He accordingly set aside the conviction and sentence.

Thereupon this appeal was preferred by the Local Government against the order of acquittal passed by the District Magistrate.

The JUDGMENT OF THE COURT was as follows :—

The matters raised for our determination in this appeal, relate to the construction of the sections regarding Municipal ferries contained in the Bengal Municipal Act. Certain persons were travelling by *sampan* in a *khal* which flows into the Kurnfuli river. On that river, there is a Municipal ferry plying in the neighbourhood of that *khal*. Complaint was made to the

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Magistrate by some passengers in a boat going through that *khal* and, after entering the Kurnfuli river, landing them on the opposite side, that they had been stopped by the servants of the ferrymen and been made to pay tolls under the Municipal Act as if they had crossed that river in a Municipal ferry-boat.

There was some argument before the Assistant Magistrate, who held the trial, whether the terms of sec. 155 of the Municipal Act in regard to the limits of the ferry would apply to passengers going from a distance of more than two miles through the *khal* into the river so as to convey them to the opposite bank. For the defence, it was contended that the passengers had entered that boat within two miles from the mouth of the *khal* and were, therefore, within the terms of sec. 155. The Assistant Magistrate, however, held on the evidence that the passengers had entered the boat beyond the limits of two miles, that, therefore, they would not come within the terms of the Municipal Act and that consequently the demanding and obtaining payment of tolls from them by the servants of the Municipal ferrymen and their detention until such payments were made constituted the offence of wrongful restraint of which he accordingly convicted the servants and sentenced them to a fine.

On appeal, the District Magistrate held that he was bound to follow a judgment in a precisely similar case delivered by the Sessions Judge in which that officer had held that the crossing of the bar of the mouth of the *khal* so as to enter the Kurnfuli river and to land passengers on the opposite bank constituted a breach of the Municipal Act. He accordingly set aside the conviction and sentence.

An appeal has been made by the Local Government against the order of acquittal. Now, in regard to the merits of the case, we may at once say that the ferrymen under no circumstances had authority to demand tolls from these persons who were merely passengers in an unlicensed boat. The remedy is provided by sec. 156 of the Municipal Act against the person who keeps a ferry-boat without license plying within the prescribed limits. The conviction and sentence were therefore proper and must be restored.

But as a part of this case we have been asked to consider whether the Magistrate is right in adopting as a matter of law the precedent of a judgment of the Sessions Judge in a former case, that is to say, whether the mere crossing the bar of the *khal* leading into the limits of the Municipal ferry would constitute a breach of the Act. We are of opinion that the view, expressed by the learned Sessions Judge, is erroneous. The crossing of the bar of a stream so as to enter another stream would constitute no breach of secs. 155 and 156. A ferry, as we understand the meaning of that expression in the Bengal Municipal Act, means the exclusive right to carry passengers across a stream from one bank to the other on payment of certain prescribed tolls, and the object of sec. 155 appears to us to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. On both grounds therefore the order of the District Magistrate on appeal setting aside the conviction and sentence is bad. The order of the Assistant Magistrate is restored.

S, C. S.

*Appeal allowed.*

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. 48 OF 1900.

PRINSEP, J.	}	ISWAR CHUNDER RAUT,
STANLEY, J.		Petitioner,
1900.		v.
20, February.		KALI KUMAR DASS,
		Opposite Party.

*Criminal Procedure Code (Act V of 1898),  
secs. 256, 257—Cross-examination, right of.*

*When, after the charge was drawn, the accused claimed the right to have the medical officer re-summoned for the purpose of cross-examination, and the Magistrate refused to allow process except on payment of fees for his attendance, and the Magistrate in his explanation to the High Court said that the accused had the opportunity to cross-examine the witness immediately after his examination-in-chief was concluded but that he had declined to do so :*

*Held—That under the terms of sec. 256, Cr. P. C., the accused was entitled to claim this as a matter of right and that sec. 257, Cr. P. C., did not apply to the present case.*

This was a rule, issued on the 18th of January 1900, against the order of an Hony. Magistrate of Naraingunge, dated the 14th of December 1899, which order was on appeal affirmed by the District Magistrate of Dacca on the 29th of December 1899.

*Mr. P. L. Roy and Babu Grija Prosunno Roy Chaudhuri* for the Petitioner.

THE JUDGMENT OF THE COURT was as follows :—

The rule must be made absolute. After the charge was drawn, the Petitioner who was the accused in the case claimed the right to have the medical officer resummoned for the purposes of cross-examination. The Magistrate re-

fused to allow process to the medical officer except on payment of fees for his attendance and, in the explanation which he has since submitted in answer to the rule, he states that the accused had an opportunity to cross-examine the medical officer immediately after his examination-in-chief was concluded, but that he declined to do so. The Magistrate, therefore, thinks that the accused was not entitled to a process for the purpose of obtaining the cross-examination.

Under the terms of sec. 256, C. Cr. P., the Petitioner was entitled to claim this as a matter of right. It is only under sec. 257, which does not apply to the present case, that an order such as the Magistrate has passed could have been made. The conviction and sentence are, therefore, set aside, and the Magistrate is directed to allow process to be issued for the attendance of the medical officer for the purposes of cross-examination, and after such cross-examination he should allow the accused to summon such witnesses as he may desire to have examined for his defence and then proceed to decide the case on the evidence on the record.

S. C. S.

*Rule made absolute.***[CRIMINAL REVISIONAL JURISDICTION.]**

REV. No. 102 OF 1900.

PRINSEP, J.	}	In the matter of MOULI
STANLEY, J.		DURZI, Complainant,
1900.		Petitioner,
20, February.		v.
		NAURANGI LALL, Ac-
		cused, Opposite
		Party.

*Criminal Procedure Code (Act V of 1898),  
secs. 157, 159, 476—Complaint—Police re-  
port—Judicial proceeding—Indian Penal Code  
(Act XLV of 1860), sec. 211.*

**MOULI DUREI v. NAURANGI LALL.**

*An enquiry can be made under sec. 159, C. Cr. P., only on a report submitted within the terms of sec. 157.*

*Where the Petitioner laid information to the Police charging a certain person with criminal trespass in his house to commit a particular offence and the Police reported that they did not believe the object was to commit the offence stated, but that they were not disinclined to believe the charge of trespass, whereupon the Magistrate called upon the Petitioner to prove his case, and the latter appeared and declined to take any further proceedings. The Magistrate then took evidence and directed the prosecution of the Petitioner under sec. 211, I. P. C.:*

*Held—That there was no judicial proceeding before the Magistrate and the order under sec. 476, C. Cr. P., directing the prosecution of the Petitioner was bad.*

*That sec. 159, C. Cr. P., had no application to the present case.*

This was a rule, issued on the 31st January 1900, against the order of the Deputy Magistrate of Madhipura, dated the 25th of November 1899, an application for a reference of which order to the High Court for revision was rejected by the Sessions Judge of Bhagalpore on the 3rd January 1900.

The facts of the case appear from the judgment.

*Mr. P. L. Roy and Babu Dasarathi Sanyal* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner laid information to the Police charging a certain person with criminal trespass in his house with intent

to have improper intercourse with one of the female inmates thereof. The Police reported that they did not believe the object stated but that they were not disinclined to believe the charge of trespass. The Magistrate thereupon called upon the complainant to prove his case. The complainant appeared and desired to take no further proceedings, as, he said, that his witnesses would not give evidence on his behalf. The Magistrate has nevertheless persisted in taking evidence and, in the end, he has directed the prosecution of the complainant under sec. 211, I. P. C., for making a false complaint.

On an application to us, a rule has been granted because *prima facie* it appeared that an order should not have been passed under sec. 476, C. Cr. P., inasmuch as there was no judicial proceeding then before the Magistrate. The Magistrate in his explanation points out that his proceedings were judicial and were taken under sec. 159, C. Cr. P. We have no doubt that sec. 159 does not apply to the present case. An enquiry can be made under sec. 159 only on a report submitted within the terms of sec. 157, and the police-report made in this matter is not of that description. We are, therefore, of opinion that as there was no judicial proceeding before the Magistrate, the order under sec. 476 directing the prosecution of the Petitioner was bad. We have taken into consideration the facts relating to this matter and we are of opinion that no further proceedings should be taken, the order under sec. 476 being set aside.

*Rule made absolute.*

S. C. S.

MUSST. MONIJAN BIBEE v. KHADEM HOSSEIN.

cessor. That sec. 539, C. P. C., was a special provision based on Sir Samuel Romilly's Act, the only difference being that under the latter the procedure was summary and that there was no qualification as to who the persons were that were authorised to file the petition therein contemplated. That sec. 539, C. P. C., was introduced for the purpose of safeguarding a trustee against unnecessary suits by a member of the public. He cited *Lakshmandas Parashram v. Ganpatrav Krishna* (2), *Kazi Hassan v. Sagun Balakrishna* (3), *Vishvanath Gobind Dashmane v. Rmabhat* (4), *Miya Valiulla v. Sayed Bava* (5) and *Wajid Ali v. Dinat-ullah* (6), and said that the true ratio of the section had been pointed out by Banerjee, J., in *Sajedur Raja v. Gour Mohun Das* (1) at p. 425.

Mr. Chatterji, in reply, cited *Jan Ali v. Ram Nath Mungdal* (7) and *Neti Rama v. Venkatacharulu* (8) and drew attention to para. 24 of the plaint submitting that the allegations contained in it brought this case within the decisions cited by him. He further submitted that the Bombay decisions went far beyond the plain meaning of the section.

The JUDGMENT OF THE COURT was as follows :—

BODILLY, J.—The case must proceed in spite of the preliminary objection. However I do not think that the point is entirely free from doubt, but I must

follow, in my opinion, the principle laid down by a large number of cases in the Bombay and the Allahabad Courts which have been cited to me and which deal with this section. The section is worded, as I said during the argument, in a very obscure manner, but it means, in my opinion, that there must be some dispute in existence of such a public nature that the intervention of the Advocate-General is necessary to decide if and by whom a suit should be brought to establish public rights.

In this regard I follow the words of Mr. Justice Banerjee, reported in *Sajedur Raja Chowdhuri v. Gour Mohan Das* (1), which are as follows :—“This condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. Where this condition is fulfilled, and the risk of harassing suits being brought against trustees is thus guarded against, there is no reason why suits brought under the section should be restricted in any other way.”

This dispute is merely one between two entirely private parties, each claiming to exercise rights, as matwallis over wakf property and it is not a dispute of such a public nature as to bring it, in my opinion, within sec. 539 of the Civil Procedure Code, making it necessary that the sanction of the Advocate-General should be obtained. For these reasons I decide that the preliminary objection fails.

Mr. J. N. Chatterji, Attorney for the Plaintiff.

Mr. Satyendra Chunder Mitter, Attorney for the Defendants.

A. N. C.

(1) I. L. R. 24 Cal. 418 at p. 425 (1897).

(1) I. L. R. 24 Cal. 418, 425 (1897).

(2) I. L. R. 8 Bom. 365 (1884).

(3) I. L. R. 24 Bom. 170 (1899).

(4) I. L. R. 15 Bom. 148 (1890).

(5) I. L. R. 22 Bom. 496 (1896).

(6) I. L. R. 5 All. 31 (1886).

(7) I. L. R. 8 Cal. 32 (1881).

(8) I. L. R. 26 Mad. 450 (1903).

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 1750 of 1901.

BRETT, J. HARA SUNDAR MAJUM-  
WOODROFFE, J. DAR, Defendant No. 1,  
1904. Appellant,  
Heard, 29, July. v.  
Judgment, BASUNTA KUMAR ROY  
5, August. & ors., Respondents. .

*Debutter—Words of dedication—Second appeal—Construction of document—Grounds.*

*Where a document of title, and which was the foundation of the whole of the Plaintiff's claim in the suit, was misconstrued by the lower Appellate Court :*

*Held—That it was open to the High Court in second appeal to interfere with the findings of the lower Appellate Court arrived at on a misinterpretation of the meaning of the passages of the document.*

**NAWBUT SINGH v. CHUTTER DHAREE SINGH (1) referred to.**

*Where in a deed of gift and dedication the following passage occurred: "The right and power of gift are yours. I and my heirs shall have no liability, claim or right:"*

*Held—That there was no absolute dedication of the property to the idol so as to constitute the property covered by the same, debutter and inalienable.*

This was an appeal preferred on the 22nd August 1901, against the decree of F. MacBlaine, Esq., District Judge of Zillah Pubna and Bogra, dated the 11th of June 1901, reversing that of Babu Mohendra Nath Mitter, Additional Subordinate Judge of that district, dated the 16th of July 1900.

The Plaintiff alleged the property in

(1) 19 W. R. 222 (1873).

suit to be *debutter* and inalienable. The Defendant No. 2 had sold his share of the property to the Defendant No. 1 in Assin 1301. Amongst other reliefs Plaintiff asked to have the sale set aside. The main question which arose in the case was whether the property was *debutter* and inalienable. The facts of the case clearly appear from the judgment. The question rested upon the construction of the *danpatra* executed by one, Krishna Mohan Sarma Roy, in respect of the property in dispute in favour of his mother Siddessurree Debya and the Wills of Siddessurree Debya, Alokmoni Debya and Annapura Debya.

The material portion of the *danpatra*, executed by Krishna Mohan Sarma Roy, was as follows :—

To the feet of Sreejuta Mata Siddessari Debya Thakurain of noble desires and worthy of supreme adoration.

This *danarpan-patra* is executed by Krishna Mohan Sarma Roy in the year 1246 B. S., (twelve hundred forty-six) to the effect following :— That my purchased taluka 3 anna 15 gundas *hissya* . . . . . all these properties are in my possession and enjoyment ; and I dedicate all these properties for the *sheba* (worship) of the idol Lakshmi Narain Chakra Bigrha installed by you, estimating the value thereof at Rs. 50. From to-day's date you do own and hold all the properties mentioned in this *danpatra* and do continue to perform the *sheba* (worship) of the idol from the proceeds thereof after paying the *sudder malguzari*. The right and power of gift and sale are yours. I and my heirs shall have no liability, claim and right. If at any time any body should advance any claim, the same shall be null and void. To the above effect I execute the *danarpan patra*. Finis ; dated the 25th Kartic of the year mentioned above.

The material portion of the Will of Siddessurree was as follows :—

To the worthy of supreme bliss.

Srimati Annapura Debya, Srimati Bhagirathi Debya and Srimati Alokmoni Debya.



## HARA SUNDAR MAJUMDAR v. BASUNTA KUMAR ROY.

A Will is executed in the year 1255 B. S., to the effect following :—

That a 7½ annas share of Kismut Pengna together with Chak Nalkola . . . . . I have been holding possession thereof . . . . . Beside these a 3 annas 15 gundas share of Kismut Pasbagsewa and a 12 annas share of Kismut Chak Pengna . . . . . *jama* belonged to my son Sriman Krishna Mohan Roy and he has endowed the same under a deed of gift for the services of the deity installed by me while holding possession of all these as also of my purchased properties, I have endowed these properties as *devottar* for the services of the said deity and with the profits thereof I have been performing the services. I am now in the last stage of my life, and there is no certainty about my existence ; you are my three daughters-in-law and as such, while I am still alive, I appoint you *shebait*s for the performance of the services of the said deity in proportion to the shares of all the endowed properties divided amongst you, you hold possession of all these properties including the *chakran* land according to the shares specified below, get your names registered in the Collectorate and the zemindar's *serisht*a as may be necessary, pay the *sudder* rent (*mulguzari*) and perform the services, and continue to enjoy them according to those shares. My sons, sons' sons shall have no concern in these properties. Finis.

*Paragraph 2.*—I fix the shares in this way, you Annapurna Debi shall take a 6 annas share, you Bhagirathi Debi a 5 annas share, and you Alokmoni Debi (torn) 5 annas share of all the properties described above, you shall hold possession in proportion to these shares and continue to perform the services. Besides these you shall hold in equal shares my own *khanabari* (homestead) *bari* i.e., site of a tank purchased by me from Joy Nath Chakravati, the *bari* obtained in exchange from Jharu Biswas, and the *bari* of the 8 annas 15 gundas share on the (illegible) east of the *khanabari*. You shall be competent for the services of the deity to grant settlement of any of all these properties otherwise you shall have no right of alienation by gift or sale you shall not be competent to

appoint any one as *shebait*, except your own heirs. Finis.

*Paragraph 3.*—You shall pay in proportion to the aforesaid shares, the *sudder jama* of Rs. 15-6 annas 13 gundas 1 kara 1 krant (illegible) Company's Rs. 16-7 annas in respect of (illegible) share of Kismut Pengna and Chak Nalkola . . . . . None of you shall act in contravention of the provisions of this Will, and if you do, it shall not be rejected. If it becomes necessary to have recourse to a loan for the performance of the *sheva* (services) of the deity or for defraying the daily and occasional expenses, you shall do so in proportion to the aforesaid shares, and manage the same. None of you shall be competent to give away or sell the services of the deity or the annual (illegible) *lowajima* as per schedule given below without the consent of the other, and even if you do so, it shall be null and void, to the above effect I execute this Will. Finis, dated the 9th Kartic, year as above.

The Will of Alokmoni Debya was as follows :—  
To

The worthy of supreme bliss Srimutti Gour Sundari *alias* Parashmoni Debya, wife of Kashi Mohan Rai and mother of Raj Kumar, Nobo Kumar and Basanta Kumar Rai.

This Will (is executed) in the year 1270, twelve hundred and seventy, to the effect following : I am in the last stage of my life ; besides, I have been so much prostrated with cholera, that my life has been totally despaired of. It is now necessary for me, now that I am alive and conscious, to lay down rules regarding the management of my moveable and immoveable properties, the performance of the annual ceremonies, and for the carrying on in a satisfactory manner, of the *sheba* worship of the idol Lakshmi Narayan. Neither I, nor you shall be competent to do any act in contravention of the rules which are laid down below by this Will. If in future, I or my heirs make any claim or demand in respect thereof the same shall be rejected. Finis, year as above, dated the 6th of Falgun.

*Paragraph 1.*—You are my daughter-in-law. I

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have been much pleased with your nursing and attendance. A 5 annas share obtained under the Will dated the 9th Kartic of the year 1255 executed by my mother-in-law the late Siddheswari Debya of the *debottar* properties of the idol Lakshmi Narain Bagraha Thakur i.e., of the immoveable properties specified below, the same being treated as 16 annas, is my *shebaiti* interest I am owning and holding the same. The same together with other moveable properties covered by the said Will as well as the *stridhan* I possess are entirely made over by me to you by this Will, and I do hereby agree that after my death, you will own and hold all the properties specified below and by getting your name published in the *sudder* and *moffasil* and by paying the rents and (revenue ?) in respect of the said *debottar* mehals, according to your own share you with your sons, sons' sons and other heirs in succession, will continue to enjoy and appropriate the same, after performing with the profits, the *sheba* worship of the idol and the annual ceremonies, etc., according to your *pali* (turn). No right of alienation by gift or sale is conferred. Except making over the said properties to your heirs, you shall not be competent to appoint any person as *shebait* in respect thereof or to make any other person owner thereof in any way. You will be competent to carry out the survey and settlement of rents in respect of the *debottar* lands, to bring the same under cultivation and to let out the same; to cancel and to confirm (the tenures) recorded as *chakrans* and to have a partition by metes and bounds effected with the co-sharers in respect of the *debottar* lands. You shall not be competent to do any wasteful act. If you do so it shall be void. Finis.

*Paragraph 2.*—A 5 annas 6 gundas 2 cowris 2 krants share of the purchased tank on account of Raj Krishna Sarkar and the *khanabari* including the tank which are my *nij* property together with the buildings, the articles of wood, iron, brass, bell metal, copper, gold and silver, and those of wool and silk which I possess, are given to you by me. You will, in the aforesaid manner, hold possession of all the aforesaid properties, nobody shall have any claim or demand or interest therein. Finis.

The material portion of the Will of Annapurna Debya was as follows :—

In the name of Gour Sundari Debya, wife of Kashi Mohan Rai.

This Will is executed in the year 1272 B. S., to the effect following :—

. . . . . A 6 annas share of all the moveable and immoveable properties which are the *debottar* properties of the idol Lakshmi Narain Bagraha Thakur, specified at the foot (the Will) executed on the 9th of Kartic of the year 1255 by my mother-in-law the late Siddheswari Debya is my *shebaiti* property. I have been owning and holding the same. I therefore of my own accord, and in my proper state of body and mind make over to you, by this Will, a moiety of the said share i.e., a 3 annas share. After my death, you will, in my own title be entitled to and hold possession of a 3 annas share being a moiety of my *nij* 6 annas share of all the properties specified below. You will, upon getting your name registered in the *sudder* and *moffasil* according to (your) share, continue to enjoy and appropriate the profits, by paying the rent (or revenue) in proportion to your share, and by carrying out according to your turn, the *sheba* worship and the annual ceremonies etc., of the idol Lakshmi Narayan. You shall not be competent to appoint any person as *shebait* in respect of the said properties, to make any person owner thereof in any way or to give away or to sell the same, to any person, other than your heirs. You will have the absolute right to carry on the measurement, and the assessment of rent in respect of the *debottar* lands and to let out the same and to bring the same under cultivation. You will be competent to annul, confirm and alter the *chakran* and other (tenures) which are recorded, as appertaining thereto. You will be competent to have a partition by metes and bounds effected with the co-sharers in respect of the *debottar* mehal. Neither I nor you shall be competent to do any act in contravention of the terms of this Will. If in future I or any of my heirs make any claim or demand in respect thereof, it shall be void. Finis, dated the 15th Sraavan.

Dr. Rash Behari Ghose, Babu Golap Chandra Sarkar and Babu Mohini Mohan Chuckerbutty for the Appellant.

Babu Shyama Prosunna Majumdar for the Respondents.

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The JUDGMENT OF THE COURT was as follows :—

This suit was brought by the Plaintiff (Respondent) to set aside the sale of a share in certain property which the Defendant No. 2 had sold to Defendant No. 1 in Aswin 1301. The Plaintiff's allegation was that the property sold was a share in *debuttar* property which was inalienable, and that therefore the sale was invalid and conveyed no rights to the purchaser. He accordingly prayed for a decree declaring the land to be *debuttar* and inalienable, that the deed of sale was invalid and of no effect, and that the Plaintiff was entitled as *shebait* to recover possession of the property in suit. There was a further prayer that an order which had been passed for the registration of the name of Defendant No. 1 as the owner of the properties should be set aside.

The Defendant No. 1, who contested the suit, denied that the property sold was *debuttar* property or that there had ever been a valid dedication of the property as such. Other minor points in defence were taken, but the main question for decision in the case has all along been whether the property in suit was a share in *debuttar* property, and whether there had ever been a valid dedication of the property.

The Plaintiff's case was that in 1246 Krishna Mohan Sarma Roy executed a *danarpan-patra* or deed of gift and dedication by which he dedicated various properties set out therein, including lands held under various titles as well as a *lakhiraj bari* and *jote*, to the worship of the family idol Lakshmi Narayana. The deed was executed in favour of his

mother Siddessuree Debya Thakurain, and after reciting that the properties had been dedicated to the idol it proceeds to state "From to-day's date you do own and hold all the properties mentioned in the *danpatra* and do continue to perform the worship of the idol from the proceeds thereof after paying the *sadar malgajari*. The right and power of gift and sale are yours. I and my heirs shall have no liability, claim and right." (This, it is to be observed, is the translation of the document by the translator of this Court).

In the year 1255 B. S., Siddessuree Debya executed a Will in which after reciting that she had been in possession of certain properties in her own right as well as of the properties dedicated to the idol by her son Krishna Mohan Roy, she goes on to say : "I have endowed all the properties as *debuttar* for the services of the said deity and with the proceeds thereof I have been performing the services." She then appoints her three daughters as *shebaits* of the idol for the performance of the services of the idol in proportion to the shares of all the properties divided among you," and directs that they will get their names registered in the Collectorate, pay the rent, perform the services, and continue to enjoy the properties according to those shares." In paragraph 2 she fixes the shares of her daughters as follows : To Annapurna Debi 6 annas share, to Bhagirathi Debi 5 annas share, and to Alokhamoni Debi 5 annas share. The document then provides : "You shall be competent for the services of the deity to grant settlement of any of all these properties, otherwise you shall have no

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right of alienation by gift or sale. You shall not be competent to appoint any one as *shebait* except your own heirs." And in the 4th paragraph the following passage occurs: "If it becomes necessary to have recourse to a loan for the purpose of the *sheba* (services) of the deity or for defraying the daily and occasional expenses you shall do so in proportion to the aforesaid shares and manage the same." A list of the miscellaneous properties is attached to the Will. This includes a large '*huka*' and a *napa* (boat) with appurtenances. These are strange articles with which to endow the *shebait*s of an idol. As regards these articles in this list too there is the proviso, "If God forbid, any of these articles are required to be sold they shall be taken in proportion to the above shares."

The three daughters of Siddessuree afterwards by different Wills left their shares, in defiance of the provisions of Siddessuree's Will, to various persons, none of whom were in fact their heirs at law. The final result of the various transfers is however that an eight annas share of the properties has come to Plaintiff and his two brothers (Defendants Nos. 2 and 3) the male descendants of Alokhamoni, one of the daughters, and the other eight annas share has passed to Defendants Nos. 4 and 5, the male descendants of Bhagirathi, another daughter. This, it is to be remarked, is the way in which the properties would have passed by inheritance, supposing them to have remained purely secular. It is not the way in which they would have passed if the provisions of the Will of Siddessuree had been followed.

The Subordinate Judge before whom the case was tried held that there was no absolute dedication of the property to the idol in the *danputra* executed by Krishna Mohan, or in the Will executed by Siddessuree. The former document gave to Siddessuree power to sell or make a gift of the property. The Will divided the properties into three shares and distributed them among the three daughters of the testatrix as *shebait*s. He further found that in the receipts given to the tenants the properties were never described as *debuttar* till 1290 (1887) and the names of Gourhari (to whom the eight annas share now in possession of Plaintiff and Defendants Nos. 2 and 3 originally passed under the Wills of Alokhamoni and Annapurna) and afterwards the names of Defendants Nos. 4 and 5 were registered as "proprietors" and not as *shebait*s. In the Revenue Challans and the Road-cess returns the alleged *shebait*s are described as proprietors. He further held that "there was no reliable evidence that the whole of the profits were devoted to the worship of (the idol) 'Lakhi Narayan.'" He accordingly came to the conclusion that the property in suit was not *debuttar* property at all, and that the dedication was a mere pretence, and has had recourse to as the family was in debt and engaged in litigation at the time of the execution of the *danputra*.

He further was of opinion that as the widow of Defendant No. 2 was alive the Plaintiff had not sufficiently proved his title to bring the suit.

He accordingly dismissed the suit with costs.

The judgment and decree of the Sub-

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ordinate Judge has been set aside by the District Judge on appeal and the suit of the Plaintiff has been decreed. Defendant No. 1 has appealed to this Court.

The judgment of the District Judge is not easy to understand. The commencement certainly conveys the impression that the inclination of the Judge was at first to support the decision of the Sub-Judge, for he arrives at the conclusion that Krishna Mohan "was not free from pecuniary embarrassment at the time of executing the *danpatra*." He seems however on a further examination of the *danpatra* to have discovered the names of the idols (*sic*) Lakhi Narayan on the margin of the document which he had not noticed at first and then to have entirely changed his view of the case. Later on in his judgment he arrives at a conclusion contrary to that previously stated, and remarks: "I do not find any evidence to warrant the statement that the family was involved in debt and litigation at the time of the *danpatra*."

He next proceeds to interpret the meaning of the *danpatra* and the Will executed by Siddessuree and adopting a translation of the Bengali words used directly contrary to that of the Subordinate Judge he arrived at the conclusion that there was an absolute dedication of the property to the service of the idol. He has however wrongly interpreted Lakhi Narayan to mean two idols whereas it clearly means one only. He accordingly held that the property in dispute was *debutter* and as such inalienable, and that the sale by Defendant No. 2 to Defendant No. 1 transferred no right in the property to the latter. He there-

fore gave the Plaintiff a decree for the full relief claimed.

For the Appellant it has been urged that the learned District Judge has mistranslated and misunderstood the passages in the *dinarpan-patra* executed by Krishna Mohan Sarma and the Will executed by Siddessuree Dehya, that the Subordinate Judge translated them aright, that there was not an absolute dedication of the property to the idol, that the dedication was a mere pretence to save the property from being sold in satisfaction of the family debts, and that the subsequent conduct of the parties and the dispositions under the Wills executed by the three daughters of Siddessuree leave no doubt that the property was in fact to pass to the descendants of Krishna Mohan and Siddessuree in the manner in which it would have passed under the Hindu law if there had been no dedication.

On behalf of the Respondent it has been urged on the authority of the case of *Nowbat Singh v. Chutter Dhare Singh* (1), that as the District Judge has interpreted the meaning of passages in the document, none of which contain technical words or phrases as to the meaning of which there could be any doubt, it is not open to this Court in second appeal to interfere with his finding so on the point. We are of opinion that the contention is unsound and that there is nothing in the ruling referred to which supports it. In that case it was held that this Court would not interfere in second appeal because of a mistake as to the meaning of some portion of the evidence which was in writing if it

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was connected with other evidence affecting its construction. The Judges, it may be observed, in their judgment in that suit are careful to say, "The misconstruction of a document which is the foundation of a suit which is in the nature of a contract or a document of title is allowed to be a ground for special appeal." The documents, which it is alleged on behalf of the Appellants that the District Judge has misconstrued, are documents of title and are the foundation of the whole of the Plaintiff's claim in the suit. The passages as to which there is dispute are the most important for the construction of the documents. The objection cannot therefore be entertained.

Now the passage as to which there is dispute in the *danarpan-patra* is as follows: "*Danbikrīr shatyadhikār āpandār āmār o āmār worisonēr kono dāi dāwā o shatyā thakilo nā.*" The learned Subordinate Judge and the translator of this Court have translated it as follows:—"The right and power of gift are yours. I and my heirs shall have no liability, claim or right." There is as usual no punctuation in the passage in Bengali nor in fact in any part of the document. The District Judge, owing apparently to the absence of any punctuation, appears to have translated it as follows:—"In the right and power of gift, you, I and my heirs shall have no liability, claim or right." The learned pleader for the Respondent does not go so far as to say that the translation of the District Judge is right but contends that this Court is bound by it. We have no hesitation in holding that the translation is wrong and that we are not bound by it.

The juxtaposition of the words supports the meaning given to them by the Subordinate Judge, and the passage as translated by the District Judge is hardly intelligible. We have no doubt then that under the *danarpan-patra*, power of alienation was expressly given to Siddessurā Debya. There was not therefore an absolute dedication of the property to the idol, so as to constitute the property covered by the same *debuttar* and inalienable.

The District Judge has held that the Subordinate Judge has erred in translating "Nitya Noimittik" in contradistinction to "Ishwar Sheba" in the Will of Siddessurā as referring to family expenses and has held that it must be taken to mean the daily expenses of the idol as opposed to the expenses at the time of the great festivals. The Subordinate Judge's construction appears however to have been based not on one isolated passage in which the two expressions occur, but on the Will as a whole. In that document the testator first divides all the properties into 3 shares, which, we may observe, is inconsistent with their nature as *debuttar* property, and then provides that after paying the rent and the expenses of the idol the daughters are to enjoy the properties according to their shares. This provision for enjoyment supports the view that the occasional expenses referred to in the later passages were family expenses. We are unable therefore to agree with the District Judge that the Subordinate Judge was in error in his translation of the words referred to in the document. Further we may add that in our opinion the whole terms of the Will, which

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bequeathed in different shares to the daughters of the testator all the property, immoveable and moveable, of which she died possessed, and the subsequent dispositions of the properties by Will by her daughters, are entirely inconsistent with the view that there was an absolute dedication of the properties as *debttar*.

As we hold that the findings of the District Judge cannot be supported as regards the foundation of the title on which the Plaintiff has based his suit we are unable to confirm his judgment and decree. We accordingly set the judgment and decree of the District Judge and restore those of the Subordinate Judge, and decree the appeal with costs.

S. C. S.

Appeal allowed.

**PRIVY COUNCIL.**

[APPEAL FROM BENGAL.]

LORD DAVEY.

LORD ROBERTSON.

SIR ARTHUR WILSON.

1904.

26, July

DEBI PERSHAD  
CHOWDHRY and  
others, Plaintiffs,  
Appellants,

v.

RANI RADHA  
CHOWDHRAIN (since  
deceased) and  
others, Defendants,  
Respondents.

*Pedigree, proof of—Probability of claim—Evidence of relatives, value of—Hindu practice of teaching boys the names of ancestors—Relationship no ground for disbelieving witness—Ordinary caution only to be exercised—Evidence of person who assists in the case, how estimated—Non-acceptance of specific statements, if ground for disbelieving witness generally.*

*D sought to prove a pedigree which would establish his title as reversioner to a Hindu widow's estate. In it he represented his grandfather as the great-grandson of an agnatic relation of the last male holder. D and his family were well-known and well-settled in the district and D's grandfather in 1812 and his father in 1863 and 1885 publicly asserted their position as agnates in Court and were not contradicted. These circumstances were pointed out as showing that D was not a claimant who dropped from the skies and the pedigree put forward by him could not be treated as in any high degree improbable, though D was still bound to prove it.*

*To prove the pedigree, D adduced the evidence of some of his own kinsfolk which, the Judicial Committee held, were admissible in quality and derived special weight from the fact that Hindu boys are taught the names of their paternal and maternal ancestors up to the seventh (or even higher) degree as a matter of necessity. Such evidence, it was pointed out, could come only from D's relatives and would be of no value if it came from strangers, and so should not be treated with more than the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted.*

*Evidence of certain other witnesses, who were disbelieved because one of them was a relative of D and was assisting him in the case and the others were connected with this person by blood or service, was held to have been wrongly dealt with. It was shown that this person who had been found by the Court of first instance to be a very respectable zemindar of the district was conceivably supporting his*

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*kinsman because he knew his cause to be just.*

*A witness's testimony should not be held to be generally untrustworthy where owing to caution on the part of the Court or inaccuracy on the part of the witness some specific statements made by him have not been accepted.*

This is an appeal from a judgment and decree of a Division Bench composed of Rampini and Wilkins, JJ., of the High Court of Judicature at Fort William in Bengal, dated the 13th February, 1900, which reversed a judgment and decree of the first Subordinate Judge of Bhagulpur, and dismissed with costs the suit of the Plaintiff.

The Plaintiff, Debi Pershad Chowdhry, sued as next reversioner to the Hira Bhatokher Estate expectant on the death of Rani Radha Chowdhrain, for a declaration that certain alienations of the estate made by her, and more particularly a deed of gift executed by her on the 21st July 1895, in favour of the Respondents, Nanda Kishore and Ananta Kishore, would be inoperative as against the Plaintiff after the said lady's death. The main question raised on the present appeal was whether or not the Plaintiff had proved that he was the next reversioner. On this point the Courts below differed; the Subordinate Judge found the pedigree proved; the High Court considered the evidence insufficient to establish the Plaintiff's right.

The pedigree is set out in their Lordships' judgment.

The estate of Bharo Kher was originally acquired by grant from the Emperor Jehangir Shah to two brothers, Hira Nand and Vidya Nand, upon whom the

title and position of Chowdhry was conferred. The property in suit constituted the share taken by Hira Nand on a partition with his brother with accretions thereto; and whether or not the property was strictly impartible, the eldest member of the family seemed to have been the Chowdhry, and, as such, to have held possession of the whole estate, allowing maintenance to the other members of the family.

In the year 1812 Munni Ram was the head of the family. On the 7th or 27th July of that year he executed a deed of gift of the whole estate in favour of his son, Shib Nag Chandi Nath, and applied for the registration of his son's name in the revenue registers.

The principal Defendant, Rani Radha, was the widow of Shib Nag Chandi Nath.

The question in dispute was one entirely of fact whether Appellant had proved that he was a direct descendant of Deo Chand (see pedigree *infra*).

The Subordinate Judge more particularly relying on the evidence of 5 witnesses for Plaintiff decided in his favour.

The High Court on appeal decided as follows on the fact:—

"Now, there can be no doubt that the Plaintiff is the son of one Gobind Pershad, who was the son of Kirpa Nath. This is proved by the evidence of the Defendant's witnesses, and there can be no question as to these facts. Therefore what the Plaintiff has to prove is, that Kirpa Nath was the son of Sankar Nath, that Sankar Nath was the son of Manik Chand and that Manik Chand was the son of Deo Chand. If he can establish these three links, he has proved his case. Now, this part of the Plaintiff's case



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entirely rests on his oral evidence, and if his witnesses are to be fully believed, he has made out his right to the relief prayed for. The Subordinate Judge, while disbelieving the Plaintiff's witnesses on many material points, has yet credited their statements as to the genealogy of the Plaintiff, although it cannot be within their personal knowledge who were the father of Kirpa Nath, Sankar and Manik. We are, however, unable to place so much reliance as the Subordinate Judge has placed on the statements of these witnesses. They cannot, we think, be regarded as disinterested or reliable witnesses. They are nine in number, and may be divided into two classes: the first class consisting of relatives of the Plaintiff, the second, of relatives and dependants of one Kartik Nath Panday, a connection of the Plaintiff by marriage, and who is undoubtedly supporting and assisting him in the prosecution of this case. Now the witnesses of the first class are Gaibi Nath Panday, who is the Plaintiff's brother-in-law; (2) Kedar Nath Upadhya, Plaintiff's uncle's son-in-law; (3) Shib Dyal Misser, Plaintiff's paternal uncle's son; (4) Rameshwar Nath Dobay, Plaintiff's brother-in-law; and (5) Goura Chowdhraani, the Plaintiff's mother. The second class consists of (1) Kartik Nath Panday, connected with the Plaintiff by marriage, who admittedly assists Plaintiff in this case (see page 100, l. 28); (2) Eknath Sukul, mother's sister's son of Kartik; (3) Jag Lal Tewari, Kartik's cook and servant; and (4) Durdari Lal Panday, Kartik's raiyat. The Subordinate Judge has disbelieved these witnesses in so far as they say that the

Plaintiff's father, Gobind, performed the *sradh* of Shib Nag. He has found that this *sradh* was performed by the Defendant No. 1 herself, and this we fully believe to have been the case, and yet he has believed them when they depose that they heard the Plaintiff's genealogy recited on the occasion of religious ceremonies, and when they say, too, that the Defendant No. 1 admitted the Plaintiff to be her husband's nearest agnate, and that, with her assent, the Plaintiff's father performed various religious ceremonies as the nearest agnate and heir of her husband. Now, in addition to the distrust in these witnesses' veracity which we must feel owing to the false evidence they have given as to the performance of the *sradh* of Shib Nag, we must say that it seems to us very unlikely that the Defendant would acknowledge the Plaintiff's father as her husband's nearest agnate and would allow him to perform religious ceremonies on her behalf during the lifetime of Harbaus Tewari, admitted by both sides to have been a nearer agnate of Shib Nag's than the Plaintiff's father, and we cannot accept, as satisfactory, the exposition of the reasons given by the Subordinate Judge which probably induced the Defendant No. 1 to act in this way. It is sufficient for us to point out that the Subordinate Judge himself does not entirely rely on the evidence of the Plaintiff's witnesses as to these alleged admissions. For he says:—'Of other instances, when she is said to have described the relationship between Gobind Pershad and her late husband, the one, when she is said to have prevented Gobind Pershad from accepting an offer

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of marriage from Panday family of Pakour, may not be reliable. But there is not sufficient reason for disbelieving all of them.' The question would rather seem to us to be whether there is sufficient reason for believing them when they made so many statements which are clearly untrue. Are we able to sift the true part (if any) of their evidence from the false, and would we be justified in relying on them to such an extent as to interfere with the devolution of very valuable property upon persons who are certainly relations, and by no means very remote relations of the last owner of the property. As to the religious ceremonies said to have been performed by the parents of the Plaintiffs, and which are described in the Subordinate Judge's judgment, we cannot, on the evidence adduced by the Plaintiffs, feel confident that they really took place."

In result the Court dismissed Plaintiff's suit. Plaintiff appealed.

In the lower Courts as well as before their Lordships of the Privy Council, a question relating to inter-marriage amongst members of the same *gotra* had been raised and in the judgment of both the lower Courts this question had been discussed. The Judicial Committee have however decided the question on evidence, and this question of *gotra* is not adverted to in their Lordships' judgment.

*Mr. DeGruyther* for the Appellants.

*The Rt. Hon'ble R. B. Haldane, K. C.*, and *Mr. C. W. Arathoon* for the Respondents, on the question of inter-marriage in the same *gotra*, referred to the exposition of the law at pp. 58, 59 and 60 of Sir Gooroo Dass Banerjee's book on the Hindu Law of Marriage, Tagore Law

Lectures for 1879, and the text of Manu there referred to. The passages, referred to by the Subordinate Judge, of Vyasa, quoted in Vyavastha Chandrika by Shama Charan Sarkar, Vol. II, p. 451, were commented on.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—At the date of the suit, out of which this appeal arises, the Respondents were in possession of the estate in dispute. Their title was a deed of gift in their favour, dated 21st July 1895. This deed was executed by Rani Radha Chowdhraïn, widow of Shib Nag Chandi Nath Chowdhry, to whom the estate had belonged. (This lady, who figures largely in the controversy, will be referred to as the Chowdhraïn). The validity of this deed was immediately challenged by the Appellant Debi Pershad Chowdhry, who, in the suit brought on 12th September 1905, claimed a declaration that he was next reversioner, and that the Chowdhraïn's gift was invalid and not binding on him.

Besides the Chowdhraïn and her donees, the Appellant Debi Pershad impleaded one Ram Nath Chowdhry, who made pretensions to the estate which have now been finally negatived, and certain relatives who make no claim. The contest in the Courts below was between the Plaintiff on the one hand, and the Chowdhraïn and her donees on the other. The Subordinate Judge decided in favour of the Appellant Debi Pershad, but this was reversed in the High Court. After judgment had been given in the High Court the Chowdhraïn died, and the Respondents in the present appeal are



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between this very lady and the group of persons in question, there is a very significant indication in an episode of her deposition, for her own pleader suggested that Gaibi Nath Panday (who married the Appellant's sister and is an important witness for him) should "repeat the exact words in cross-examination," he being a person "before whom the witness appears."

Now of this family (*viz.*, that of the Appellant) thus well known, it is certain that three times, *viz.*, in 1812, in 1863, and in 1885, its representative, for the time being, has, occasion requiring it, made public assertion of his position as an agnate of the Chowdhraïn's husband, and has never met with a denial. In 1812 Kirpa Nath, the Appellant's grandfather, and in 1863 and 1885, Gobind Pershad, the Appellant's father, came into Court in the quality of agnate. These judicial appearances have not the less significance that while Kirpa Nath came into Court adversely to the interests of the Chowdhraïn, the intervention of the father, Gobind Pershad, was invoked by the Chowdhraïn herself.

In face of these facts, it would be affectation to treat the thesis of the Appellant, as expressed in his pedigree, as being in any high degree improbable; but it not the less must be adequately proved. Now the Appellant brings a substantial body of evidence from his own kinsfolk, which is clearly within the Indian Evidence Act. This evidence derives special weight from the considerations explained in the following passage in the judgment of the Subordinate Judge in this case:—

"The Plaintiff himself says, that amongst

others he heard the names recited by his father and uncles and Durga Dutt Chowdhry. It is well known, as has been recorded in that first volume of the fifth report from the Select Committee that Hindu boys are taught the names of their ancestors, paternal and maternal, by their parents and other relatives while they are very young, together with their *gotras* and *Prabars*, &c. These instructions are given not merely as a matter of curiosity, but as a matter of necessity; for Hindus, and specially the Brahmins, are required to perform their *śradhs* annually and on *Parvana* occasions, and to offer water oblations (*turpana*) for a whole fortnight, or rather 15 days of the dark side of the moon in the month of Bhadro. Their right of inheritance depends upon such ceremonies, and their marriages are regulated according to blood relationship. This way the names of the ancestors up to the seventh degree in ascent (the *Sakulyas*) at the least are taught, though in most respectable families the names up to the fourteenth degree in ascent (the *Samanodakas*) are also taught. So, there is nothing unusual in the Plaintiff's statement."

It cannot be doubted that, in its quality, this is admissible evidence. The singular criticism of the High Court is that it comes from relatives of the Appellant; but it is difficult to see where else such evidence could be found; or that in the mouths of strangers it would have any value at all. Each of the persons who has spoken to this pedigree has been carefully cross-examined, and each proves circumstances, apart from the pedigree, which support his knowledge and credit. This is not the case of a pedigree learned by rote, but it is circumstantially corroborated, as far as time and memory admit.

Their Lordships are unable to agree with the High Court in their appreciations of the evidence. For the reason already given, they do not think that the relationship of one class of the

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witnesses is a consideration which should inspire more than the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted. Again the High Court discards, or at least largely discounts, the rest of the Appellant's witnesses because it appears that one of them, Kartik Nath Panday, besides being a relative was "assisting the Appellant" in the case, and the others are connected with this person by blood or service. Their Lordships do not consider this to be a safe or sufficiently discriminating way of dealing with the testimony of these witnesses. They observe that the Subordinate Judge describes Kartik Nath Panday as "a very respectable zemindar of this district;" and it is at least conceivable that he is supporting his kinsman because he knows his cause to be just. Nor do the instances in which the Subordinate Judge declined to accept specific statements of the witnesses seem to imply any reason for distrusting their testimony generally. The matter of the *madh*, of which the High Court makes much, involves the credit of only one witness; and the other instances in which the Subordinate Judge has not acted on the evidence do not involve more than caution on his part or inaccuracy on the part of the witness.

In default of more substantial topics, the learned Counsel for the Respondents bestowed much attention on a supposed anachronism in a pedigree which is printed on pages 63 and 64. It is enough to say that it is adequately proved that there were two persons of the name of Kirpa Nath; and, if this be so, the difficulty disappears.

Their Lordships deem it unnecessary to refer to several ephemeral arguments naturally arising out of a case so voluminous.

Their Lordships are satisfied that the Appellant has established his claim. They will humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court discharged with costs, and the decree of the Subordinate Judge restored. The Respondents will pay the costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Watkins and Lampriere* for the Respondents.

*Appeal allowed with costs.*

C. W. A.

[ORDINARY ORIGINAL CIVIL  
JURISDICTION.]

SUIT No. 295 OF 1876.

CUNNINGHAM, J

ROSE

1881.

1, August.

SREEMUTTY BIDDA-

DHURRY DASSEE & anr.

*Administration of estate by Court—Position of creditors—Default on creditor's part—Creditor admitted so as not to disturb past dividends, position of—Equity.*

*The general principle governing the position of creditors of an estate under administration by the Court is that they will on due cause shown be let in at any time while the fund is in Court, even where the money has been apportioned amongst the creditors and transferred to the Accountant-General for payment to them.*

LASHLEY v. HOGG (1), ANGELL v. HARDON (3) DAVID v. FROWD (4) referred to.

(1) 11 Ves. 602 (1805).

(3) 1 Madd. 529 (1816).

(4) Mylne & Keen's p. 200 (1833).

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*Where, however, a creditor has been guilty of remissness in the assertion of his claim, his default shall not be allowed to operate so as to prejudice or inconvenience others more diligent than himself.*

CATTELL v. SIMONS (5) referred to.

*The legal position of a creditor who for some reason or other has been excluded from a first dividend and subsequently gets his claim admitted to the schedule so as not to disturb past dividends, is that if further assets come in he is entitled to have a preferential dividend paid to him out of such assets before any further dividend is paid.*

SNEE v. PRESCOT (6) referred to.

This was a motion on behalf of the Agra Bank, one of the creditors in the administration suit against the estate of Heera Lal Seal, to have a preferential dividend paid to them out of the available assets, before the payment of any further dividend.

*Mr. Stokoe*, on behalf of the Bank, moved on notice in terms of prayer of petition for an order that before any further dividends be paid on the sums realized since payment of last dividend, a dividend be paid to applicant out of the money now in hand so as to place applicant on an equality with the other creditors who have been paid.

He cited sec. 43, of Bankruptcy Act of 1879. He said that he did not refer to this Act as governing this Court but to shew the principle that the Legislature has adopted. *David v. Frowd* (4), *Angell*

*v. Haddon* (3), *In the matter of Wheeler* (7), *Snee v. Prescott* (6), *Ex parte Boddam* (8).

*Mr. Allen*, contra, cited *Cattell v. Simons* (5).

*Mr. Fox* for the Defendant followed *Mr. Allen*.

The facts of the case appear from the judgment.

The JUDGMENT OF THE COURT was as follows:—

CUNNINGHAM, J.—The question raised in this motion is the claim of the Agra Bank, one of the creditors in the administration suit against the estate of Heera Lal Seal, to have a preferential dividend paid to them out of the available assets before any further dividend is paid.

The original administration decree was made on the 12th June 1876; the Agra Bank proved for Rs. 1,12,617-10-2, inclusive of interest to the 14th April 1876. This claim, however, did not include a sum of Rs. 71,500 representing certain cheques drawn on the Bank in favour of Heera Lal by the Cossipore Hydraulic Company, which sum the Bank had transferred from the account of the Cossipore Company to that of Heera Lal. It was subsequently decided that this transfer was improper and that, on repayment of it to the Cossipore Company, the Bank would be entitled to add it to their claim against Heera Lal and on the 12th September 1876 an order in this suit was made, upon the Bank undertaking to repay the Official

(3) 1 Madd. 529 (1816).

(5) 8 Beavan 243 (1845).

(6) 1 Atkyns 246 (1743).

(7) 1 Sch. and Lef. 242 (1803).

(8) 29 L. J. Bankruptcy N. S., pp. 20, 24 (1860).

(4) 1 Mylne and Keen's p. 200 (1833).

(5) 8 Beavan 243 (1845).

(6) 1 Atkyns 246 (1743).

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Trustee on behalf of the Cossipore Company the amount of the cheques and interest, that the Bank's claim against the estate should be amended by the addition of that sum.

On the 16th October 1876 the Bank paid the Cossipore Company the Rs. 71,500 + Rs. 1,674-14-5 interest: but they appear to have taken no steps to see that the order of amendment was carried out and consequently their claim was not amended and on the 12th August 1878 a decree in this suit was passed declaring the creditors and their claims, shewing the Bank as a creditor for Rs. 1,12,617-10-2 only, and omitting the Rs. 73,174-14-5 and on this occasion, again, the Bank failed to take steps for having the decree amended. They say that they became aware of the error only on the 25th April 1880, when they got the first dividend. They then took action and on the 20th December 1880 an order was made in this suit that, without disturbing any past dividend, already declared, the schedule containing the list of creditors attached to the administration decree of the 12th August 1878 should be amended by adding the sum of Rs. 73,174-14-5 to the Bank's claim, thus increasing it to Rs. 1,85,792-8-7 and by inserting in the 4th column of the schedule a direction that the sum of Rs. 71,500 part of the added amount bears interest at 6 per cent. from the 12th October 1876.

The Bank now prays to be allowed, out of assets, which they believe to have been realized since the order of the 20th December 1880, before any further dividend is paid to the other creditors, to be allowed a first dividend on the

Rs. 73,174-14-5 In support of the Petitioners it is urged that all that the order does is to amend the schedule of debts with a proviso that past dividends should be undisturbed, and that the schedule being thus amended there is nothing in the order to prevent the Bank, now that assets are actually in hand, from asking for a preferential dividend in respect of the sum erroneously omitted from the original schedule. On the other hand the creditors contend that the position which the Bank asks for now and would occupy if I make the order, is something very different from that which it occupies under the order of the 20th December 1880. That order, it is urged, gave the Bank merely the right to come in, for the future, and prove *pari passu* with the other creditors. The order now prayed for would entitle them not only to come in *pari passu* but to have the first dividend on the Rs. 73,174-14-5, which, as matters now stand, they have lost, paid to them in preference to any other claim of the creditors; and that the present order, accordingly, would materially alter the position assigned to the Bank by that of the 20th December 1880 and be in fact a supersession of that order.

The general principle, governing the position of creditors of an estate under administration by the Court, is that creditors will on due cause shown be let in at any time while the fund is in Court: *Lashley v. Hogg* (1), *Hartwell v. Colvin* (2) and that, even where the money has been apportioned amongst the creditors

(1) 11 Ves. 602 (1805)

(2) 16 Beav. 143 (1852).

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and transferred to the Accountant-General for payment to them: *Angell v. Haddon* (3). The effect of the proceedings in an administration suit was clearly explained by the Master of the Rolls in *David v. Frowd* (4). That though a claim is not established in the first instance, if a person comes in and shows that his failure to do so has not been by wilful default, he will, on establishing his claim, have the same benefit of his title as if he had originally claimed (p. 209). This principle of a rateable apportionment amongst creditors without preference or priority, is obviously just and equitable—it is recognized by our own legislature in the case of the administration of a deceased's estate,—sec. 282 of the Indian Succession Act—in the Insolvency section of the Civil Procedure Code, sec. 356 (d), in the English Insolvency Act, 32 and 35 Vic., c. 71, 543.

It is, however, qualified in its practical application by another important principle, viz., that when any creditor has been guilty of remissness in the assertion of his claim, his default shall not be allowed to operate so as to prejudice or inconvenience others more diligent than himself and, moreover, as in the case of *Cattell v. Simons* (5), a creditor, who had failed for nine years to obtain due recognition of an equitable mortgage, was not allowed to disturb the existing arrangement by inducing the Court to recognize his security to the detriment of the other creditors. Such being the law applicable to the case, I have to

consider what the intention of the order of the 20th December 1880 was and whether it precludes the Bank from asking the relief now prayed. It forbade the disturbance of any past dividend, and as there were sums in Court apportioned under the first dividend but not claimed, it was no doubt directed immediately to the exemption of those sums from any claim on the part of the Bank. Thus the Bank suffered pretty heavily for its default, for, in the first place, it has been kept out of the dividend due on the Rs. 71,500 ever since the declaration of dividend, and in the next place, had further assets not been available, it would have lost its money altogether. Now, however, that further assets have come in, is there anything in the order to imply that the Bank may not claim to have its first dividend paid to it before any further distribution? I do not think that there is; but, on the contrary, that this is the legal position assigned to a creditor, who, for some reason or other, has been excluded from a first dividend and subsequently gets his claim admitted to the schedule “so as not to disturb past dividends.” This view is strongly favoured by the case *Snee v. Prescott* (6), where the Lord Chancellor observed that a creditor who has admitted “so as not to disturb former dividends,” and by that means must in the first place be brought up equal to the creditors, under the former dividend, before the Commissioners can proceed to make a second.

There is, at any rate, nothing in the order to show an intention to exclude the Petitioners from this advantage and

(3) 1 Madd. 529 (1816).

(4) 1 Mylne and Keen's, p. 200 (1833).

(5) 8 Beavan 243 (1845).

(6) 1 Atkyns 246 (1748).



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I think that I ought to read it in the light most favourable to the equity of the case and to what I understand to be the policy of the law. I must therefore admit the claim, but the Bank must pay the costs of and incidental to the application.

*Application granted without costs.*

A. N. C.

[ORDINARY ORIGINAL CIVIL  
JURISDICTION.]

SUIT No. 323 OF 1901.

WOODROFFE, J. } BHUGWAN DAS KHETTRY  
1904. } v.  
5, December. } NILKANTA GANGULI.

*Civil Procedure Code (Act XIV of 1882), secs. 372 and 365—Meaning of "other cases" in sec. 372—Mortgage decree—Order absolute for sale—Death of decree-holder—Pending suit—Application for substitution by legal representatives of a decree-holder, if under sec. 372 of C. P. C.*

*The words "other cases" in sec. 372 of the Civil Procedure Code mean cases other than those specifically mentioned in the previous sections in Chap. XXI. If therefore the preceding sections, though they may have dealt with the event of death, have dealt so with particular cases only, other cases will fall under sec. 372. Sec. 365, C. P. C., refers to death only as occurring before decree.*

*A mortgage suit, even after a decree has been made and an order absolute for sale passed, is a pending suit until the sale actually takes place, and an application made before sale by the legal representatives of the deceased decree-holder for substitution would fall within sec. 372 of the Civil Procedure Code.*

CHUNNI LAL v. ABDUL ALI KHAN (1)  
*referred to.*

PANNA LAL v. AGHORE NATH NEOGY (2)  
*followed.*

This was an application, in Chambers, on a Registrar's summons, on behalf of Baldeb Das Khettry and Basanta Lal Khettry, the sons and executors of the last Will and testament of the Plaintiff abovenamed, now deceased, for an order that the cause-title in the plaint and the register of the suit be amended by substituting therein the names of the said applicants as such sons and executors as aforesaid in the place and stead of the said deceased Plaintiff, and that thereupon, the reference and the sale of the mortgaged property pursuant to the decree and the order made in this suit, and dated respectively the 8th of July 1901 and 2nd of September 1902, be proceeded with and that the costs of and incidental to this application be costs in the cause.

The facts are shortly as follows:—Bhagwan Das Khettry, the Plaintiff, now deceased, obtained the usual mortgage decree against the Defendant on the 8th of July 1901. Pursuant to the said decree the Registrar took the accounts directed thereby and by his report, dated the 5th of December 1901, he found and reported that on the 2nd of July 1902 there would be due to the Plaintiff upon and by virtue of the mortgage security mentioned in the said decree a sum of Rs. 5,531-6-9 and he appointed the 3rd of July 1902 as the day of payment of

(1) I. L. R. 23 All. 381, 384 (1901).

(2) Unreported, decided by Sale, J., on 10th May 1898.

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the said sum together with the Plaintiff's taxed costs. The Defendant failed to pay same and thereupon on the 2nd of September 1902 an order absolute for sale was made. Thereafter the Defendant paid to the Plaintiff the following sums on the following dates :—Rs. 800 on the 5th of September 1902, Rs. 150 on the 6th of April 1903 and Rs. 200 on the 25th of July 1903. No subsequent payment was made by the Defendant either to the Plaintiff, or, after the latter's death, to the applicants.

The Plaintiff, Bhugwan Das Khettry, died on 12th of January 1904 leaving a Will whereof he appointed his sons, the present applicants, executors. Probate of this Will was taken out on the 19th of August 1904.

*Babu Brajo Lal Mukerji*, for the Defendant, opposed the application. He submitted that it was not maintainable. This being a mortgage-decree, sec. 232 of the Civil Procedure Code could not apply. The only other sections applicable were secs. 365 and 372. But if sec. 365 were applicable, this application was barred by limitation (Art. 175A, Limitation Act). Nor was sec. 372 applicable, because the words "in other cases" in that section mean cases other than death, marriage or insolvency of parties: *Benone Mohini v. Sarat Chunder* (3), but in this case the devolution of interest was by death. Moreover, since an order absolute for sale had been made, the suit was not a 'pending suit.' The decree was final. But even if sec. 372 be held applicable, the application is barred: *Vide* Art. 178, Limitation Act. He also cited *Mungul Prasad v. Girija*

*Kant* (4) and submitted that sec. 365 was the only section which could apply and therefore the application was barred by limitation.

*Babu Luckhi Narain Khettry* for the applicants, in reply, submitted that the application was under sec. 372 of the Civil Procedure Code. Notwithstanding the order absolute for sale, this suit was a pending suit, for the Defendant could redeem the mortgaged property by paying off the mortgage debt at any time before the actual sale of the property: *Vide Ribijan Bibi v. Sm. Suchi Bewa* (5). The words "other cases" in sec. 372, C. P. C., do not mean cases other than death, marriage or insolvency, but cases other than those specifically mentioned in the previous sections of Ch. XXI.

The Court delivered a considered judgment :—

WOODROFFE, J.—This is an application for substitution upon a Registrar's summons after a mortgage-decree made in this suit on the 8th July 1901. Pursuant to the decree the Registrar took the accounts thereby directed and made his report on the 5th December 1901. The 3rd of July 1902 was appointed as the day for payment. The Defendant having failed to pay to the Plaintiff the sum due under the mortgage decree and costs, an order absolute for sale was made on the 7th September 1902. Thereafter the Defendant paid to the Plaintiff certain sums of money on the 5th September 1902, the 6th April and the 25th July 1903.

The Plaintiff died on the 12th January 1904 leaving a Will of which he appointed his sons, the present applicants, exe-

(4) I. L. R. 8 Cal. 51 (1881).

(5) 8 C. W. N. 684 (1904).

(8) I. L. R. 8 Cal. 837 (1882).

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utors, and they on the 2nd August 1904 applied for and on the 19th August 1904 obtained probate of their father's Will. They state that, except as above-mentioned, the Defendant has not paid anything either to their father during his lifetime or to them after their father's death and that they are desirous of having their names substituted in the cause-title and register of this suit in place and stead of the deceased Plaintiff their father and of having the sale of the mortgaged property proceeded with. They accordingly on the 22nd November 1904 took out a Registrar's summons for an order that the cause-title in the plaint and the register of the suit be amended by substituting the names of the applicants as sons and executors in the place and stated of the deceased Plaintiff their father and that thereupon the reference and the sale of the mortgaged property pursuant to the decree and the order made in this suit and dated respectively the 8th July 1901 and the 2nd September 1902 be proceeded with and that the costs of and incidental to this application be costs in the cause.

Numerous objections have been taken the effect of which if upheld is admitted to be that nothing can be done and the sale which has been directed by the decree in this suit cannot take place.

Various sections of the Code have been referred to for the purpose of showing that none are applicable. This is not, as has been supposed, a proceeding in execution in the usual sense of the term but a carrying out of the directions contained in the decree passed in this suit, *viz.*, that upon default the mortgaged property should be sold. Then it is said,

referring to Ch. XXI of the Civil Procedure Code, that if sec. 365 is applicable the application is barred. That section it has been held does not apply to a suit in which a decree has, as in the present case, been made.

It is unnecessary, however, to consider any section other than sec. 372 under which, it is stated, the application is made.

It is objected that this application does not come within the words "other cases" as these words mean, it is submitted, cases other than death, marriage and insolvency and the event in the present instance is the death of the Plaintiff. But I think that these words mean cases other than those specifically provided for in the preceding sections. If, therefore, the preceding sections though they may have dealt with the event of death have so dealt with particular cases only, other cases will fall under sec. 372: so while sec. 365 refers to death it does so only as occurring before decree.

It is next said that there has been no devolution of interest "pending the suit," but that such devolution occurred after the suit had come to an end, *viz.*, it is alleged, on the 2nd September 1902 after the passing of the order absolute for sale. I cannot accept the contention that absolutely and in every case after decree no suit is pending. For some purposes a suit may still under sec. 372 be treated as a pending suit even after a decree has been made. The determination of the question whether a suit is or is not pending does not always depend upon the question whether a decree has or has not been passed in it,

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This may be so in some cases assuming, as to which there appears to have been expressed some doubt, that the section does not apply to proceedings in execution and that the word 'suit' is limited to proceedings up to the decree. In other cases this is not so for the decree may be of a preliminary character such as decrees directing an account, the settlement of a scheme, partition under sec. 88 of the Transfer of Property Act. It is, however, urged that in the present case there was a final decree when the order absolute was made. In my opinion, however, the suit cannot be said to have come to an end until the actual sale under that order takes place—up to which time as has been recently held by this Court, the mortgagor has the right to pay and redeem. It has, with reference to the doctrine of *lis pendens*, been considered *Chunni Lal v. Abdul Ali Khan* (1), that a suit is not at an end until there is a final decree, that in a mortgage suit the *lis* would certainly not be completed before the passing of the order absolute and would probably not be completed before the actual sale or in the case of a decree for foreclosure until the mortgagee was actually placed in possession under his foreclosure. A case more directly in point is that of *Panna Lal v. Aghore Nath Neogy* (2).

In this case an application was made on behalf of the Plaintiff on a petition asking that the representatives of the Defendant Aghore Nath Neogy should be made parties in the suit in his place and stead. The suit was a mortgage suit

in which a decree was made on the 8th September 1882. The Registrar's report was made on the 28th February 1883 and the 8th September 1883 was fixed as the date of payment of the mortgage money. On the 13th January 1885 an order absolute for sale of the mortgaged premises was made. Subsequently on the 7th February 1885 an office copy of the order was filed in the usual way in the Account Department for the purpose of proceeding to a sale of the property.

In that case Mr. Justice Sale observed as follows:—"In the first place I think the suit is a pending suit, the decree is a mortgage decree and though an order absolute under the Transfer of Property Act has been made yet it is clear that this does not prevent the representatives of the mortgagor from applying, at any time up to the actual sale of the property by tender of the mortgage debt to him, that the proceedings be set aside and the property redeemed. . . . .

"Further it is clear that under the order for sale various proceedings have to be taken, amongst others examination of title requiring examination of witnesses. It is clear also that according to the practice under the Judicature Acts in England, after the usual mortgage decree the suit is held to be a pending suit up to the time when the property is actually sold. For these reasons, I have no hesitation in holding that notwithstanding the order absolute for sale the suit is still a pending suit."

The Court further held that sec. 372 was the section applicable to applications like the application then before it subsequent to decree. This decision, with

(1) I. L. R. 23 All. 331, 334 (1901).

(2) Unreported, decided by Sale, J., on the 10th May 1893.

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which I agree, is a clear authority in support of the applicant's contention. No question arises of limitation assuming the case to fall, as I hold it does, within sec. 372. I make therefore the order in terms of the summons.

*Messrs. G. C. Chunder & Co., Attorneys for the Petitioner.*

*Messrs. T. H. Wilson & Co., Attorneys for the Opposite Party.*

*Application granted.*

A. N. C.

[FULL BENCH REFERENCE.]

APPEAL FROM APPELLATE DECREE  
No. 2310 of 1901.

MACLEAN, C. J.	}	LAL GOPAL DUTT CHOW-
HOSE, J.		DHRY and others,
RAMPINI, J.		Appellants,
STEPHEN, J.		v.
MITRA, J.*		MONMOTHA LAL DUTT
1904.		CHOWDHRY and another,
19, August.		Respondents.

*Bengal Tenancy Act (VIII of 1885), sec. 67*  
—*Liability of auction-purchaser to pay interest at the rate stipulated in the kabuliyat of his predecessor.*

*A jama was created by a kabuliyat, dated 11th Joista 1287 (1880), in which it was stipulated that interest would be payable on arrears at the rate of 1 anna per rupee per mensem. It was sold for its own arrears in 1895 :*

*Held—That the lease being a subsisting one the purchasers (in this case some of the landlord decree-holders) bought the jama subject to the terms of the lease one of which related to interest.*

This was an appeal preferred on the 18th of November 1901, against the decree of Babu Nunda Lal Kundu, Subordinate Judge of Zillah Khulna, dated

the 21st of June 1901, affirming the decree of Babu Sarat Chandra Ghose, Munsif, 2nd Court, at Bagirhat, dated the 28th of February 1901.

The appeal arose out of a suit for the recovery of a three annas share of the arrears of rent due in respect of a *jama* for the years 1303 to 1306. The Plaintiff's claims, which among other items included a demand for interest on the said arrears at the rate of 1 anna per rupee per mensem, were based on a *kabuliyat*, dated the 11th of Joista 1287 B. S. (23rd May 1880), and executed by one Ishan Chandra Shaha. According to Plaintiff's allegations the *jama* came into the possession of the principal Defendants in the following manner: The *jama* held by Ishan Chandra Shaha having fallen in arrears the Plaintiff and the Defendants Nos. 1 to 7 (who were joint owners of the property) jointly brought a rent suit against Ishan and got a decree in 1299 B. S. (1892). About this time (1300 B. S.) the Plaintiff and the Defendants separated. In 1895 the Defendants Nos. 1 to 6 who were 8 as co-sharers executed the whole rent-decree obtained in 1299 B. S., and themselves became the purchasers at a value of Rs. 100 setting off the purchase-money against the whole decree. The present suit was brought by the Plaintiff who owned a three annas share to recover a three annas share of the arrears of rent for the years 1303 to 1306 from Defendants Nos. 1 to 6 who, he alleged, had purchased the property for themselves without his consent and were in possession of the *jamai* right of Ishan Chandra Shaha.

The first Court in decreeing the suit,

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amongst other reliefs, allowed Plaintiff to recover interest on the arrears at the rate of 1 anna per rupee *per mensem* as stipulated in the *kabuliyat* and this was affirmed on appeal by the lower Appellate Court.

The only question raised in second appeal before the High Court was about the rate of interest.

The appeal first came before Maclean, C. J., and Bodilly, J., who on the 9th August 1904 referred the matter to a Full Bench with the following observations :—

MACLEAN, C. J.—This is a suit for arrears of rent for the years 1303 to 1306 Bengal Style with cesses, dāk-charges and interest. The facts as found by the lower Appellate Court are as follows :—

"The facts of the case are that the Defendants Nos. 1 to 6 are eight annas sharers of the property, the Plaintiff is 3 annas co-sharer. The parties remained joint till 1300, when they separated. Before their separation one Ishan Chandra Shaha held a jama of Rs. 285-10-5 for 500 bighas of land. This jama was created by a *kabuliyat*, dated 11th Joista 1287 B. S. The jama having fallen in arrear, all the co-sharers jointly sued for arrears of rent and obtained a joint decree; in execution of that decree by the Defendants Nos. 1 to 6 only, the jama was sold, and they themselves became the purchasers at a value of Rs. 100 setting off the purchase money against the whole decree, though the previous order of the Court was to deposit the purchase money in Court. Thereafter the Defendant No. 7 sued separately for her 5 annas share of rent

and obtained a decree in the lower Court and in the Appellate Court. It is now pending in appeal in the High Court. The Plaintiff therefore brought this suit for his 3 annas share of rent for the years 1303 to 1306, stating that the Defendants Nos. 1 to 6 purchased the property for themselves without his consent, and he did not get possession of the jama right of Ishan Chandra Shaha."

The only question raised before us was as to the rate of interest, i.e., whether the Plaintiff was entitled to recover interest at the rate mentioned in the *kabuliyat* or at the rate mentioned in sec. 67 of the Bengal Tenancy Act.

There appears to be a considerable difference of judicial opinion on the point. In *Alim v. Satis Chandra Chaturdhuri* (2), *Ali Mamud Pramanick v. Bhagabati Debya Chowdhurani* (3), *Kali Nath Sen v. Traylukhya Nath Roy* (1), and *Administrator-General of Bengal v. Asraf Ali and others* (4), it was apparently held that interest was not payable at the rate mentioned in the *kabuliyat*, whilst a contrary view was held in *Kishore Lal Dey v. The Administrator-General of Bengal* (5) and *Rajnarain Mitra v. Panna Chand Singh* (6).

This question of the rate of interest was the only one raised before us

In consequence of the above divergence of view we send the case to a Full Bench.

The question we submit is: "Whether

(1) I. L. R. 26 Cal. 315 (1899).

(2) I. L. R. 24 Cal. 37 (1896).

(3) 2 C. W. N. 525 (1898).

(4) I. L. R. 28 Cal. 227 (1900).

(5) 2 C. W. N. 303 (1898).

(6) 7 C. W. N. 208 (1902).

## Gopi Nath Mahato v. Mansaram Koomar.

happened. Very good, this is criminal negligence. He should not have gone away while the swinging was on. It is quite clear that the witnesses have been gained over, their demeanour declares this. One is a chowkidar and should be dismissed. Such an inhuman practice must be put down at all costs. It is a blot on civilization. Under sec. 336, I. P. C., I sentence accused Gopi Nath to 3 months' rigorous imprisonment for allowing Mansaram to swing by hooks from a *charak pujah* pole which accused had a license to conduct.

• Mr. P. L. Roy and Babu Joy Gopal Ghosha for the Petitioner.

Mr. Leith (Deputy Legal Remembrancer) for the Crown.

The JUDGMENT OF THE COURT WAS AS follows :—

The circumstances of this case are somewhat peculiar. It seems that the Petitioner before us had a license to conduct the swinging during the *charak pujah* in his village, of which he was the headman. It seems that the persons who swing on these occasions are expected to be attached to the swinging apparatus by cloths. The case against the Petitioner is that he allowed a certain person to swing by hooks inserted in the flesh. He has been convicted in respect of that act under sec. 336, I. P. C., and has been sentenced to three months' rigorous imprisonment. The offence made punishable by sec. 336 is the doing of an act so rashly or negligently as to endanger human life or the personal safety of others. We are unable to see how what has been brought home to the Petitioner by the evidence can come within the provisions of that section. It has not been shewn to us that the Petitioner was punishable under any other law on the facts found, and as we are clearly of opinion that he was not punishable under sec. 336, I. P. C., we must make the

rule absolute, set aside the conviction and direct his discharge from bail.

*Rule made absolute :*

H. P. C. *Conviction set aside.*

## [TESTAMENTARY AND INTESTATE JURISDICTION.]

SUIT NO. 7 OF 1900.

SALE, J.	}	In the goods of
1900.		MOHENDRA NARAIN ROY,
1, August.		deceased.

*Probate and Administration Act (V of 1881), secs. 50 and 87—Revocation of probate—Procedure—Practice—Motion on notice—Rule nisi—Jurisdiction—"High Court," meaning of, in sec. 87.*

To revoke a grant of probate on the ground of forgery the proper course is to make an application under sec. 50 of the Probate and Administration Act and not by suit.

KOMOL LOCHUN DUTT v. NILRUTTUN MUNDLE (1) followed.

The "High Court" in sec. 87 of the Probate and Administration Act is not merely confined to the Appellate Jurisdiction of that Court, but includes its Original Jurisdiction, and under that section the High Court exercising its Original Jurisdiction has concurrent jurisdiction with the District Judge for the purpose of exercising all powers provided by the Act.

Proceedings of this description should be initiated by motion on notice and not by rule. The procedure by rule nisi should be confined to applications which are urgent and where relief in the shape of an injunction is required.

This was a rule which had been obtained on the 25th June 1900 by the brother

(1) I. L. R. 4 Cal. 360 (1878).

## IN THE GOODS OF MOHENDRA NARAIN ROY.

and the only daughter of the deceased, calling on Ashutosh Mukerjee, the sole executor named in the last Will of the deceased, to show cause why the grant of probate of the Will made to him should not be revoked and why he should not pay the costs of and incidental to this application.

The deceased Mohendra Narain Roy died at Calcutta on the 20th February 1900, leaving him surviving a childless widow, an only daughter by a predeceased wife, a brother and his widowed mother. He left no property, moveable or immovable, within the jurisdiction of this Court save and except a watch and chain, an umbrella and some wearing apparel. He came to Calcutta for medical treatment about 17 days before his death, and died at the house of his father-in-law, Ashutosh Mukerjee.

It was alleged by Ashutosh Mukerjee that prior to his death, that is to say, on the 19th February, the deceased executed a Will whereby he appointed him his sole executor. On the 28th April 1900 Ashutosh, the father-in-law, obtained probate of that Will from this Court, and now the applicants sought to set aside the grant of probate on the ground, *first*, that this Court had no jurisdiction to entertain the application for probate and, *secondly*, that the Will was not a genuine Will of the deceased.

*Messrs. W. C. Bonnerjee, Garth and Chakravarti* in support of the Rule.

*Messrs. Jackson and Sinha* showed cause.

The JUDGMENT OF THE COURT was as follows:—

SALE, J.—This is a rule which was

obtained on the 25th of June this year by the brother and the only daughter of one Mohendra Narain Roy, deceased, calling on Ashutosh Mukerjee, the sole executor named in the last Will and testament of the deceased, to show cause why the grant of probate of the Will made to him on the 28th day of April last should not be revoked and why he should not pay the costs of and incidental to this application.

It appears from the petition of Ashutosh Mukerjee, the sole executor appointed by the Will, that probate, was issued of the Will of the deceased on the 28th of April 1900.

The present applicants allege that the Will is not the Will of Mohendra Narain Roy, deceased, and that the signature of the alleged testator is a forgery and they therefore ask that the probate should be revoked.

The rule was obtained on various affidavits filed, all of which tended to show that certain of the near relatives of the testator were ignorant of the fact that the testator had executed a Will at the time that the Will was alleged to have been executed. The affidavits also tend to show that although the brother, mother and daughter of the deceased were in the house when the testator was lying ill at the time when the supposed Will is said to have been executed, they never heard that the testator was desirous of making a Will or taking any steps to have a Will executed. It also appears from their affidavits that the testator had his ordinary place of residence or fixed abode not in Calcutta but in the mofussil in the District of Beerbhoom where he possessed landed property jointly with his



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brother, one of the present applicants, and the suggestion upon the affidavits is that the signature of the testator who was in ill-health was procured by his father-in-law in a surreptitious manner, and that Ashutosh Mukerjee acting in collusion with the widow of the deceased falsely now alleges that the testator before his death executed the Will in question.

In opposition to the rule there are also a number of affidavits filed, which affidavits are relied upon as explaining away the suspicious circumstances attending the execution of this Will.

The affidavits in support of the Will purport to show that the deceased had for some time been dissatisfied with his relatives, particularly with his brother and mother, inasmuch as he thought they were not giving proper attention to him in his illness and not procuring medical attendance for him. The affidavits go to show that the testator went to Suri for the purpose of obtaining medical attendance and that from Suri he was brought down by servants sent up for that purpose to his father-in-law's place in Calcutta; and it is shown that while in Calcutta he expressed a desire to make a Will with the object of providing for his wife who, he said, was not on friendly relations with his relatives. Therefore an attorney was sent for and in the presence of the doctor Atool Bose the Will was read over and explained to him.

That is the general nature of the case I have to try.

I should like to express my sympathy with Mr. Jackson when he said that proceedings of this kind ought not to be initiated by rule but by notice. That

procedure would, I think, be advantageous, and the time necessarily devoted in the hearing of the proceeding is shortened inasmuch as an *ex parte* proceeding on granting a rule is avoided.

I am informed that a learned colleague, sitting on the Original Side lately, also expressed dissatisfaction at this practice. His opinion was that these proceedings in this Court should not be by rule but by motion, and I think that as a general rule that practice is one which ought to be maintained. It seems to me that a rule for the purpose of setting aside probate necessitates very many affidavits and does not come on for hearing for a long period and requires two hearings when one possibly would be sufficient. The rule ought to be confined to applications which are urgent and where relief in the shape of an injunction is required.

Coming to the points raised in this case, a preliminary objection taken is that this Court has no jurisdiction to entertain applications for probate and having no jurisdiction to grant probate it should now be revoked.

Reliance is placed on sec. 87 of the Probate and Administration Act. That section says:—"The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judges."

It has been contended that the "High Court" should be taken as meaning High Court as defined in the General Clauses Act. In the latter Act High Court is defined as the Highest Court of Appeal and, it is said, that as the High Court it has concurrent jurisdiction with the

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District Judge in the exercise of powers under the Probate and Administration Act. If that contention were correct, the result would be serious. It would mean that the "High Court" in sec. 87 meant High Court in the exercise of its Appellate Jurisdiction. It is only the High Court exercising Original Civil Jurisdiction which has jurisdiction of issuing probates and granting administration under the Probate and Administration Act, nor is it very clear—if by High Court is meant a Court of Appeal—how that Court could have concurrent jurisdiction with a District Judge. I take it that High Court in its Appellate Jurisdiction cannot have any power or jurisdiction to deal with things that can only be done by the High Court in its Original Jurisdiction. Moreover it has been pointed out that if the High Court has no power under the Probate and Administration Act to grant probates and letters of administration, it is also clear that it has no power to do so under the Charter. Sec. 150 of the Probate and Administration Act expressly provides that "No proceedings to obtain probate of a Will, or letters of administration to the estate, of any Hindu, Mahomedan, Buddhist or person exempted under sec. 332 of the Indian Succession Act, 1865, shall be instituted in any Court in British India except under this Act." That section would of course control the power which the Court possesses under the Charter; that has been so held in more than one recent case. But I think it is sufficiently clear that the "High Court" in sec. 87 of the Probate and Administration Act is not intended merely to be confined to the High Court in its Appellate Jurisdiction,

but also includes the High Court exercising Original Jurisdiction. It is only by placing that meaning on the "High Court" that any effect can be given to sec. 87. Moreover the words in sec. 87 are in effect the same as in sec. 264 of the Indian Succession Act, and as Mr. Bonnerjee pointed out at a very early period, the definition of District Judge in the Succession Act included the High Court exercising Original Jurisdiction. In the Probate and Administration Act that is not defined. District Judge means Judge of a principal Court of Civil Jurisdiction. In sec. 3 of the Indian Succession Act 'District Judge' is defined in the same way and certainly from that time downwards it has been considered that the definition of District Judge included a Judge of the High Court exercising Original Jurisdiction.

I therefore think that there is no doubt under sec. 87, that this Court, as exercising Original Jurisdiction has concurrent jurisdiction with the District Judge for the purpose of exercising all powers provided by the Act.

The next question is that under sec. 50 of the Probate and Administration Act this Court ought to revoke the probate inasmuch as the grant was obtained by fraud and misrepresentation of the property which the testator possessed within the jurisdiction of this Court. In the petition for probate the testator is described as a Hindu inhabitant of Calcutta, and as regards the property there can be no question that he left no property in Calcutta except a watch and chain, umbrella and wearing apparel.

So far as the property is concerned, no misrepresentation or fraud has been prac-

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tised on this Court. I am informed that the only property that the testator possessed was the property I have mentioned. I think, having regard to the facts of the case, by reason of the testator having come to Calcutta only for the purposes of medical treatment, that would be a slender ground to charge that fraud was practised upon this Court. It is true he had no fixed abode in Calcutta but that is not alleged and having regard to the circumstances that he came to Calcutta suffering from a serious complaint and it was not known how long he might have remained in Calcutta it seems to me it would be going too far to say that the executor practised fraud on the Court by describing the testator as a Hindu inhabitant of Calcutta. As a matter of fact he resided in Calcutta and had been residing in one sense of the word since the 11th of February and he had come there for no other purpose than, so far as it appears, of having medical attendance.

I think therefore no grounds exist for revocation of the probate on that ground.

Still, a more serious question is raised as to whether or not this Will is not a forgery. Under sec. 50 of the Probate and Administration Act it is provided :—  
“The grant of probate or letters of administration may be revoked or annulled for just cause.”

The explanation states that just cause exists where the probate is obtained by making a false representation. I take it that that expression is sufficient to cover a case in which it is alleged that the Will of the testator is a forged document. Illustration (c) cites a case “that the grant was obtained by means of an

untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently.”

Therefore it appears to me, in accordance with sec. 50 of the Probate and Administration Act, that the proper course, when there is an allegation of forgery, would have been to make an application under sec. 50 to have the probate revoked on that ground. It was suggested, supposing that form was not permitted by the Code, that there was another course by way of a suit to have the probate declared invalid on the ground that the Will was a forged document. I, however, entertain very great doubts whether that course is now open having regard to the Probate and Administration Act.

Although sec. 50 is similar in terms to sec. 234 of the Indian Succession Act, it has been held by a Divisional Bench of this Court, so far back as the year 1878, that the proper course under the Succession Act is to make an application for revocation in a case where it is alleged that the Will is a forgery.

In the case of *Komol Lochun Dutt v. Nilruttun Mundle* (1) Justice Markby in delivering judgment says :—

“The probate can be revoked upon any of the grounds mentioned in sec. 234. The duty of the Judge upon an application being made under this section somewhat depends upon what has passed on the previous grant of probate. Clearly, however, the first thing for him to do is to direct notice to be given to the executor and all persons interested under the Will or claiming to have any interest

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ni the estate of the deceased. It is also clear from sec. 261 that the executor will be the Plaintiff in the regular suit which the Judge will then have to try, and the object of this is clear. It is in order to enable the Judge, if he thinks proper, to call upon the executor to prove the Will again in the presence of the objector, notwithstanding the prior probate, just as in England he may be called upon to prove the Will in solemn form. But a discretion is left to the Judge. Where there had been already full enquiry as to the genuineness of the Will, the Judge would probably take, as he would have a right to take, the previous grant of probate as *prima facie* evidence of the Will, and so shift the onus on to the objector. But if there had been no previous contention, and the Will had only been proved summarily, or in what is called common form in England, that is, without any opposition, and merely *ex parte*, to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family, then he ought in all ordinary cases to have the Will regularly proved afresh, so as to give the objector an opportunity of testing the evidence in support of the Will before being called upon to produce his own evidence to impeach it. For example, when, as has actually happened in this case, the widow applied to have the probate revoked, the District Judge rejected her application without giving any notice to anyone, because she did not make a *prima facie* case against the Will. We think that was wrong. The District Judge should have summoned the executor and the other parties interested under the Will and in the estate of the

deceased, and should, in such a case as the present, have required the executor to prove the Will in the presence of the widow.

"So also when the applicant for probate is about to prove a Will in common form, and a caveat is put in, unless the parties signify their desire at once to proceed to trial, it is preferable that a postponement should be granted so that there may be a formal trial of the matter on all the evidence that either side may be able to adduce." I do not think I should be right in departing from that procedure in a case where forgery is alleged. So far as my knowledge goes, the practice has been in accordance with the statement of Justice Markby, and I would not be right in departing from that procedure. It is obviously unsatisfactory, in a case where forgery is alleged, to come to a conclusion upon issues of that character merely on affidavits. I am bound to say that if it was a matter which could be decided on affidavits, I should hold that the evidence rather preponderates in favour of the Will. It seems to me that the affidavits produced in support of the Will together with the testator's own letter go very far to explain how the Will came to be executed in Calcutta. It has occurred to me whether it is open to me to say that the probate which has already been granted should be considered as *prima facie* evidence of the Will and that I should accordingly shift the onus on to the objector. After all, little would be gained by adopting that course, and it would be departing from the practice of this Court. I think therefore taking all the circumstances that I ought to set

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this case down to be tried and to direct the executor to give his evidence afresh, in the presence of the objector, of the due execution of this Will. The effect would be to revoke the probate. That must follow. That was asked for. This is a case which must be expedited and not relegated to the bottom of the Peremptory List of Causes. I direct the case to appear at the top of the remanet list this day three weeks.

*Messrs. Rutter & Co.*, Attorneys for the Applicants.

*Babu M. M. Chatterjee*, Attorney for the Executor.

S. R. D.

## [TESTAMENTARY AND INTESTATE JURISDICTION.]

HARINGTON, J.	} In the goods of
1900.	
19, December.	

HARENDRA KRISHNA  
MUKERJEE, deceased.

*Probate and Administration Act (V of 1881), secs. 50 and 83—Revocation of probate—Procedure—Practice—Motion on notice—Suit to set aside probate—Rule nisi—Will, invalidity of—Grant of probate, irregularity in—Civil Procedure Code (Act XIV of 1882), Sch. IV, Part E, Form 115.*

*When it is sought to revoke a grant of probate on the ground of the invalidity of the Will, the proceedings should be initiated by a regular suit, using the form of plaint given in the Civil Procedure Code, Sch. IV, Part E, No. 115, and not by motion on notice.*

*KOMOL LOCHUN DUTT v. NILRUTTUN MUNDLE (1) distinguished.*

*When it is sought to revoke the grant of probate of a valid Will on the ground of some irregularity in making the grant,*

(1) I. L. R. 4 Cal. 360 (1878).

*the proceedings should be by motion on notice.*

*Proceedings of this description should not be initiated by a rule nisi.*

## IN THE GOODS OF MOHENDRA NARAIN ROY (2) referred to.

This was an application on notice by the widow of the deceased for revocation of the probate of the Will of her deceased husband which had been granted to his brother Parbutty Churn Mukerjee, the executor named in the Will, on the ground that the Will was a forgery. The application was opposed by the executor both on the facts and on the ground that it was wrong in form, but as regards the issues of fact it was agreed that they could not be tried upon the present application.

*The Advocate-General (Hon'ble J. T. Woodroffe) and Mr. Sinha for the Applicant.*

*Messrs. Garth, Chakravarti and J. G. Woodroffe for the Executor.*

*The Advocate-General.*—The proper form of application is by motion on notice as appears from the recent decision in *In the goods of Mohendra Narain Roy (2)*. Sir Lawrence Jenkins when sitting on this side of the Court required proceedings to be commenced by motion on notice and not by rule nisi. The procedure is not by suit as suggested, see *Kamol Lochun Dutt v. Nilruttun Mundle (1)*. The object of this contention is to throw the onus on the applicant, who would be the Plaintiff, in such a suit whereas the onus is on the executor who has not yet proved

(1) I. L. R. 4 Cal. 360 (1878).

(2) 5 C. W. N. 377 (1900).

## IN THE GOODS OF HARENDRA KRISHNA MUKERJEE.

the Will in solemn form to so prove it in the applicant's presence.

*Mr. J. G. Woodroffe.*—According to the usual practice the procedure is by rule nisi. This appears from the judgment in the case cited. But if that procedure is not to be followed, the proceedings should take the form of a regular suit. It is not contended that the mere change in the form of the proceedings would affect the onus. As to the form of pleadings in such a suit, see the unreported case in this Court of *William George Black v. William Kenneth Douglas and another*, suit No. 225 of 1877, decided by Pontifex, J., on the 2nd May 1878, which was a suit by the son of the alleged testatrix against the executor and executrix to call in the probate of the Will and to have the same proved in solemn form on the ground that the testatrix was not in a sound and disposing state of mind.\*

*The Advocate-General* in reply.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

HARRINGTON, J.—This was an application by the widow of one Harendra Krishna Mukerjee for revocation of probate of the Will of her deceased husband which has been granted to Parbutty

\* The prayer of the plaint ran as follows:—  
“The Plaintiff therefore prays that the probate of the alleged Will of the said Eliza Anne Black so granted to William Kenneth Douglas and Alice Mary, his wife, be called in, and that it may be ordered that the said alleged Will be proved in solemn form and that all necessary directions be given and the Plaintiff also prays for such further and other relief in the premises as the circumstances of the case may require and as to this Honorable Court shall seem fit.”—*REP.*

Churn Mukerjee. The application is opposed both on the facts and on the ground that it is wrong in form. It is conceded however that the issues of fact cannot be tried on the present application. The only question therefore to be decided now is whether the proceedings are in proper form and whether any order ought to be made on this application.

The Respondent contends that a rule should have been obtained calling on the executors to show cause why the probate should not be revoked; he also says if that contention is not correct, at any rate, the proceedings should have taken the form of a regular suit. In either view the present application which is by notice of motion would be wrong.

Now the jurisdiction to annul or revoke a grant of probate is given to the Court by sec. 50 of the Probate and Administration Act which enacts that probate may be revoked or annulled for “just cause.” The illustrations and explanation shew that “just cause” may be either a defect in the proceedings not necessarily affecting the validity of the Will or it may be a matter which renders the Will invalid.

In the present case the affidavits disclose that the case for the applicant is that the Will of which probate has been granted is a forgery and that the deceased at the time he was alleged to have made his Will, was incapable of making a disposition of his property.

Chapter V of the Probate and Administration Act, comprising secs. 51 to 87, purports to lay down the practice in the granting and revoking of probates and letters of administration, but while secs. 70 to 73 and 83 indicate that where

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the grant of probate is opposed by a caveator the proceedings are to be in the form of a suit under the provisions of the Code of Civil Procedure, in which the Petitioner for the grant shall be Plaintiff, and the person opposing the grant Defendant, there is nothing in the chapter to indicate what procedure is to be followed where a grant has been already made and it is sought to set aside that grant. It is said that the practice that has been adopted here, is to issue a rule calling on the executors to show cause why probate should not be revoked. Such a procedure is not directed either by the statutes or by the rules of this Court. It has been disapproved in a recent case, and it is stated that it was not followed by a learned Judge who was lately a member of this Court. Under these circumstances I am not bound by that practice. I agree in thinking that the practice of proceeding by rule is not the proper practice for obtaining revocation of probate. The practice of initiating proceedings for revocation of probate by motion has been approved in a recent case in this Court, and inasmuch as the present application is made in accordance with that practice I think the applicant should have an order made on her motion. But I do not agree with her contention that the case of *Komol Lochun Dutt v. Nilruttun Mundle* (1) is an authority for the proposition that a grant of probate cannot be revoked by a regular suit instituted for that purpose.

No doubt that case lays down that the grant of probate cannot be questioned in an ordinary civil suit; but it does not lay down that probate cannot be revoked

by a regular suit brought in the Court by which the probate was granted under its Probate Jurisdiction.

That such a suit can be brought is clear from the Civil Procedure Code. In the Civil Procedure Code, Sch. IV, Part (E) which is headed "plaints in suits for special relief," the form of a plaint is given, No. 115 (2), which is to be used by an executor or legatee or next of kin seeking to obtain revocation of probate in cases in which the claim for revocation is founded on the allegation that the Will of which probate has been granted is not the true Will of the testator.

This form is only applicable to a case in which the ground on which relief is sought is that the Will is invalid. It could not be used in a case in which an application is made to recall the grant of probate of a valid Will on the ground of some irregularity in making the grant. Such an application as that will be properly made by motion.

It has been argued that the applicant is entitled to have the Will proved in her presence. This may be so, but that is not the present application. The present application is that the probate already granted should be revoked on the ground that the Will is a forgery. That is in its nature quite distinct and different from a proceeding to have the Will proved in the presence of the objector—or as it would be called in England in solemn form—and it is quite distinct from a motion to recall a grant on the ground of some informality in the proceedings.

In the present case the application is made on the faith of a practice which has been approved and followed in this Court, and on that ground I think an

(1) 1. L. R. 4 Cal. 360 (1878).

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order ought to be made on this motion. But in my opinion in cases in which Form 115, Schedule IV of the Civil Procedure Code is applicable, the proper practice is to bring a suit for revocation of probate using that Form in obedience to sec. 644 of that Act.

I do not think therefore it would be right to dismiss the application although in my opinion the course followed by the applicant is not the proper one. Sec. 644 of the Civil Procedure Code and Schedule IV, Part E, Form 115 indicate that when it is desired to dispute the validity of a Will of which probate has been granted, the proceedings should be by a regular suit brought in this Court under its Probate Jurisdiction. \*

The order will be that the matter be set down for hearing as a contentious cause, the petition being treated as a plaint, the affidavit of executor as the written statement. Liberty to file a separate written statement in a fortnight.

*Babu Nolin Chunder Gupta*, Attorney for the Applicant.

*Messrs. Carruthers & Co.*, Attorneys for the Executor.

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM ORIGINAL DECREE

No. 65 of 1899.

PROTAP NARAIN

MUKERJEE and anr.,

MACLEAN, C. J. Defendants, Appellants,  
BANERJEE, J. v.

1900.

2, August.

SARAT KUMARI DEBI,

wife of Ram Narain

Banerjee, Plaintiff,

Respondent.

*Specific Relief Act (I of 1877), sec. 23, cl. (c)—Family arrangement—Compromise of*

*doubtful rights—Suit to enforce compromise by a person not party thereto—Person beneficially entitled under the compromise.*

*A suit to set aside a deed of partition between the members of the same family was compromised. By the deed of compromise it was stipulated that certain of the parties to the compromise should pay to the Plaintiff Rs. 5,000. The Plaintiff was not a party to the suit or compromise.*

*Held—That she being a person beneficially interested under the compromise, was entitled to sue for the recovery of the money, if the compromise was a compromise of doubtful rights.*

This was an appeal preferred on the 27th of February 1899, against the decree of Babu Mohim Chunder Ghosh, Subordinate Judge, 3rd Court of Zillah Hooghly, dated the 16th of February 1899.

The suit, out of which this appeal arose, was instituted to recover the sum of Rs. 5,000 under the following circumstances: One Nobokristo Mukerjee died in 1297, B. S., leaving four sons, viz., Protap Narain, Ram Narain, Surya Narain and Raj Narain, and four daughters, Sarat Kumari, Kusum Kumari, Khirod Kumari and Fool Kumari, and a widow Nistarini Debi. After his death, the four sons and the widow executed a deed of partition, by which the widow gave up her one-fifth share in her husband's estate and in lieu thereof got four rooms in the family dwelling-house, a house at Bali and a monthly allowance of Rs. 25 from each of her four sons on account of maintenance. The sons further agreed by this deed that they should each of them pay Rs. 1,500 to the mother within five years from its



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date. Subsequently in 1892, the youngest son Raj Narain instituted a suit against his three brothers and the mother to set aside this deed of partition. This suit was amicably settled and a petition of compromise (*solenamah*) was filed in the suit dated the 26th May 1893. That *solenamah*, after providing for a division of the properties left by Nobokristo among the sons, proceeded as follows:—

"7. We, the four uterine brothers, Protap Narain and Ram Narain and Surya Narain and Raj Narain Mookerjees shall pay Rs. 5,000 to each of our sisters Srimati Sarat Kumari Debi, Srimati Kusum Kumari Debi, Srimati Khirod Kumari Debi and Srimati Fool Kumari Debi within five years from this date. If we do not pay within five years, we shall pay interest on the said sum at the rate of 12 annas per cent. per month. Out of this, I, Surya Narain Mookerjee, shall pay to my third sister, Khirod Kumari Debi, the sum of Rs. 5,000 which is payable to her; and I, Raj Narain Mookerjee shall pay to Srimati Fool Kumari Debi the sum of Rs. 5,000 which is payable to her, and we, both Protap Narain and Ram Narain Mookerjees, shall pay the sum of Rs. 10,000 at the rate of Rs. 5,000 each to Srimati Sarat Kumari Debi and Srimati Kusum Kumari Debi, i.e., each of us shall pay at the rate of Rs. 5,000 to our mother Srimati Nistarini Debi according to the aforesaid stipulation. God forbid, if our mother dies within the said five years, then we shall pay the said sum to the said Sarat Kumari and Kusum Kumari Debi. Khirod Kumari and Fool Kumari Debi shall have no right to the said sum.

"8. That in addition to the monthly allowance provided for by the deed of partition, I, Ram Narain Mookerjee, shall pay to our mother Srimati Nistarini Debi each year at the time of Durga Pujah festival the sum of Rs. 200, and I, Raj Narain Mookerjee, shall pay each year to our mother at the time of Durga Pujah festival, a sum of Rs. 100, and I, Surya Narain Mookerjee, shall pay each year to my mother at the time of the said Durga Pujah festival a sum of Rs. 100.

"9. That the late Nobokristo Mookerjee, the father of us, Protap Narain, Ram Narain, Surya Narain and Raj Narain Mookerjees, and the husband of me, Srimati Nistarini Debi, died without making any Will. Though I, Raj Narain Mookerjee, had previously done some acts in the belief that my father had made a Will, but now I have learnt on enquiry that such belief of mine is groundless, and I, Srimati Nistarini Debi, have also learnt on enquiry that my deceased husband, Nobokristo Mookerjee, had not made any Will, so that in future we shall not be able to make any claim or demand on the ground of the existence of a Will made by him.

\* \* \* \*

"13. That I, Srimati Nistarini Debi, on agreeing to take Rs. 100 as monthly allowance at the time of the partition between my sons of the estate left by my husband, relinquished the share receivable by me under the Hindu law, and signed the said partition deed. But as I was then ill in body I declared that I had not perfectly understood the same. But I now having relinquished the share receivable by me after perfectly

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understanding the above matter and the disputes among my sons having been settled and my sons having agreed to pay at the rate of Rs. 5,000 to my daughters, as stated in para. 7, I am fully a consenting party to the said partition deed and to this *ruffanama* (deed of compromise) and I fully approve all the terms of the same. In future I shall not be able to make any claim or demand on the ground of my having any share in the properties left by my husband."

A decree was made in that suit in terms of the said *solanamah*.

Subsequently in 1894 the mother died, having prior to her death executed a Will, the 3rd clause of which was as follows:

"That my youngest son, Raj Narain Mukerjee, had brought a suit No. 15 in the 3rd Sub-Judge's Court, Zillah Hooghly, to set aside the said deed of *butwara* which suit having been disposed of, and according to the terms of a *solanamah* on the 26th May 1893, there is a stipulation in para. 7 of the said *solanamah* of that date, to the effect that of the sum of Rs. 5,000 payable to my eldest daughter Srimati Sarat Kumari Debi, and the sum of Rs. 5,000 payable to my second daughter Srimati Kusum Kumari Debi, in all Rs. 10,000, by my eldest son Protap Narain Mukerjee and by my second son Ram Narain Mukerjee, shall each pay at the rate of Rs. 5,000. My said sons, up to this time, have not paid any the least amount on that account according to the said stipulation. On my death, the said daughters shall get the said sums from the said sons, under the terms of the said *solanamah*, (and) my said sons shall not be able

to raise any kind of objection to the same. On account of (my) said sons, having agreed to pay such sums to my daughters, I consented to the said *ruffanama* and on relinquishing the right which had devolved on me to obtain a fifth share of the properties left by my husband by reason of the partition made between the sons, I have been only receiving a monthly allowance. But if, according to the terms of the said *ruffanama* my sons do not pay to my said daughters each at the rate of Rs. 5,000 payable to each respectively, then on the terms of the said *ruffanama* and the *butwara* being cancelled, (the profits which I would have received, of the one-fifth share of the properties left by my husband from the 19th day of Falgun 1297 till the date of my death, after deducting therefrom the amount recovered for my monthly allowance), a four annas portion of such balance amount as I would have received on adjustment of accounts, my daughter Sarat Kumari Debi shall be able to realise from my son Protap Narain Mukerjee and another 4 annas portion my daughter Kusum Kumari Debi shall be able to realise from my son Ram Narain Mukerjee."

Probate of the Will was granted to Ram Narain Mukerjee, the executor named in the Will.

The Plaintiff, Sarat Kumari, now brought this suit against her brothers Protap Narain and Ram Narain, to recover the sum of Rs. 5,000 with interest. In her plaint she pleaded the state of the family at the death of Nobokristo as given above, referred to the deed of partition, the subsequent suit by Raj Narain, the *solanamah*, the decree on the

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*sarvamah*, the death of her mother Nistarini and her Will and alleged that the said sum had not been paid either to her deceased mother or to her. The lower Court made a decree in her favour, from which the Defendants now appealed.

*Mr. Woodroffe and Babu Benode Behari Mukerjee* for the Appellants.

*Dr. Rash Behari Ghosh and Babu Debendra Chunder Mullik* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This appeal raises an interesting but not, I think, a very difficult point. The facts necessary to be stated for its due appreciation lie within a very narrow compass. One Nabokristo Mukerjee, the father of the present Plaintiff, died on the 27th Bhadro 1297 leaving him surviving four sons, four daughters and his widow, the mother of all the eight children. A short time after his death, the four sons partitioned the property, and they came to an arrangement with their mother, in lieu of her share under a partition, that she should be entitled to occupy certain rooms and receive Rs. 100 a month. Afterwards one of the sons, Raj Narain Mukerjee challenged this partition and instituted a suit to have it set aside, and he made parties to that suit, his three other brothers and his mother. In that suit, the parties effected a compromise. The present Plaintiff, one of the daughters, was not a party to that suit or to the compromise, which is dated the 26th of May 1893. The compromise evidently was effected after the trial of the suit had begun, because it recites "that after examination of witnesses on

behalf of the Plaintiff had commenced, this suit has been postponed for settlement by way of compromise." The clauses in that document to which I need refer are the 7th, the 9th and the 13th.

The 7th clause is in these terms :— "We, the four uterine brothers, shall pay Rs. 5,000 to each of our sisters," naming them, "within five years from this date. If we do not pay within five years we shall pay interest on the said sum at the rate of 12 annas per cent. per month. Out of this, I, Surja Narain Mukerjee, shall pay to my third sister, Khirod Kumari Debi, the sum of Rs. 5,000 which is payable to her, and I, Raj Narain Mukerjee, shall pay to Srimati Fool Kumari Debi the sum of Rs. 5,000 which is payable to her; and we, both Protap Narain and Ram Narain Mukerjee, shall pay the sum of Rs. 10,000 at the rate of Rs. 5,000 each to Srimati Sarat Kumari Debi and Srimati Kusum Kumari Debi, (i.e.), each of us shall pay at the rate of Rs. 5,000 to our mother Srimati Nistarini Debi according to the aforesaid stipulations. God forbid, if our mother dies within the said five years, then we shall pay the said sum to the said Sarat Kumari Debi and Kusum Kumari Debi. Khirod Kumari and Fool Kumari shall have no right to the said sum."

Clause 9 is in these terms :—"That the late Nabokristo Mukerjee, the father of us, Protap Narain, Ram Narain, Surya Narain and Raj Narain Mukerjee, and the husband of me, Srimati Nistarini Debi, died without making any Will. Though I, Raj Narain Mukerjee, had previously done some acts on the belief that my father had made a Will, but now I have learnt on enquiry that such belief

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of mine is groundless, and I, Srimati Nistarini Debi have also learnt on enquiry that my deceased husband Nobokristo Mukerjee had not made any Will, so that in future we shall not be able to make any claim or demand on the ground of the existence of a Will made by him."

Clause 13 is in these terms:—"That I, Nistarini Debi, on agreeing to take Rs. 100 as monthly allowance, at the time of the partition between my sons, of the estate left by my husband, relinquished the share receivable by me under the Hindu law, and signed the said partition deed. But, as I was then ill in body, I declared that I had not perfectly understood the same. But I now having relinquished the share receivable by me after perfectly understanding the above matter, and the disputes among my sons having been settled and my sons having agreed to pay at the rate of Rs. 5,000 to my daughters, as stated in paragraph 7, I am fully a consenting party to the said partition deed and to this *ruffanama*, and I fully approve all the terms of the same. In future I shall not be able to make any claim or demand on the ground of my having any share in the properties left by my husband."

The mother has died within the five years mentioned in clause 7, and the present Plaintiff Sarat Kumari Debi sues her brothers, Protap Narain and Ram Narain for the Rs. 5,000, which she says they agreed to pay her under the *solenamah*. Her case is that under the terms of the *solenamah* or compromise, the mother having died within the prescribed period, the Rs. 5,000 is now payable to her. The Defendants contend

that she is not entitled to maintain this suit, not being a party to the compromise, and, in support of that proposition, certain cases decided in the Courts in England have been referred to. For instance the cases of *In re Rotherham Alum and Chemical Company* (1) and *Child and Co. v. Thurley* (2). It is unnecessary, however, to deal with these cases, for we have to decide this question according to Indian and not according to English law, and the question admittedly turns upon what is the true meaning of sub-section (c) of sec 23 of the Specific Relief Act. That section runs as follows:—"Except as otherwise provided by this chapter,"—and it is not suggested that there is any other provision which touches this point,—“the specific performance of a contract may be obtained (c) where the contract is a settlement on marriage,” which is not the case here, “or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder.” The Plaintiff says that this was a compromise of doubtful rights between members of the same family, and that she is a person beneficially entitled thereunder. We have, therefore, to consider, *first*, whether the compromise in this case is one of doubtful rights within the meaning of the sub-section, and, *secondly*, whether the Plaintiff is a person beneficially entitled thereunder, so as to entitle her to sue under the statute. There is no such statutory right known to the English law, and consequently English authorities are not of much value in this connection.

(1) L. R. 25 Ch. Div. 103 (1883).

(2) L. R. 16 Ch. Div. 151 at p. 155 (1880).

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There cannot be any reasonable doubt that this was a compromise of doubtful rights. In the first place one of the sons was challenging the validity of the previous partition, and the mother was suggesting, at any rate the existence of a Will by her late husband, and claiming that she did not fully understand the arrangement as to her only receiving Rs. 100 per month and that she was not bound by that arrangement, whilst apparently the other brothers were contesting these claims. There was therefore a contest between the parties. The issue of that contest was doubtful, the rights of the parties under that contest was undetermined, and so far as one can judge doubtful. Under such circumstances it is impossible to say that this compromise was not one of doubtful rights.

Then the question arises whether the Plaintiff is a person beneficially interested thereunder. That, again, is reasonably clear. The words "beneficially entitled thereunder" are wide and comprehensive. the legislature does not confine the right to sue hereby merely to the parties to the compromise. We have then to discover whether the present Plaintiff is a person beneficially entitled under the compromise. She clearly was: she was entitled to Rs. 5,000 on the happening of a certain event which has happened. The mother stipulated, as one of the terms of her joining in the compromise, that the Plaintiff should have this sum of Rs. 5,000, and that being so, she is clearly a person beneficially entitled under the compromise. This disposes of the case. It has, however, been suggested that Kusum Kumari Debi or her representa-

tives are necessary parties to the suit. I do not think this is so. The Plaintiff is not asking for any relief as against her. It is clear on the construction of clause 7 read with clause 13 of the compromise, that each of the two daughters was to receive a sum of Rs. 5,000 and the Plaintiff is not asking for anything more than her Rs. 5,000. Her present claim does not appear to affect in any wise the rights of her sister Kusum Kumari. One other point has been mentioned. It is said, that it has not been decided whether the liability of the two brothers Protap Narain and Ram Narain is a joint or several liability, in other words whether each of them is liable for the whole Rs. 5,000 or only for Rs. 2,500. No difficulty however arises as to this, for Dr. Rash Behari Ghosh for the Respondent is willing to take a decree limiting the liability of each brother to Rs. 2,500 only. The decree must be modified by limiting the liability of each brother, that is, of each Defendant, to Rs. 2,500 only. Subject to this modification the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion.

S. C. S. *Appeal dismissed.*

D. C. M.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 539 OF 1900.

PRINSEP, J.	}	ADHAR MIDDAY and
HANDLEY, J.		others, Petitioners,
1900.		v.
4, September.		THE EMPRESS, Opposite
		Party.

*Warrant, validity of—Attachment of property in execution of an invalid warrant—*

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*Resistance or obstruction to such execution—  
Re-issue of warrant after expired date, legality  
of—Penal Code (Act XLV of 1860), secs  
183, 186.*

*A warrant for realization of money due under a certificate from a Revenue officer having the force of a decree, dated the 15th February, was issued on the 24th February 1900 and made returnable on the 5th March following. A return was made on the 3rd March that no property of the debtor could be found. On the 30th March the same warrant was re-issued by the Nazir and made returnable on the following day. In execution of this warrant certain cattle belonging to the judgment-debtor were attached, and these were taken away by the debtor's men who pushed one of the peons. The debtor's men were thereupon prosecuted for and convicted of offences under secs. 183 and 186 of the Penal Code.*

*Held—That after the return of the 3rd March was made, the warrant ceased to be a valid warrant and it could not be re-issued in that form.*

*That the warrant being illegal, no offence relating to the execution of such warrant was committed by the persons resisting such execution.*

This was a rule issued on the 12th of July 1900, against the order of the 2nd Deputy Magistrate of Diamond Harbour, dated the 8th of June 1900, which order was, on appeal, affirmed by the District Magistrate of the 24-Pergunnahs on the 30th of June 1900.

The facts of the case material to this report appear from the judgment.

*Babu Shyama Prasunno Mozumdar* for the Petitioners.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

The Petitioners were convicted of offences under secs. 183 and 186, I. P. C., and were sentenced to imprisonment as well as fine, and their appeals were dismissed by the District Magistrate. The question raised in this rule is whether the peons who are said to have been obstructed in the execution of their duty were so acting, that is to say, whether they were acting under valid warrants for attachment of the property of the debtor. The warrant was for realization of money due under a certificate from a Revenue officer having the force of a decree. We find that the warrant bears date the 15th February and it was issued on the 24th idem. It declared that the return was to be made on the 6th of March. It was made over to two peons, Adhar and Bhutnath, for execution. A return was made on the 3rd March that no property of the debtor could be found. On the 30th of March, the same warrant was re-issued and given to Ram Charan and Jogendra, two other peons, and they were directed to make a return on the following day. The evidence goes to show that, under this warrant, they made an attachment of certain cattle apparently belonging to the judgment-debtor, and that these were taken away by the debtor's men who pushed one of the peons. It was pleaded before the District Magistrate in appeal and the same point has been raised before us that no offence within secs. 183 and 186 has been committed inasmuch as the peons were not making an attachment in execution of their duty under a valid warrant. We cannot agree with the view taken

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by the District Magistrate. It seems to us that, after the return of the 3rd March was made, that warrant ceased to be a valid warrant and it could not be re-issued in that form. If it was the intention of the Deputy Collector to attach property, he should have issued a warrant which could be properly executed. We think, therefore, that on this ground the conviction and sentence should be set aside, and inasmuch as any assault which was committed on the peon was merely nominal, we think that no other punishment should be awarded for that offence. The fine, if paid, will be refunded.

*Rule made absolute :*

H. P. C.

*Commution set aside.*

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM ORIGINAL DECREE

Nos. 298, 299, & 348 OF 1898.

AMEER ALI, J.

BRETT, J.

1900.

17, July.

In No. 298,

HARI SARAN MAITRA,

Defendant No. 2,

Appellant,

v.

JOTINDRA MOHAN

LAHIRI and others,

Plaintiffs, Respondents.

*Contribution, suit for—Joint wrong-doers—  
Bona fide claim of right.*

*When a joint decree was passed against several persons, no suit for contribution would lie as between them if they were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. But if they were not guilty of wrong in that sense but acted under a bona fide claim of right and had reason to suppose that*

*they had a right to do what they did, then there is a right of contribution inter se.*

*Some time in 1826 R, the common ancestor of the parties, dispossessed K of a share in a certain property; after an interval of 27 years and 6 months K brought a suit and proved his right and recovered possession; meanwhile, i.e., 5 years after the dispossession R had died and had been succeeded by his sons. There was nothing to shew that R or after him his heirs knew that they were doing a wrongful or unlawful act or that they did not do it under cover of a bona fide claim of right. The circumstances pointed to the opposite conclusion:*

*\* Held—That in such a case a suit for contribution lay.*

MERRY WEATHER v. NIXAN (1), BETTS v. GIBBINS (2), ADAMSON v. JARVIS (3), PEARSON v. SKELTON (4), PALMER v. WICK AND PULTENCYTOWN STEAM SHIPPING COMPANY, LD. (5), SREEPUTTY ROY v. LOHARAM ROY (6), SAPUT SINGH v. IMBIT TEWARY (7), and BROJENDRA KUMAR ROY CHOWDHURY v. RASH BEHARI ROY CHOWDHURY (8) referred to.

These were appeals preferred against the decree of Babu Gopal Chandra Banerjee, Subordinate Judge of Zillah Rungpur, dated the 25th of May 1898.

The facts of the case, appear from the judgment.

(1) 8 T. R. 186 (1799).

(2) 2 A. & E 57 at p. 74 (1834).

(3) 4 Bing. Rep. 66 (1827).

(4) 1 M. & W. 504 (1836).

(5) L. R. App. Cas. for 1894, p. 318 (1894).

(6) 7 W. R. 384 (1867).

(7) 1 L. L. R. 5 Cal. 720 (1860).

(8) 1 L. L. R. 13 Cal. 300 (1886).

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*Babus Sreenath Das, Saroda Churn Mitter, Pramatha Nath Sen and Tarit Mohan Das* for the Appellant in No. 298.

*Babus Issur Chandra Chuckerbutty, Kishori Lal Sarkar, Munindra Nath Bhattacharjee, Tarit Mohan Das and Debendra Nath Bagchi* for the Appellant in No. 299.

*Babus Nilmadhub Bose and Mohini Mohan Chuckerbutty* for the Respondents in Nos. 298 and 299.

*Babus Nilmadhub Bose and Mohini Mohan Chuckerbutty* for the Appellant in No. 348.

*Babu Issur Chandra Chuckerbutty* for the Respondent in No. 348.

THE JUDGMENT OF THE COURT was as follows :—

The suit, out of which these appeals arise was brought by the Plaintiff on the 10th September 1894, against the Defendant for contribution. He and the Defendants are the descendants and heirs of Roma Nath Lahiri. Roma Nath and Kali Chandra Lahiri were co-sharers in a certain property called Karaibari, the former being entitled to a twelve annas and the latter to a four annas share. Roma Nath dispossessed Kali Chandra and he and after his death his sons held possession of the share of Kali Chandra from 22nd September 1826 to the 25th July 1854. Kali Chandra brought a suit against Roma Nath and obtained a decree declaring his title to the four annas share and for possession in 1854. After Kali Chandra's death his widow brought a suit against the heirs and representatives of Roma Nath, No. 8 of 1862, for the recovery of mesne profits for the period of her husband's dis-

possession and that suit was finally disposed of by the High Court in April 1879. The result was that Kali Chandra's widow obtained a decree for Rs. 85,795 with costs and interest at 6 per cent. per annum against the heirs and representatives of Roma Nath.

Roma Nath had died in 1831. Execution under that decree was taken out by the decree-holders. Various sums were paid at different times and finally on Plaintiff's property being attached in execution he had to pay off the balance. His contention was that in consequence he had had to pay more than the amount due from him which should have been proportionate to his share in the ancestral estate inherited by him and the Defendants from Roma Nath.

He claimed to be entitled to receive Rs. 4,670 from Defendant No. 1 and Rs. 9,000-4 from Defendant No. 2 with interest on the amounts claimed at 12 per cent. per mensem during the pendency of the suit and costs against the Defendants severally according to their respective shares or for any modified or altered relief which the Court might think fit to award him.

In the schedule to the plaint he set out his own share and the shares of the Defendants as the basis on which he had calculated the amount due from each. The share of Defendant No. 2, Hari Saran Maitra, he put down at 3 as. 4 p. The share of Defendant No. 1, Nilkamal Lahiri, he put down at 6 as. 8 g. and his own share at 3 as. 18 g. He also set out the share of Kanaktara Debya as 2 as. 10 g. That share after the death of Kanaktara in 1884, admittedly devolved in moiety on Defendant No. 1 and the Plaintiff.



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The payments and liabilities in respect of that share are shown in the schedule to balance and for the purposes of this case that share may be left out of consideration. The only dispute which has been raised in this appeal is with regard to the other three shares.

The Defendants in bar of the suit put forward a plea of limitation, and on that plea the Sub-Judge of Rungpore dismissed the suit on the 25th June 1895. On appeal this Court reversed the judgment and decree of the Sub-Judge on the 16th August 1897, and remanded the suit to him for trial on the merits. As this appeal is against his decision on the merits it is necessary to mention the rest of the defence which was entered into by the Defendants.

The defence, common to both Defendants, was as follows: that the Plaintiff had not paid more than he was liable to pay in proportion to his share in the ancestral estate: and that after the decision of the suit various worthless and groundless objections were set forward by the Plaintiff's mother and guardian Bhubaneswari Debya which delayed the payment in satisfaction of the decree of certain sums of money which were in deposit in the treasury of the Garo Hills and the Court of the District Judge of Rungpore to the credit of Plaintiff and the Defendants and consequently a large amount of interest accrued on the debt due under the decree, any share of which the Defendants denied the Plaintiff's right to recover from them. The objections were all disallowed in judgments passed in 1882 and 1886.

Further it was contended that Plaintiff having voluntarily and without any

fraud admitted when the last payments were made in execution of the decree, liability of Rs. 25,700 and having paid that sum under the petition then filed he is bound by that admission: Plaintiff's right to the interest claimed during suit or after was also denied.

For Defendant No. 1 it was further urged that he had paid up the full amount due from him proportionate to his share in the ancestral estate and that he was not liable to the Plaintiff for anything more.

For Defendant No. 2 it was contended that he had paid up the full amount due from him in proportion to his share. It was urged that it was unjust that Plaintiff should claim from Defendant No. 2 contribution on the basis of his having a 3 annas 4 gundas share in the estate, and yet, out of the joint fund taken out of deposit in the Garo Hills treasury, should credit him with an amount proportionate to 2 annas share only.

It was also contended that the Plaintiff did not claim interest for the delay in taking out the share of the joint fund from the District Judge's Court and its payment in satisfaction of the decree as the delay was due to a groundless objection preferred by him in that Court: and that in consequence of a dispute between Plaintiff and Defendant regarding a portion of Defendant's 3 annas 4 gundas share, the Defendant was kept out of possession and enjoyment of 1 anna 4 gundas share of it up to April 1888, and so Plaintiff's claim for interest was in proportion not maintainable: and finally that Plaintiff's claim was altogether without foundation: he had increased the

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interest on the original decretal debt in consequence of his groundless objections and he had not paid any sum under the decree that was due from the Defendants. The Subordinate Judge framed five issues. The first relating to limitation has already been noticed. The others were :—

2. Whether the Plaintiff was alone liable for the interest that accrued subsequent to his guardian taking objection to the amendment of the High Court decree and to the payment of the money held in deposit in the treasuries at Rungpur and Garo Hills to the decree-holders?

3. Whether Plaintiff satisfied any portion of the decree payable by the Defendants and, if so, to what extent?

4. Is the Plaintiff entitled to any and what interest on the excess paid by him?

5. What was Defendant No. 2's share in the money held in deposit at Garo Hills and Rungpur treasuries?

On the 2nd issue the Subordinate Judge found that the Plaintiff was entitled to the share of the interest paid by him to the decree-holders for the Defendants. He held that the objections raised by the Plaintiff's guardian did not prevent the Defendant from withdrawing their shares in the sums in the treasuries and for paying off the decree.

On the 3rd issue he found that the Plaintiff had proved that he had paid Rs. 6,215-11-2 for Defendant No. 2, Hari Saran Maitra, and that he had paid Rs. 3,229-11-5 for Defendant No. 1, Nilkamal Lahiri.

On the 4th point he found that the Plaintiff was not entitled to recover interest at 12 per cent. per month from the Defendants during the pendency of the

suit as Plaintiff's guardian was responsible for borrowing money at such high interest, and Plaintiff also instituted the suit after a long delay.

On the 5th issue he found that Defendant No. 2 Hari Saran Maitra's share in the deposit in the Garo Hills treasury was two annas at the time the money was drawn by the decree-holder as he was out of possession of 1 anna 3 gundas (apparently this should be 1 anna 4 gundas) share at that time.

With regard to the contention that the Plaintiff was bound by the admission of liability made in the petition filed by the pleader when the Rs. 25,700 was paid in satisfaction of the decree, the Subordinate Judge held that the Plaintiff being then a minor was not bound by the admission of his guardian, even if that admission was voluntary which he doubted.

In consequence of the delay in the withdrawal of the sums out of the treasury of the Garo Hills and the Court of the District Judge of Rungpur caused by the objections put forward by the Plaintiff which were all rejected, the Subordinate Judge held that the Plaintiff was not entitled to recover from the Defendants interest on the sums paid by the Plaintiff for the Defendants.

An objection of law which was not raised in the pleadings was taken during the trial. It was that the Plaintiff being a joint wrong-doer with the Defendants could not sue them for contribution. This objection was rejected by the Subordinate Judge on the ground that Roma Nath was the original wrong-doer and not the present parties to the suit.

Finally he gave the Plaintiff a decree for Rs. 3,229-11-9 against Defendant

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No. 1 and for Rs. 6,215-11-2 against Defendant No. 2 with proportionate costs and interest at 6 per cent. during pendency of the suit and up to realization.

Both Defendants have appealed separately to this Court. Defendant No. 2 in appeal No. 298 of 1898 and Defendant No. 1 in appeal No. 299 of 1898. Plaintiff has also preferred a separate appeal No. 348 of 1898 in respect of the interest which had been disallowed.

When the appeals came on for hearing, the learned pleader for the Plaintiff stated that he would not press the Plaintiff's appeal. That appeal is therefore dismissed.

The other two appeals have been argued separately though some of the contentions raised are common to both.

The first common contention which has been raised is that the Plaintiff as a joint tortfeasor with the Defendants cannot recover contribution from them. The general principle as laid down in the leading case of *Merry Weather v. Nixan* (1) is relied on. That principle is not, however, in our opinion, applicable to the present case. The principle was explained by Lord Denman in *Betts v. Gibbins* (2) who said:—"The general rule is that between wrong-doers there is neither indemnity nor contribution: the exception is where the act is not clearly illegal in itself." In *Adamson v. Jarvis* (3) and *Pearson v. Skelton* (4) it was pointed out that "the rule applies only to cases where the person asking redress must be presumed to have known that

he was doing an illegal act and does not extend to cases where he was a tortfeasor by inference of law only." In the case of *Palmer v. Wick and Pulteneytown Steam Shipping Company, Ltd.* (5) Lord Herschell, L. C., adopted the view expressed by Best, C. J., in *Adamson v. Jarvis* (3) and pointed out that there is a tendency even in England to limit the broad principle laid down in *Merry Weather v. Nixan* (1). The law, as thus laid down by high authority, had been followed by this Court in several cases. In the case of *Sreeputty Roy v. Loharam Roy and others* (6) the Plaintiff was one of several persons including the Defendants who had wrongfully constructed a bandel and caught fish within the limits of a Jalkar belonging to a third party. That third party had in a subsequent suit obtained a decree against the Plaintiffs and Defendants jointly which he had executed against the Plaintiff alone. The Plaintiff sued the Defendants for contribution. In the judgment of the Full Bench delivered in that case the following remarks are made:—"All that we can say is that the Plaintiff was not necessarily precluded from recovering contribution merely because the damages for which the decree was given was caused by a wrong, in the legal sense of the term, done to the Plaintiff." If they (the Plaintiff and the Defendants) were all jointly concerned in committing an act which they knew to be illegal, the Plaintiff is not entitled to contribution. "The general rule [*i.e.*, laid down in *Merry Weather v. Nixan* (1)] has been

(1) 8 T. R. 186 (1799).

(2) 2 A. & E. 57 at p. 74 (1834).

(3) 4 Bing. Rep. 66 (1827).

(4) 1 M. & W. 504 (1836).

(1) 8 T. R. 186 (1799).

(3) 4 Bing. Rep. 66 (1827).

(5) L. R. App. Cas. for 1894, p. 318 (1894).

(6) 7 W. R. 384 (1867).

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greatly modified in later cases. The true principle was laid down by Chief Justice Best in *Adamson v. Jarvis* (3) in which he said that the rule was confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

The same view was adopted in *Saput Singh and others v. Imrit Tewari and others* (7) where the law was laid down as follows:—"The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all depends upon the question whether the Defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In that case no suit for contribution will lie. If the Defendants in the former suit were not guilty of wrong in that sense but acted under a *bona fide* claim of right and had reason to suppose that they had a right to do what they did then they may have a right of contribution *inter se* and the Court should inquire what share they each took in the transaction." The same view was taken in the case of *Brojendra Kumar Roy Chowdhury v. Rash Behari Roy Chowdhury* (8).

Applying the principles thus laid down to the facts of the present case we find as follows:—Some time in 1826, that is nearly 75 years ago, Roma Nath, the common ancestor of the parties in this suit, dispossessed Kali Chandra, possibly a relation, of a share in a certain property; why he did so we do not know, and there

is nothing on the record to help us. After an interval of 27 years and 6 months Kali Chandra brought a suit and proved his right and recovered possession. Meanwhile, i.e., 5 years\* after the dispossession, Roma Nath had died and had been succeeded by his sons. There is nothing in the record to show that Roma Nath in the first instance or after him his sons and heirs when they entered into possession of the share, of Kali Chandra knew that they were doing a wrongful or unlawful act, or that they did not do it under cover of a *bona fide* claim of right. The circumstances in fact point to the opposite conclusion, and under the circumstances and having regard to the authorities quoted we are unable to hold that the Plaintiff's suit for contribution against the Defendants is not maintainable. We agree therefore with the Subordinate Judge in rejecting this objection.

We will now take the case on the merits. The Plaintiff in this case is seeking equitable relief against the Defendants and it therefore rests on him primarily to establish his case that he has paid more than his share under the decree. It has been urged by the learned pleader for the Plaintiff-Respondent that in the pleadings no question was raised as to the correctness of the shares set out in the schedule attached to the plaint or during the trial. So far as Defendant No. 1 is concerned, this seems to be correct, and is in fact admitted by his pleader. So far as Defendant No. 2 is concerned, it appears that, after the remand by this Court, he put in a petition to the Sub-Judge on the 13th. Magh 1304 (25th January 1898) in which he prayed that two additional issues might

(3) 4 Bing. Rep. 86 (1827).

(7) I. L. R. 5 Cal. 720 (1889).

(8) I. L. R. 13 Cal. 300 (1886).

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be framed and tried. They were as

(1) Is the Defendant liable for more than two annas share of the debt and interest? (2) Is the Plaintiff legally entitled to a decree for contribution as prayed for by him and is the Plaintiff entitled to any relief, he being one of the tortfeasors.

Arguments appear to have been heard on the subject of the petition but no order with regard to it was passed. We find however no discussion of the shares of the parties in the judgment of the Sub-Judge though we do find that the question of the Plaintiff's right as a joint tortfeasor to sue for contribution was considered. For Defendant No. 1 it is contended that the question can be considered by this Court, such order being passed with regard to costs as may seem fit.

Now the Plaintiff estimates his share at 3 annas 18 gundas in the ancestral property, apart from the share inherited by him from Kanaktara on her death. As already noticed, there is no dispute about Kanaktara's share or the respective liabilities in respect of it of Plaintiff and Defendant No. 1. It has been dealt with separately. In the schedule of accounts a complete adjustment in respect of it is exhibited and we may omit that share from consideration. We have to deal with the respective shares of the parties of which they were in possession from September 1826 to 25th July 1854,—while Plaintiff says that he was in possession of a share of 3 annas 18 gundas—the case for the Defendant is that he was in possession of a 5 annas share.

Of late years there appears to have been a good deal of litigation between

the parties and in order to show what that litigation was about and at the same time apparently to prove what his share in the ancestral property was during the years in question the Plaintiff has filed several copies of proceedings in Court and amongst others a copy of a judgment of this Court dated the 5th September 1892. Similarly, for the Defendant, copies of petitions, judgments and other proceedings were filed. It is to be observed that in this appeal each party wishes to make use of those documents to prove that the pleadings and conduct of his opponent in those proceedings support his own case in this Court. In fact they want to prove from those proceedings that each of them was in possession of a smaller share than is now alleged and his adversary was in possession of a larger share.

It rests however with the Plaintiff to prove his share first. He says his share was 3 annas 18 gundas and he must show how he arrives at it.

Roma Nath, the common ancestor of the Plaintiff and Defendants, had 5 sons. Ordinarily on his death they would have succeeded to his estate in equal shares of one-fifth or 3 annas 4 gundas each. As a matter of fact they have not so succeeded. Defendant No. 2 is the only descendant who is now admittedly entitled to a 3 annas 4 gundas share but his right to it was only ascertained after a suit for that purpose had been instituted by his mother on the 26th August 1870 (No. 42 of 1870). The only explanation of the alteration in the shares which came to the heirs of Roma Nath, which we can find on the record, is to be gathered from the judgment of this

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Court (NORRIS and BEVERLEY, JJ.) dated the 6th September 1892, which, as noticed above, was filed by the Plaintiff. The whole history of the devolution of the shares and the litigation between the parties is fully and lucidly set out in that judgment. It is not possible for us now to say where the facts stated in the judgment were gathered from, i.e., whether from the arguments of the counsel, or the pleadings or judgments in the previous cases. But they appear to us to be correct, and it hardly rests with the Plaintiff to dispute them.

There can be no doubt that on the 26th August 1870 Uma Sundari instituted a suit against Bhubaneswari, the mother and guardian of the Plaintiff, Nilkamal Defendant No. 1, and Kanaktara (since deceased and whose property has been inherited by Plaintiff and Defendant No. 1) to recover possession of 1 anna 4 gundas share of the property of which she said she had been dispossessed out of the 3 annas 4 gundas share which devolved on her grandfather on the death of Roma Nath. In opposition to her claim a copy of a deed of (*annoomati annoogya patra*) settlement said to have been executed by Roma Nath in October 1826 and a deed of conveyance of 10 gundas of the share said to have been executed by Uma Sundari's mother Chandramani to Shib Nath, the *karta*, or manager of the joint family, dated March 1856, were propounded by the Defendants. The suit was finally disposed of on appeal by the High Court. The conveyance was held not to be binding on Uma Sundari and the documentary evidence to prove the settlement was held to be inadmissible. A decree for 3 annas 4

gundas share was granted in favour of Uma Sundari. This decree was affirmed by the Privy Council on the 20th November 1880.

In spite, however, of the result of that suit there can be no doubt [see judgment of the Privy Council in *Bhubaneswari Devi v. Hari Saran Moitra* (9)] that there was some deed executed by Roma Nath of the description of the deed of settlement and that the arrangement which it purported to make was acted upon. It is only on that theory that the shares at present claimed and held by the Plaintiff and Defendant No. 1 can be explained. The statement of the shares then created and the devolution of those shares on the heirs and descendants of Roma Nath are fully set out in the judgment of this Court to which reference has been made previously. By the settlement Roma Nath kept 3 annas for himself and his wife, gave 3 annas to his eldest son, and 2 annas 10 gundas to each of his younger sons.

Kanaktara was the widow of the eldest son. Roma Nath died in 1831, and on the death of his widow his 3 annas devolved in equal shares on the two surviving male descendants, Nilkamal and Shib Nath. Shib Nath is the father of Plaintiff and his share then became 4 annas. In March 1856 the grandmother of Defendant No. 2 Chandramoni, Kanaktara and Chandramani, widow of the deceased third son of Roma Nath, are said to have conveyed 10 gundas each of their shares to Shib Nath. Shib Nath appears to have been then the manager of the family. This made Shib Nath's share 5 annas 10 gundas. Shib Nath made a

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gift of 10 gundas to Nilkamal, Defendant No. 1, and this left him with 5 annas which devolved on his death on his widow Bhoobaneswari.

The share of Nilkamal by inheritance from Jagadiswari by gift from Shibnath and by inheritance from Chandramani amounted to 6 annas 18 gundas. The 10 gundas was however given after 1856.

After the suit brought by Uma Sundari, mother of Defendant No. 2, and daughter of Chandramani, in 1870, had been disposed of and a share of 1 anna 4 gundas had been decreed to her in addition to the share of 2 annas of which she was then in possession, 1 anna 2 gundas were taken from Plaintiff's share and 2 gundas from the share of Defendant No. 1 which was then 6 annas 10 gundas.

According then to the facts as they appear in the judgment and which afford the only explanation which has been offered to us of the shares claimed by the Plaintiff and Defendant No. 1, it appears to us that there can be no doubt that between 1826 and 1854 the shares in respect of which the Plaintiff must be held to be liable under the decree amounted to 5 annas. His father Shib Nath was then the *karta* of the family and it seems impossible to believe that when he, in opposition to Uma Sundari's claim, put forward the deed of settlement and the conveyances he did not act according to them in appropriating the profits of the estate among the different co-sharers. The deed of settlement appears to have disappeared between 1826 and 1870, but it seems to have been produced and referred to in the proceedings in 1832 and 1837. It was not therefore

a purely imaginary document though this Court held in Uma Sundari's case that the evidence adduced to support it was insufficient.

From this judgment and from the facts as they appear in the case it appears then that for the years 1826 to 1854 the Plaintiff's share must be taken as 5 annas, the share of Defendant No. 2 as 2 annas 10 gundas and the share of Defendant No. 1 as 6 annas. This excludes the 2 annas 10 gundas share of Kanaktara as to which there is no dispute. That Plaintiff's share was 5 annas is further supported by Ex. XXIV the account of Koraibari for 1883-1884, by Ex. XXV, the certified copy of the English account of Garo Hills in the name of Kanaktara Debi, by Ex. I the petition put in by Bhoobaneswari Debi in the execution proceedings of the case in which the mesne profits were decreed, and by order 25 in the order sheet of those proceedings. The evidence of Plaintiff's witness Mathura Nath Pal is to the same effect.

On behalf, however, of the Plaintiff it is argued that the averments in the plaint filed by Uma Sundari in August 1870 (5 Bhadra 1277) show that her share was all along 3 annas 4 gundas and that dispossession of one anna 4 gundas of that share was only alleged from 1861 (Falgoon 1268), also that the same case was put forward by Hari Saran Maitra, Defendant No. 2, in his suit brought in 1881 for the mesne profits from 1877 and in his suit brought in 1891 for mesne profits from 1292 to 1295 (1885 to 1888). It is urged that it never was his or his mother or his grandmother's case before him that they were only in possession of 2 annas 10 gundas share from 1826 to

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1854, and that as the point was not distinctly raised in the pleadings their liability should be held to be proportionate to the 3 annas 4 gundas share to which they have been found to be entitled.

We do not, however, think that in the plaint referred to it was intended to do more than to assert the right of Defendant No. 2 or his predecessors to a 1 ans. 4 g. share of which possession was held jointly with their co-sharers. We do not think that the statements in the different plaints can be regarded as admissions of possession. On the other hand we see no reason to doubt that the father of the Plaintiff as manager of the family was able to act on the settlement which he and others propounded and to distribute the profits in accordance with it. We find therefore that the share for which the Plaintiff must be held responsible for the years 1826 to 1854 was 5 ans., Defendant No. 1, 6 ans, Defendant No. 2, 2 ans. 10 g. The alleged conveyance of the 10 g. by the grand mother of Defendant No. 2 to Shib Nath was in 1856.

The Plaintiff has estimated his own liability at Rs. 20,912-9-0-15 on the basis of a 3 ans. 18 g. share. It should however have been calculated at Rs. 26,810-15-8 on the basis of a 5 annas share.

The liability of Defendant No. 1 has been estimated on the basis of a 6 annas 8 gundas share. It should have been estimated on the basis of a 6 annas share. This would make his liability Rs. 32,173-3 instead of Rs. 34,318. As to the credits there is no real dispute. Making up the account on this basis the amount paid by the Defendant No. 1

covers his liability and we find that the Plaintiff's claim for contribution against him must fail.

The liability of Defendant No. 2 has been estimated on the basis of a 3 ans. 4 g. share. It should have been estimated on the basis of a 2 ans. 10 g. share. This would give his liability as Rs. 13,405-8-1 instead of Rs. 17,159-0-4-17 as given in the schedule of the plaint.

There has been considerable discussion as to the share to which Defendant No. 2 is entitled to credit for out of the sum drawn from the 'Garro Hills treasury and paid to the decree-holders in satisfaction of their decree. The Plaintiff has given him credit for Rs. 2,615-9-4-10 in respect of a 2 annas share, and the Sub Judge has accepted that estimate on the ground that the Plaintiff was out of possession of the 1 anna 4 gundas share at that time. It is not clear what time the Subordinate Judge refers to. The suit was brought by Uma Sundari claiming a 3 annas 4 gundas share in 1870 and it was decreed in the High Court in 1874 and in the Privy Council in 1880. The money was drawn out of the Garro Hills treasury in 1883. Certainly at the time the money was drawn, Defendant No. 2 was entitled to a 3 annas 1 gundas share of it. We cannot therefore agree with the finding of the Subordinate Judge in this point but hold that Defendant No. 2 is entitled to a credit out of the sum drawn from the Garro Hills treasury proportionate to a 3 annas 4 gundas or one-fifth share, that is to say to Rs. 4,181-11-9.

As to the other credits there is no dispute.

On these findings then of this Court



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It follows that the Defendant No. 2 has paid up the full amount due from him under the decree, proportionate to his share, and the Plaintiff's claim against him for contribution fails.

The result is that the judgment and decree of the Subordinate Judge is set aside and in lieu thereof, we dismiss the Plaintiff's suit against both Defendants.

Appeals Nos. 298 and 299 of 1898 are decreed and appeal No. 318 of 1898 is dismissed.

As the decision of the case has really turned on the ascertainment of the shares of the different parties in the ancestral property during the years 1826 to 1851, and as that issue was not raised at all by Defendant No. 1 in the pleadings and only at a late stage after remand by Defendant No. 2, we think that the parties should bear their own costs in these appeals.

The Defendants are entitled to their costs in the lower Court with interest at 6 per cent. per annum up to the date of realization; and it is ordered accordingly.

*Appeal dismissed.*

S. C. S.

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM APPELLATE DECREE

No. 566 OF 1899.

RAMPINI, J.

PRATT, J.

1900.

8. August.

SHIB NARAIN PAHARI,  
Plaintiff, Appellant,

v.

SHANKAR PANIGRAHI  
and others, Defendants,  
Respondents.

*Onus probandi—Mortgage suit—Fraud—Collusion.*

*In a suit on a mortgage, where collusion and fraud is pleaded by a subsequent*

*auction-purchaser of the mortgaged property, the onus is upon the Plaintiff to prove that the transaction was perfectly genuine and free from taint of fraud.*

**BRAJESHWARE PESHAKAR v. BUDHAN-  
UDDI (1) referred to and explained.**

**ISHAN CHUNDER SIRKAR v. BENI  
MADHUB SIRKAR (2) distinguished.**

This was an appeal preferred on the 23rd of March 1899, against the decree of Babu Durga Churn Ghose, Subordinate Judge of Zillah Midnapur, dated the 23rd of December 1898, modifying the decree of Babu Kalidhan Mukerjee, Munsif of Contai, 4th Court, dated the 31st of July 1897.

The facts of the case appear from the judgment.

*Babu Karuna Sundhar Mukerjee* for the Appellant.

*Dr. Asutosh Mukerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the Subordinate Judge of Midnapur, dated the 23rd December 1898.

The suit is one brought upon a mortgage. The Plaintiff is the mortgagee; and he alleges that the mortgage which was for Rs. 49, was executed in his favour by the father of the Defendants Nos. 1 to 3 and by the Defendant No. 1. Subsequently to the execution of this mortgage the property was sold in execution of another decree for arrears of rent and purchased by the Defendants Nos. 5 to 13. In this suit the Defendants Nos. 1 to 3

(1) I. L. R. 6 Cal. 268 (1880).

(2) I. L. R. 24 Cal. 92 (1896).

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did not appear, but the Defendant No. 4 appeared. He admitted the genuineness of the mortgage, and pleaded part payment, but he gave no evidence at all in support of his allegations. The real contesting Defendants are the Defendants Nos. 5 to 13, who say that the mortgage was a collusive transaction and was never really executed by the father of the Defendants Nos. 1 to 3 and by the Defendant No. 4. It is to be noticed that the Defendants Nos. 5 to 13 do not contest the Plaintiff's suit with regard to plot No. 1, because they have no concern with that plot. Their concern is with plot No. 2 which they purchased.

The Court of first instance gave the Plaintiff a decree.

The Munsif's decision has been reversed by the Subordinate Judge, who has found that the mortgage bond, although duly executed, was, nevertheless, fraudulent and collusive.

The learned pleader for the Plaintiff-Appellant urges that the burden of proof in this case has been misplaced, and that the Judge in the Court below was not justified in relying upon the ruling in *Brajeshware Peshakar v. Budhanuddi* (1), in support of his placing the *onus probandi* in this case on the Plaintiff. The pleader contends that the *ratio decidendi* in that case was that the execution-purchaser was not the representative of the judgment-debtor, that his purchase was adverse to the rights of the judgment-debtor and that therefore he was entitled to impugn the genuineness of the mortgage transaction. The learned pleader contends that by the Full Bench ruling in *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (2) it has now been laid down that the execution-purchaser is the representative of the judgment-debtor and that the onus should therefore be placed, not upon the Plaintiff but upon the Defendant.

We are unable to take this view of the matter. The Full Bench ruling in the case of *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (2) only held that an execution-purchaser is the representative of the judgment-debtor for the purpose of sec. 244, C. P. C. Furthermore, we do not find that the *ratio decidendi* of the case of *Brajeshware Peshakar v. Budhanuddi* (1) is as stated by the learned pleader for the Appellant, that the execution-purchaser is not the representative of the judgment-debtor. The ruling in that case seems to proceed upon the general principle that the Plaintiff must prove his case, and we do not think that the rule is altered when the transaction is impugned on the ground of fraud. It must be for the Plaintiff to prove that the transaction was perfectly genuine and free from taint of fraud. As a matter of fact such a case has not been made out. The Plaintiff has produced *prima facie* evidence in support of the genuineness of his mortgage, but it has not satisfied the Judge in the Court below. On the contrary he has held on that evidence that the mortgage was a fraudulent transaction. The grounds upon which he has come to this conclusion are as follows:—(i) that the mortgage deed is unregistered; (ii) that the transaction was between relations and there was no necessity on the part of

(1) I. L. R. 6 Cal. 268 (1880).

(2) I. L. R. 24 Cal. 62 (1896).

(1) I. L. R. 6 Cal. 268 (1880).

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the mortgagors for borrowing money; (iii) that the mortgagors were possessed of other properties; (iv) that the due date for re-payment of the loan was fixed at more than 4½ years later; (v) that the attesting witnesses to the deed are not independent persons.

Now, it is not possible for us to say that these facts do not justify the finding of the Judge deducing fraud, when he takes the view with regard to the transaction which he has done. The strongest facts in support of the conclusion that the deed is not genuine, are three, namely, that there is no evidence that the Defendants required to borrow such a small sum as Rs. 49, that it is in evidence that they were possessed of other property; and that the date for repayment of this paltry loan of Rs. 49 was fixed at 4½ years later; so that the Defendants, these well-to-do gentlemen, possessed of other means were to pay off this trifling and insignificant sum of Rs. 49 at the rate of Rs. 10 per annum. The three witnesses to the deed are not independent witnesses and the suit has been brought after great delay, namely, 11½ years.

Altogether we are not prepared to say that the finding arrived at by the learned Subordinate Judge is incorrect, or that he has improperly laid the onus of proof upon the Plaintiff: and we accordingly dismiss this appeal with costs.

*Appeal dismissed.*

S. C. S.

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM APPELLATE DECREE

No. 1892 of 1898.

GHOSE, J.

PRATT, J.

1900.

23, November.

SHEIKH SARAFUDDIN  
MONDUL and another, De-  
fendants, Appellants,

v.

CHANDRA MANI GUPTA  
and another, Plaintiffs,  
Respondents.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3 - Limitation—Dispossession by a co-sharer landlord—Recognition of tenant's title.*

*Where one of two co-sharer landlords brought a suit to have his right established to sell the occupancy holding of the raiyat in execution of a decree for money obtained by him, and it was proved that although the other co-sharer landlord had dispossessed the raiyat more than 2 years before the institution of the suit, but that notwithstanding the unlawful dispossession, the title of the raiyat was throughout recognised by all parties concerned, and the recognition had been up to within two years of the institution of the suit:*

*Held—That the suit was not barred by the two years' rule.*

This was an appeal preferred on the 8th of September 1898, against the decree of Babu A. C. Ghosh, Subordinate Judge of Birbhum, dated the 25th of July 1898, preferred on appeal from the decision of Babu Bhaba Churn Mukerjee, Additional Munsif of Rampurhat, dated the 15th of March 1897.

The facts of the case, out of which this appeal arose, were as follows:—

Chandra Mani Gupta (Plaintiff No. 1) having obtained a decree for money

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against Siva Ram Mondul (Defendant No. 3) attached in execution of the said decree the land in suit together with other lands forming the *jote* of the said Siva Ram Mondul. Thereupon the Defendants Nos. 1 and 2, the Appellants in this appeal, preferred a claim to the land in suit which was allowed. Chandra Mani Gupta then brought the present suit, for a declaration of her judgment-debtor's (Siva Ram Mondul's) right to the land in suit and that it was liable to be sold in execution of the decree obtained by her against the said Siva Ram Mondul.

The Plaintiff's case, so far as is material to this report, was briefly this:— That the disputed 6 bighas 11 cottahs of land formed part of the *jote* of Siva Ram Mondul consisting of 12½ bighas of land in *kismut* Chanchal of which the Plaintiff was *seputnidar* to the extent of a one moiety share, and Defendant No. 1 was the *durputnidar* of the remaining one moiety share, and that both the landlords were in possession by separate realization of rent from the tenants of the aforesaid *mehal kismut* Chanchal, that Siva Ram Mondul who was an occupancy *raiyat* of the said *jote* sub-let a portion of his *jote*, viz., the disputed 6 bighas 11 cottahs of land, to one Ram Doyal Muchi in 1289, B. S., and Ram Doyal Muchi remained in possession of the same since then to 1293 as *kamfadar* under Siva Ram Mondul, that Ram Doyal gave up the land in 1293, whereupon Siva Ram sub-let the same to one Haridas Babaji who died in 1299 without leaving any heir, that after Haridas' death, Siva Ram took *khas* possession of the land, and that since then he was in *khas* possession

of it, by cultivating the land himself, that the Plaintiff obtained a decree for money for Rs. 80-9 annas against Siva Ram Mondul on the 17th January 1895, and that in execution of the said decree the whole *jote* of Siva Ram was attached, out of which Defendants Nos. 1 and 2 preferred a claim in respect of 6 bighas 11 cottahs only, the subject-matter of the present suit, that the said claim was allowed on the 13th July 1895.

The defence of the principal Defendants Nos. 1 and 2 was, *inter alia*, that the Plaintiff Chandra Mani Gupta had no right to sue inasmuch as she had no right to the money due upon the decree mentioned by her in the plaint; that the Defendant No. 3 Siva Ram had no right to the land in suit; that the suit was barred by limitation as Siva Ram was never in possession within twelve years prior to the suit; that Siva Ram, on behalf of himself and his minor brother relinquished the land in suit in favour of Defendant No. 1 and the predecessors in interest of the Plaintiff, who were the 16 annas landlords at that time; that thereafter Defendant No. 1 kept the land in *khas* possession and paid rent therefor to himself and his co-sharer landlord and settled the same with Ram Doyal Muchi but no mutation of names in the landlord's *sherista* was made and Siva Ram's name continued in the *sherista* in respect of the whole *jama*; that Defendant Nos. 1 and 2 continued to be in possession up to date; that subsequently the land in suit was registered in the name of Haridas Babaji, who was merely a *benamidar* of Defendant No. 1; that no objection was made by Defendant No. 3 at that time and as Defendant

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No. 3 or his brother was not in possession within 12 years or two years of the suit, whatever right they had in the land in suit had been relinquished. Defendant No. 3 supported the Plaintiff's allegations.

Girija Sankar Roy, the adopted son, was also made a Plaintiff.

The Munsif dismissed the Plaintiff's suit and held on the question of limitation, that Siva Ram was an occupancy *raiyat*, and any suit for recovery of possession of the land in suit by him would be governed by Art. 3, Part I, Sch. III of the Bengal Tenancy Act which provides two years' limitation from the date of dispossession and that the said article would apply to any such suit by Siva Ram Mondul was sufficiently clear from the case of *Bheka Singh v. Nakhel Singh* (1) and that the provisions of sec. 28 of the Limitation Act read together with sec. 185 of the Bengal Tenancy Act, clearly shewed that even if Siva Ram had any such right as alleged by the Plaintiff it was extinguished.

On appeal, the Subordinate Judge reversed the decision of the Munsif and allowed the appeal and decreed the Plaintiff's suit holding that the suit was not for recovery of possession of *jote* land by a tenant against his landlord, and that two years' limitation would not apply, but was for declaration of *jote* right of the tenant in the disputed land under sec. 283 of the Civil Procedure Code, that it might be sold in execution of Plaintiff's decree for money, and that the Defendant No. 1 not being 16 annas proprietor, dispossession by him could not be held to be dispossession

by the landlord as contemplated by the Bengal Tenancy Act, and relying upon the case of *Dinabandhu Shaha v. Lolit Mohun Mitter* (2) held that 12 years' limitation applied to the case and the suit having been instituted within 12 years from 1294 the date of dispossession, was not barred.

The lower Appellate Court further found that the alleged *istafa* by Siva Ram in 1282 was not proved and that Siva Ram's name was still recorded in the *sherista* of the Plaintiff as *jotedar* of the entire land, and it continued in the *sherista* of Defendant till 1294. It was also found that Plaintiff had sued Siva Ram for her share of the rent of the whole *jote* from 1297 to 1300 and obtained a decree and that the money was realised and Defendant No. 1 paid the money.

Defendants Nos. 1 and 2 preferred this appeal.

*Babu Karuna Sindhu Mukerjee* for the Appellants.

*Babus Golap Chandra Sarkar* and *Surendra Chandra Sen* and *Mr. J. R. Percival* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The question that has been primarily discussed before us is, whether, under Art. 3 of the 3rd Schedule of the Bengal Tenancy Act, the suit is barred by limitation. We, however, pointed out in the course of the argument that that is not quite the right way of putting the point that arises in this appeal. That point is this. The *raiyat*, Siva Ram, having been dispossessed by the Defendants

(1) L. L. R. 24 Cal. 40 (1896).

(2) 2 C. W. N. 595 (1895).

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more than two years antecedent to the suit, whether it is now open to the Plaintiff, who is one of the co-sharer landlords, to bring to sale the land of Siva Ram in execution of a decree obtained by him against that individual. No doubt, if Siva Ram lost his right by efflux of time, and if he was not in a position to assert his right to this land by reason of the article of the limitation law in the Bengal Tenancy Act, to which we have referred, it would not be open to the Plaintiff in this case to bring to sale the property in question as the property of Siva Ram. But then turning to the judgment of the lower Appellate Court, it seems to us that as a matter of fact the right of Siva Ram to this property did not come to an end before two years antecedent to the present suit. It would appear from the facts as recited in that judgment that notwithstanding the unlawful possession which is said to be taken by the Defendant No. 1, who is one of the co-sharer landlords, the title of Siva Ram as tenant was throughout recognized by all parties concerned, and the recognition seems to have been up to, as we gather, within two years of the institution of the suit. That being so, it seems to us that the view of the relative rights of the parties, as taken by the Court of Appeal, is right.

The result is that this appeal is dismissed with costs.

*Appeal dismissed.*

S. C. S.

H. P. C.

# [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 724 of 1895.

STANLEY, J.

1901.

\* 14, January.

NETAI CHAND CHUCKERBUTTY, Plaintiff,  
v.  
ASHUTOSH CHUCKERBUTTY, Defendant.

*Mortgage suit—Administration suit—Residuary legatee, mortgage by—Administration, subsequent, of testator's estate—Receiver of testator's estate pending administration—Receiver, sale by, of mortgaged property before completion of administration.*

*Defendant mortgaged certain properties, which he took under the Will of his father to the Plaintiff. Plaintiff brought this suit on the mortgage and obtained a decree and an order for sale by the Registrar. In the meantime a suit for administration of the testator's property had been filed and an order made in that suit appointing a Receiver. Plaintiff now applied that the sale of the mortgaged properties might be held by the Receiver appointed in the administration suit instead of by the Registrar. The administration suit was still pending and administration of the testator's estate had not been completed :*

*Held—That the sale could not be held by the Receiver before the completion of the administration.*

*That till such completion of administration it could not be said that the Defendant was entitled to the mortgaged properties.*

This was an application in Chambers for a sale of certain properties by the Receiver, appointed in an administration suit, under the following circumstances : It appears that the Defendant Ashutosh

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had acquired the properties in dispute under the Will of his father Woomesh Chunder Chuckerbutty by which he was also appointed the executor. On the 29th February 1892 he mortgaged them to the Plaintiff's father and subsequently created various other encumbrances. Some time in 1893, one Jadub Kissen Mukerjee and others brought a suit (being suit No. 514 of 1893) against the Defendant Ashutosh for the administration of the estate of Woomesh Chunder Chuckerbutty and for other reliefs and in that suit an order was made appointing a Receiver who took over possession of, amongst other properties, the properties mortgaged to the Plaintiff's father.

The present suit was instituted in 1895 for the recovery of the monies due on the mortgage executed by Ashutosh, the subsequent mortgagees being also made parties thereto. Under an order made in the administration suit, the Receiver was also made a party Defendant. On the 2nd June 1896 the suit was dismissed as against the Receiver but decreed against the others. By an order made in this suit some of the properties mortgaged were ordered to be sold by the Registrar, and, in pursuance of that order, the Registrar had settled the notification and conditions of sale and the properties had been partially advertised to be sold by the Registrar on the 23rd instant. The Plaintiff now applied, with the consent of all the parties to the mortgage suit, that the sale advertised for the 23rd instant be held by the Receiver, as such Receiver in possession of the mortgaged properties, and not by the Registrar, on the ground that the said properties were in the possession

of the Receiver and that the purchasers at his sale will be able to take possession from him and will be in a position to ascertain precisely the nature of the charges, if any, still attaching to those properties in the administration suit.

The administration suit was still pending and the administration had not yet been completed. It appeared that there was no finding in that suit that the Defendant was entitled to the properties which he had mortgaged free from encumbrances or charges, and the Receiver was still in possession.

The JUDGMENT OF THE COURT was as follows :-

I have considered this application and cannot see my way to accede to it.

The property which forms the subject-matter of the sale which has been ordered formerly belonged to one Woomesh Chunder Chuckerbutty.

The estate of Woomesh Chunder Chuckerbutty is being administered under the directions of the Court in suit No. 514 of 1893. Ashutosh Chuckerbutty, a son of Woomesh Chunder Chuckerbutty, appears to have acquired the property in question under the Will of his father. He mortgaged it to one Bhola Nath Chuckerbutty and to various other parties and the action in which the order for sale has been made was instituted in 1895 and is a suit for recovery of the moneys due on foot of the mortgage made in favour of Bhola Nath Chuckerbutty.

The administration suit is, as I have observed, still pending, and it does not appear that there has been any finding of the Court in that suit that Ashutosh

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Chuckerbutty was entitled to the property which he has mortgaged free from incumbrances or charges. From the fact that a Receiver was appointed who is still in possession of the property, it would seem that this matter is still undetermined. Mr. Osmond Beeby is the Receiver and he was appointed such in the administration suit.

Any incumbrance or charge which affected the property at the time of the death of Woomesh Chunder Chuckerbutty would be paramount to the mortgage securities obtained from Ashutosh Chuckerbutty, and any sale which is made under the order which has been made in the mortgage suit cannot prejudice such incumbrances, if any there be.

The mortgagees have obtained in their mortgage suit the usual decree for sale, and pursuant to the decree the Registrar has settled the notification and conditions of sale, and the properties have been partially, it is said, advertised to be sold by the Registrar on the 23rd of February instant. An obvious difficulty in the way of effecting an advantageous sale by the mortgagees is the fact that the administration suit is still pending. Purchasers would possibly be slow to bid for property which they must purchase subject to an existing *lis pendens*. To avoid this difficulty no doubt the idea of having a sale carried out by the Receiver in the administration suit has occurred to the advisers of the parties to the mortgage suit. In the affidavit upon which this motion is grounded, it is stated that it has been represented to the Plaintiff by the mortgagees that a sale by the Receiver "will be more beneficial to all parties concerned as the purchasers

at his sale will be able to take possession from him and will be in a position to ascertain precisely the nature of the charges, if any, still attaching to the said properties in the said suit No. 514 of 1893." This statement suggests to me that one at least of the objects of this application is to overcome the difficulty which stands in the way of the applicant, namely, the difficulty of making title to the properties by reason of the existence of the administration suit.

Now if there are charges attaching to the properties which are paramount to the interest of the mortgagor and his mortgagees as is suggested, it seems obvious to me that a sale by the Receiver should not be sanctioned by the Court unless at least all the charges which affect the property have been ascertained in the administration suit and are provided for.

It appears to me that to grant the present application would only tend to confuse and entangle the proceedings in the administration suit and possibly lend to grave complications. I see at present no justification for the application. If the mortgagees choose to sell now, they must sell subject to all paramount claims which may be established against the properties in the administration suit. The Receiver in that suit cannot properly deliver possession of the properties to a purchaser unless he do so under an order of this Court to be made in the administration suit. It has not been shown to me that such an order could be properly made at the present time.

The application appears to me to be misconceived and must be refused.



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*Babu Bhupendra Nath Basu*, Attorney for the Plaintiff.

*Babus Bolie Chand Dutt, Kamini Kumar Guha, H. C. Ghose, A. C. Bose, and Messrs. Gregory and Jones*, Attorneys for some of the Defendants.

S. R. D.      *Application refused.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 952, 968, 1034, 1035 OF 1900.

AMEER ALI, J.      JOGESHWAR GHOSE,

PRATT, J.      Petitioner,

1901.      v.

5, February.      THE KING EMPEROR,  
Opposite Party.

*Criminal Procedure Code (Act V of 1898), sec. 215—Commitment, quashing of, when may be made—Points of law—Statements made by witnesses—Absence of evidence to go to a jury—Contradictory statements in cross-examination—Penal Code (Act XLV of 1860), sec. 193—False evidence in a judicial proceeding—High Court, powers of, to quash commitment.*

*Absence of evidence to warrant a commitment is a point of law and may furnish a good ground for the quashing of a commitment.*

*Under the present Code of Criminal Procedure a Court of Session does not possess the power to withdraw a case from the jury on any ground whatsoever.*

*Where the case is such that the Sessions Judge would, if he possessed the power of withdrawing the case from the jury, exercise that power, the High Court will exercise its powers of revision.*

These were rules issued on the 8th of December 1900, against the proceedings taken against the Petitioners as well as the order of the Sessions Judge of Rungpur, dated the 19th of November 1900.

The facts of the cases were as follows :—

Ram Gopal Byragi complained to the Police against Samiruddin Nasya, Kefaitulla Nasya and others, alleging that while he was taking his wife Genda Dasya in a cart from her father Nabu Mistry's house to his own house, 10 or 15 persons (including the accused) stopped the cart and forcibly carried off Genda Dasya.

Charges were framed under secs. 366, 147, 343 and 379, I. P. C., and the case was committed to the Sessions. At the Sessions trial the Sessions Judge concurring with the assessors acquitted the accused.

The Sessions Judge thereupon framed proceedings against the Petitioners under sec. 477, Criminal Procedure Code, and committed them for trial under sec. 193, I. P. Code, at the next Sessions.

In No. 952.—*Mr. C. P. Hill* (with him *Babus Sarat Chandra Khan* and *Manmatha Nath Mukherjee*) contended that there was no contradiction on the face of the statements and therefore there was no case to go to a jury so far as his client was concerned.

In No. 968.—*Babus Sarat Chandra Khan* and *Manmatha Nath Mukherjee* argued upon the same lines.

In Nos. 1034, 1035.—*Mr. Caspersz* (with him *Babu Mohini Mohan Chakravarti*) for Nobo Mistry and Ram Gopal Bairagi referred to *In the matter of Munni Buksh* (1) and argued that regard should be had to the fact that these statements, though confused and apparently inconsistent, were made under the stress of cross-examination, no intention

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to commit perjury was made out. The Court should therefore quash the commitments.

*Mr. Leith* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

In these cases rules were issued on the Magistrate of the district to show cause why the commitment of the Petitioners should not be set aside or, in the alternative, why the cases should not be transferred to some other Sessions Court or why such other order should not be made as to this Court might appear fit and proper. All the cases do not stand on the same footing.

We will take up, *first*, the petition of Kali Kant Biswas, the Sub-Inspector of Police (case No. 968). He appears to have given evidence before the Sessions Judge in an abduction case, and it is alleged that on that occasion he made one statement in his examination-in-chief and another and of a contradictory character in cross-examination. The Sessions Judge has, in his proceeding under sec. 477, C. Cr. P., set out the two statements which he considers contradictory. The application for quashing the commitment is made under sec. 215, C. Cr. P., which provides that a commitment once made under the sections mentioned there by a competent Magistrate or by a Court of Session under sec. 477 or by a Civil or Revenue Court under sec. 478 can be quashed by the High Court only and only on a point of law. Insufficiency of evidence has never been treated as a ground for quashing a commitment, but this Court following the principle laid down by the Courts in England has held

that the absence of evidence to warrant a commitment is a point of law and may furnish a good ground for quashing the commitment. What we have to see, therefore, in the present case, is whether upon the proceeding of the Sessions Judge it is clear that the statements made by Kali Kant Biswas are of such a contradictory character as to justify the commitment. We have read the evidence given by the accused and the grounds of commitment, but we are not satisfied that the statements of the accused, interpreted as they reasonably might be, show any contradiction such as the Sessions Judge supposes they do. In this case, therefore, we are of opinion that the commitment should be quashed and we quash it accordingly.

The other witnesses, namely, Nobo Mistry and Ram Gopal Bairagi who had also deposed in the same abduction case before the Sessions Judge, have been committed by him to take their trial under a charge under sec. 193, I. P. C. The learned Sessions Judge in his proceeding under sec. 477 gives the statements one or other of which, he considers, must be false. These statements are of a very confused character and appear to have been made in the course of a severe cross-examination. There is nothing to show that the accused Nobo Mistry and Ram Gopal Bairagi had any particular motive in making a false statement with regard to those particular matters. It may be contended that that fact is for the consideration of the jury. But this Court has undoubtedly to consider whether there is such evidence as would justify the case going before a jury. If the case is such that the presiding Judge

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would, if he had the power, withdraw it from the jury, we think it would not be right to allow the commitment to stand.

Under the Criminal Procedure Code a Court of Session has not the power to withdraw a case from the jury on any ground whatsoever. The power of quashing a commitment, in other words, withdrawing a case from the jury, is specially given to the High Court, and the High Court has to consider whether there is a ground of law. In our opinion, the statements upon which the commitments in the cases against Nobo and Ram Gopal are based do not amount to such a contradiction as to justify the prosecution of these witnesses under sec. 193, I. P. C. We accordingly quash their commitments (Nos. 1034 and 1035) also.

In the case of Jogeshwar Ghose, Head Constable (No. 952), we felt some doubt because, no doubt, in his evidence he stated, first, that he had not seen the Sub-Inspector on that Saturday before 8 or 8-30 P.M. and, afterwards, on being further questioned, he stated that he had seen him in the forenoon of that day. These are the only two contradictory statements made by him and upon which his commitment is based. The accused Jogeshwar when asked how he came to say at one time that he had not seen the Sub-Inspector before 8 or 8-30 P.M. and, afterwards, that he saw him in the morning at 10, 10-30 A.M. said he had made a mistake. The learned Sessions Judge in committing this accused under sec. 193, I. P. C., does not furnish any further grounds than what is stated above and the only persons who are named as witnesses, are men, who either affirmed

him or heard him give evidence. It seems to us that, in the absence of any fact which would justify a prosecution of this character, it would not be right, merely because there stand two contradictory and possibly erroneous statements on the record that the accused should be harassed by a trial in the Sessions Court. On the face of the commitment there is nothing to show that the statement of the accused that what he stated first was a mistake was untrue in fact. We think, therefore, that in this case also we are justified in quashing the commitment and we do so accordingly.

*Rules made absolute :*

H. P. C.                      *Commitments quashed.*

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NO. 998 OF 1900.

AMEER ALI, J.	}	DEBI SINGH, Petitioner,
PRATT, J.		v.
1901.		THE QUEEN-EMPRESS.
8, February.	}	

*Penal Code (Act XLV of 1860), secs. 225B, 353—Resistance to execution of warrant—Obstruction to public servant in execution of duty—Warrant, validity of—Warrant with incorrect description—Onus of proof—Criminal Procedure Code (Act V of 1898) sec. 75.*

*In order to have a conviction for illegal disobedience of a warrant, it is for the prosecution to shew that the accused is the person against whom the warrant was issued or in other words, that he satisfied the description of the person against whom it was issued and not on the accused to shew that he was not the person.*

*It is illegal to convict a person, under secs. 225B and 353 of the Penal Code when the warrant attempted to be executed*

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*was addressed to the person with a wrong description to which the accused did not answer.*

This was a rule issued on the 20th December 1900, against the order of the Joint-Magistrate of Chupra, dated the 26th of October 1900, which order was, on appeal, affirmed by R. H. Anderson, Esq., Sessions Judge of Saran, on the 7th December 1900.

The facts of the case material to this report were as follows :—

The Petitioner was in arrears to the Collector with his rent for a ferry and a warrant was issued by the Saran certificate officer for his arrest. This was entrusted to Ram Avtar Lal Bakshi to execute and he proceeded with two peons Lakhan Dube and Bias Lal to the Petitioner's village where he arrived on the 4th August. On the next morning they went to the Petitioner's house, found him there and demanded the money due. The Petitioner said he had paid and was asked for proof. As he admitted he had none the Bakshi said he would arrest him and showed the warrant. The Petitioner said he would not obey the order. The two peons then arrested the Petitioner under the Bakshi's orders and the Petitioner called for help. Some men came and forcibly released him from the peons and he went off after giving each of the peons a slap in the face.

The warrant was addressed to Debi Singh, son of Gunraj Singh, but the Petitioner alleged that his father's name was Rung Lal Singh and not Gunraj Singh, and that the warrant was invalid.

*Mr. Hill* and *Babu Dwarka Nath Mitter* for the Petitioner.

*Mr. Leith* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

We issued this rule upon the District Magistrate to show cause why the conviction of, and sentence passed upon, the Petitioner by the Joint-Magistrate of Saran should not be set aside on the grounds stated in the petition. One of those grounds is that the warrant of arrest which the Petitioner is alleged to have disobeyed was not a valid warrant in law and, therefore, the conviction under secs. 225B and 353 was illegal. It appears that the warrant was made out against Debi Singh, son of Gunraj Singh, and, in the course of the trial, it appeared upon the examination of the accused that his father's name was different. In order to have a conviction for illegal disobedience of the warrant, it was for the prosecution to shew that the accused was the person against whom the warrant had issued, or, in other words, that he was the son of Gunraj Singh and not of Rung Lal Singh as he alleged. It was not for the accused to shew that he was not the person against whom the warrant was issued. The onus was on the prosecution to prove the affirmative, not on the accused to prove the negative. Upon the whole, therefore, we are of opinion that the conviction cannot be sustained and we accordingly set it aside and direct that the Petitioner be discharged from bail.

*Rule made absolute :*

• • *Conviction set aside.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 996 OF 1900.

SALE, J.

NASIB ALI MOJUMDAR,

PRATT, J.

Petitioner,

1901.

20, February.

| RUKHMINI MOHAN ENDA,

Opposite Party.

*Criminal Procedure Code (Act V of 1898); secs. 517, 523—Disposal of property taken by Police as stolen property—Adjudication of theft case if absolutely necessary before order for disposal of property—Stay of proceedings in case—Speedy remedy, whether may justify order made at request of parties—Jurisdiction.*

*A Magistrate has jurisdiction to make an order under sec. 523 of the Code of Criminal Procedure for disposal of property taken charge of by the Police as stolen property when he considers that an immediate order is necessary to save the property from possible loss or decay before a formal adjudication of the case of theft, specially when the case has broken down by reason of non-prosecution and when both the parties apply to the Magistrate for such an order.*

This was a rule issued on the 15th of December 1900, against the order of the Extra Assistant Commissioner of Cachar, dated the 25th of October 1900.

The facts of the case appear from the judgment.

Mr. P. L. Roy (with him Babu Sarat Chunder Ghosh) for the Petitioner.

Babu Jogendra Chunder Ghosh for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The facts, out of which this rule arises, may be briefly stated as follows:—Rukhmini contracted for the purchase

of 330 logs and subsequently for the purchase of 265 logs from Nasib Ali, whose men had cut them down under a permit from the forest officer. Of these logs some had been resold, it is said, by Rukhmini, and the remainder numbering 362 logs were being floated down the river when a dispute arose between Nasib Ali and Rukhmini, the former contending that the sale was incomplete because the full price had not yet been paid by the latter. A riot is said to have taken place, which resulted in the institution of cross-cases. The complaint of theft and riot preferred by Nasib Ali was reported by the Police in "C" Form, and the Magistrate tells us that Nasib Ali has taken no subsequent steps to have that case brought to trial. In the counter-case some of Nasib Ali's party were sent up for trial on a charge of rioting and that case is still pending. The Police seized the 362 logs, and reported the fact to the Magistrate. The pleaders of both parties asked the Magistrate to make an adjudication under sec. 523, C. P. C., respecting the disposal of the logs. The Magistrate while conceding that it would be more satisfactory if final order on those applications could be postponed till the conclusion of the trial on the pending case of riot, still recognized the urgency of the matter, as the river was rapidly receding, and there would soon be insufficient water for floating the logs to a convenient mart. Therefore in the interests of the rival claimants, and it must be added at their own express desire the Magistrate who is styled Extra Assistant Commissioner proceeded to determine who was entitled to the possession of the logs. On the 25th October last he

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ordered that upon Rukhmini depositing in Court the sum of Rs. 3,225 which was the amount claimed by Nasib Ali as still due to him on account of purchase-money and royalty (though a less sum was admitted by Rukhmini), the logs should be delivered over to Rukhmini. The deposit was made and the logs were accordingly made over to Rukhmini. Now a rule has been obtained by Nasib Ali calling upon the Deputy Commissioner of Cachar as well as Rukhmini to show cause why the order of the Extra Assistant Commissioner, dated the 25th October last, should not be set aside on the grounds stated in the petition or why such other order should not be made as to this Court may appear fit and proper. In the meantime an order was made upon Rukhmini restraining him from disposing of the logs in dispute pending the hearing of this rule.

It has been contended before us that the Extra Assistant Commissioner had no jurisdiction to make an order under sec. 523, C. P. C., and that he should waited till the conclusion of the trial of the pending criminal case, and then have made an order under sec. 517 regarding the disposal of the timber.

After hearing the learned counsel on both sides at considerable length, we are not disposed to accept this view, or to say that the legal advisers of the respective parties were wrong in claiming an adjudication under sec. 523. The pending case is one of rioting and not of theft of the disputed logs. Mr. Roy for the Petitioner concedes that the logs were not seized in connection with the pending case of rioting. They appear to have been seized by the Police in connection with the counter-charge of

theft as well as rioting. They were seized because in the language of sec. 523 they were "alleged to have been stolen." That case has broken down upon investigation by the Police, but having seized the property the Police were obliged to ask for orders as to its disposal. The parties themselves pressed the Magistrate to determine the question forthwith under sec. 523 in order to avoid the risk of serious loss if the timber were left stranded. Under the circumstances the Magistrate seems to have had jurisdiction to make the order he did, and we think he would have no authority to deal with it under sec. 517 as if it were the subject of the pending case of rioting. If Nasib Ali feels aggrieved he has a remedy for damages against Rukhmini. It has been urged that the amount ordered to be deposited was inadequate because the timber is worth Rs. 7,000. This is, however, a misconception, if, as the Extra Assistant Commissioner states in his explanation, Rukhmini had already paid some Rs. 3,937 to Nasib Ali besides something for royalty to the forest department. However this may be, we have only to determine whether the lower Court had jurisdiction to make an order under sec. 523. We think it had, and that it was not wrong to adjudge the purchaser to be the party entitled to possession of the timber. We accordingly discharge the rule.

*Rule discharged.*

H. P. C.

**ORDINARY ORIGINAL CIVIL  
JURISDICTION.]**

SUIT No. 880 OF 1896.

STANLEY, J.	}	BHUGWAN DAS SUREKA
1901.		v.
4, February.		HEERA LAL.

*Administration suit—Receiver—Discharge of Receiver before completion of administration decree.*

*No order can be made for the discharge of a Receiver appointed in an administration suit and directing him to make over possession of the estate to the Plaintiff, before the completion of the administration decree.*

This was a suit instituted by the next friend of the Plaintiff, who was then a minor, for the construction of the Will of his grandfather Sewbux Sureka and to have the validity of certain trusts under the Will, and the rights of the parties ascertained and declared. The plaint also asked for an inquiry as to what the estate of the grandfather consisted of, for the appointment of a Receiver and the usual relief sought for in an administration suit.

On the 28th January 1897, a Receiver was appointed by the Court of the moveable properties, of the rents, issues and profits of the immoveable properties and of a certain business carried on by the grandfather.

On the 16th March 1899, a preliminary decree for administration was made, and it was further directed that the Receiver should be continued; the Court reserved consideration of all further directions and costs till after the Registrar's report.

The Plaintiff, who had subsequently attained majority, now applied for an order that the Receiver do pay to the Petitioner's attorneys their costs not

otherwise disposed of and after making certain other payments mentioned in the petition, that he should be directed to make over the properties including Government securities of the value of over a lakh of rupees to the Plaintiff and that he should then be discharged upon passing his accounts. Plaintiff urged that there was no contest in the suit, that he was the sole beneficiary under the Will, and that he was therefore entitled to all these properties. It appeared that the accounts directed by the preliminary decree had not yet been taken, and no advertisements had been published in the papers for the creditors to come in, but the Plaintiff and the Defendant, the surviving executor, put in affidavits stating that there were no debts due from the estate.

*Mr. Pugh* for the Plaintiff.—There being no debts and no contest as to the Plaintiff being entitled to the estate, his application should be granted. [STANLEY, J.—There being an administration decree, how can I discharge the Receiver?] I don't ask the Court to touch the decree. The Receiver holds for the parties and not for the creditors, *see Kerr on Receivers*, 2nd Ed., p. 187; *Davis v. Duke of Marlborough* (1), *Bainbridge v. Blair* (2) and *Hoskins v. Campbell* (3).

*Mr. Sinha* for the surviving executor left the matter in the hands of the Court.

THE JUDGMENT OF THE COURT WAS AS follows:—

STANLEY, J.—This is a renewal of an application which was made to me on a previous occasion when it appeared to me the application was entirely untenable

(1) 2 Swanston 103 (1812).

(2) 3 Beav. 421 (1841).

(3) W. N. for 1869, p. 59.

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and I so stated. The application is now renewed on further affidavits. These affidavits, however, do not materially affect my views as to the propriety of the order I should make.

The suit was brought in 1896 by or on behalf of the present applicant who was then an infant for the construction of the Will of one Sew Bux Sureka, the grandfather of the applicant, and to have the valid trusts of the Will and the rights of all parties in his estate ascertained and declared. In the claim the usual accounts and enquiries which are directed by the Court in an administration suit are asked for as also the appointment of a Receiver and the other relief which is sought for in an administration suit.

On the 28th of January 1897, the Court was pleased to appoint Mr. Fink to be the Receiver of the moveable property and of the rents, issues and profits of the immoveable property and of the business carried on at No. 3, Juggomohan Mullick's Street, forming the estate of Sew Bux Sureka with power to get in and collect the outstanding debts and claims due to the estate of the said testator and with all the powers provided for in sec. 503, clause (d) of the Civil Procedure Code.

On the 16th March 1899, a preliminary decree for administration was made, and it was thereby ordered that the Receiver be continued and the usual administration accounts were directed including an account of debts and funeral and testamentary expenses, and an enquiry was directed to ascertain the encumbrances and charges affecting the estate and as to the provision which should be made

for carrying out the provisions of the testator's Will. It further directed that the Registrar should cause advertisements to be published in the papers calling upon creditors to come in and prove their claims, and that the estate should be applied in payment of his debts, etc.

The Defendants were directed to bring in their accounts, and the Court reserved the consideration of all further directions and the question of costs till after the Registrar's report. Pursuant to the decree a Receiver was appointed.

The application now made to me is that "the Receiver appointed under the order of 28th January 1897 do pay to the Petitioner's attorneys their costs not otherwise disposed of and incidental to this suit (as between attorney and client to be taxed by the Taxing officer of this Honorable Court) whether incurred on behalf and account of your Petitioner his next friend or the said Receiver and do also pay to the said Receiver's attorneys all other costs incurred by the said Receiver in suits and proceedings other than this whether in Calcutta, at Mandalay or elsewhere and do endorse and deliver over to your Petitioner all the Government security and pay to him all the monies balance now in his hands standing to the credit of the said estate in his books of accounts and forming part of the estate of the said Sew Bux Sureka, deceased, and do also make over and deliver to your Petitioner the immoveable properties at Ranigunj and Mandalay forming part of the estate of which he may have obtained possession and thereupon and upon passing his accounts the said Receiver be discharged and that the said Receiver may be at



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liberty, out of the assets belonging to your Petitioner in his hands, to pay your Petitioner's costs of the last-mentioned application."

It appears that as yet the accounts directed by the decree have not been taken and that, in fact as Mr. Pugh has stated, there has been no advertisements for creditors and yet I am asked to direct the Receiver not merely to give over the immoveable property to the Plaintiff but also to hand over to him the monies and securities of considerably over one lakh of rupees.

So far as I am aware, the Plaintiff may not be able to establish his title to any portion of this property. It has not been decided by the Court that he is absolutely entitled to any portion of it and it has not been ascertained yet whether there are any encumbrances or charges affecting the property.

If the present applicant is really entitled to all this property free from any encumbrances or liabilities, the proper course is to have the accounts and enquiries directed by the decree made before the Registrar and to have his report thereon made and confirmed.

The short cut which is sought to be taken in this case in the disposal of an administration suit is one which not a little surprises me and one to which I can lend no countenance. It is without precedent in my experience and contrary to the practice of the Court. I must refuse the application with costs.

*Messrs. Kalinath Mitter & Sarbadhikari* for the Plaintiff.

*Messrs. G. C. Chunder & Co.* for the Defendant.

S. R. D.

*Application refused.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2390 of 1898.

MACLEAN, C. J. ISHAN CHANDRA DEY,  
BANERJEE, J. Defendant, Appellant,

STEVENS, J. GONESH CHANDRA  
1900. PARSHI and others,  
28, May. Plaintiffs, Respondents.

*Registration Act (III of 1877), sec. 50—  
Registered transfer—Unregistered mortgage  
deed—Decree.*

*When a decree or order is obtained upon an unregistered mortgage deed against the mortgagor alone, subsequent to a registered transfer of the mortgaged property, sec. 50 of the Registration Act gives priority to the registered transferee.*

*When an unregistered mortgage is merged in a decree, a transferee under a registered deed subsequent to the mortgage is precluded from claiming priority under sec. 50 only when the decree can be used as evidence against the registered transferee.*

This was an appeal preferred on the 30th of November 1898, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge, 2nd Court of Zillah 24-Pergunnahs, dated the 27th of July 1898, affirming the decree of Babu Chandi Churn Sen, Munsif, 2nd Court at Alipur, dated the 21st of February 1898.

Jhumuk Parshi and Jitni Parshini, who were the original proprietors of the land in dispute, mortgaged the same to the Defendant Ishan Chandra Dey in Pous 1297 by an unregistered mortgage bond. Subsequently in Bhadra 1300, Jitni Parshini and the heir and legal representative of Jhumuk Parshi sold this land to the Plaintiff by a registered deed of

## ISHAN CHANDRA DEY v. GONESH CHANDRA PARSHI.

sale. In 1894, subsequent to the execution of the deed of sale, the Defendant Ishan Chandra Dey brought a suit for recovery of money due under the mortgage bond and obtained a decree declaring his lien upon the land. In execution of the decree the land was put to sale and purchased by himself; and when possession was delivered to him by the Court, the Plaintiff brought a suit for damages on the allegation that Defendant cut down the trees on the land. But that suit was withdrawn, and he subsequently brought the present suit on the ground that the decree in execution of which the disputed land was sold and purchased by Defendant was a mere collusive transaction. The Defendant also impeached the sale-deed executed in favour of Plaintiff as a mere collusive transaction. The issues were as follows:—

Whether the sale transaction set up by Plaintiff is a collusive transaction, and whether the mortgage bond set up by Defendant is collusive transaction, or whether both the transactions are real and *bonâ fide*?

Whether the registered deed of sale executed in favour of Plaintiff shall have priority over the unregistered mortgage bond executed in favour of Defendant?

It was found by the lower Courts that both the transactions were real and none of them collusive. With regard to the second issue the first Court remarked as follows:—

“Now the question is—whether the registered sale-deed subsequently executed is calculated to nullify or supersede all claims based under the unregistered mortgage bond previously executed in

consequence of the provisions contained in sec. 50 of the Registration Act. After carefully looking into the several case-law on the subject, I think the registered deed takes effect against the previously unregistered document. \*On taking equitable view also it is quite apparent that intending purchasers may avoid the risk of purchasing any encumbered property by a search of the Registration Office. But those who lend money on unregistered bond deprive these purchasers of the opportunity of making proper enquiry into the matter. Under these circumstances the law punishes the holder of the unregistered instruments.”

Plaintiff's suit was accordingly decreed. The lower Appellate Court upheld this judgment. Defendant preferred this second appeal.

*Dr. Ashutosh Mukerjee* and *Babu Jnanendra Nath Bose* for the Appellant.

*Babu Joy Gopal Ghosha* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—I think it sufficient to say that I concur in the view expressed in the case of *Keshab Pandurang v. Vinayak Hari* (1) and also in the two cases of *Jethabhai Dayalji v. Girdhar* (2) and *Desai Lallubhai Jethubhai v. Munda Kuber Das* (3), a view which seems to be in consonance with that taken in the case of *The Himalya Bank v. The Simla Bank* (4) and the case of *Jagrup Rai v. Radhey Singh* (5). I am not dis-

(1) I. L. R. 18 Bom. 355 (1893).

(2) I. L. R. 20 Bom. 158 (1894).

(3) I. L. R. 20 Bom. 390 (1895).

(4) I. L. R. 8 All. 23 (1885).

(5) I. L. R. 13 All. 288 (1890).

ISHAN CHANDRA DEY v. GONESH CHANDRA PARSHI.

posed to follow the case of *Baijnath v. Luchman Das* (6), which is not consistent with that taken in the other cases to which I have referred. The appeal therefore fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The learned vakil for the Appellant contends that any view opposed to his contention would necessitate the reading of some qualifying words into sec. 50 of the Registration Act after the words, "not being a decree or order," and that whenever an unregistered mortgage is merged in a decree, a transferee under a registered deed subsequent to the mortgage is precluded from claiming priority under sec. 50. The answer to this contention is, shortly, this, that the words "a decree or order" in sec. 50 must mean a decree or order which can be evidence against the subsequent transferee under a registered deed; and in order that a decree or order may be evidence against a subsequent transferee, it must either be a decree or order to which the subsequent transferee was a party, or a decree or order obtained against his transferor before the transfer to him, in which case also the decree will be evidence against him. But where the decree or order is obtained upon an unregistered mortgage deed against the mortgagor alone, subsequent to the registered transfer on which the opposing claim is based, there sec. 50 must, in my opinion, give priority to the claimant under the registered transfer; because in such a case the only basis upon which the mortgagee can rest his claim must be, not the decree which is not evidence

against the subsequent transferee, but the prior unregistered mortgage, and that, by sec. 50, is entitled to no priority against the subsequent registered transfer.

STEVENS, J.—I concur.

S. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 253 OF 1899.

MOHUNT JAGANNATH

RAMANUJ DAS

and others,

GHOSE, J.

PRATT, J.

Defendants, Appellants,

1900.

v.

28, November. CHANDRA KUMAR BOSE

and others,

Plaintiffs, Respondents.

*Bengal Tenancy Act (VIII of 1885), sec. 106—Res judicata—Civil Procedure Code (Act XIV of 1882), sec. 13—Parties.*

*Plaintiffs initiated proceedings under sec. 106 of the Bengal Tenancy Act against the landlord and the Defendants Nos. 2 to 9 who claimed to be rival tenants of the land, to have their names recorded as tenants in the settlement proceedings. The Settlement Officer held that the Plaintiffs were the tenants and made an order in their favour. On appeal by Defendants Nos. 2 to 9, and not by the landlords, the Special Judge reversed the decision and ordered that the names of Defendants Nos. 2 to 9, who he held were the tenants, be registered. The Plaintiffs thereupon brought the present suit to have their rights declared as tenants of the land:*

*Held—That the previous decision of the Special Judge not having been a decision between the parties, i.e., the tenants on the one hand and the landlord on the*

**MOHUNT JAGANNATH RAMANUJ DAS v. CHANDRA KUMAR BOSE.**

other, it could not operate as *res judicata* in the present suit.

This was an appeal preferred on the 1st of August 1899, against the order of W. B. Brown, Esq., District Judge of Zillah Cuttack, dated the 2nd of May 1899, reversing the order of Babu Adoito Prosad Dey, Munsif of Kendrapara, dated the 9th of February 1899, and remanding the suit to his Court for trial on its merits.

The facts of the case appear from the judgment.

*Babu Jyoti Prasad Sarbadhikari* for the Appellants.

*Babu Dasurathi Sanyal* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The question raised in this appeal is one of *res judicata*; and it arises in this way: The Plaintiffs initiated proceedings under sec. 106 of the Bengal Tenancy Act against the landlord and the Defendants Nos. 2 to 9 who claimed to be rival tenants of the land, to have their names recorded as tenants in the settlement proceedings. The Assistant Settlement Officer held that the Plaintiffs were the tenants, and accordingly made an order in their favour. The landlord did not appeal against this order, but the other Defendants Nos. 2 to 9 did appeal to the special Judge; and on their appeal, that officer reversed the order of the Assistant Settlement Officer, holding that the Plaintiffs had not satisfactorily proved that they were the tenants, and at the same time ordered that the names of the Defendants Nos. 2 to 9 should be registered as the tenants. In making this order the Special Judge in the

concluding part of his judgment made the following observation:—"I think he (that is, the Plaintiff) has failed to make out his case in the present proceeding; though possibly if the case had been thoroughly threshed out in the ordinary Civil Court, the result might have been different." Thereupon the suit, out of which this appeal arises, was instituted by the Plaintiffs to have their rights declared as tenants of the land with a right of occupancy therein; and the defence on the part of the Defendants was that the suit was barred by *res judicata* by reason of the previous decision in the settlement proceeding.

The learned District Judge in this case has held that the previous decision by himself as Special Judge would not operate by way of *res judicata*, and has accordingly directed that the case should be tried out on the merits.

The learned vakil for the Appellants, who has ably argued the case, has contended that this view of the law is incorrect; and he has relied upon a variety of cases in support of his contention. We are, however, unable to accept the view that he has placed before us, and we think the Judge is right in the conclusion that he has arrived at. We have already stated that, so far as the question between the Plaintiff on the one hand, and the landlord and the other Defendants on the other, under sec. 106 of the Bengal Tenancy Act was concerned, it was determined in favour of the Plaintiff by the Assistant Settlement Officer. The landlord was satisfied with that determination, and he did not appeal to the Special Judge; and the appeal that was preferred was by the

**MOHUNT JAGANNATH RAMANUJ DAS v. CHANDRA KUMAR BOSE.**

Defendants Nos. 2 to 9 only, who claimed to be the rival tenants of the property. And therefore it seems to be obvious that the decision that was pronounced by the Special Judge on appeal was a decision as between the Defendants Nos. 2 to 9 as Appellants and the Plaintiffs and the landlord as Respondents. And this is made more clear by the fact to which we have already referred, *viz.*, that in allowing the appeal of the Defendants Nos. 2 to 9 the Special Judge ordered that their names should be registered as *raiyats*. We think, under these circumstances, it could not rightly be said that the decision of the Special Judge was a decision between the parties, namely, the Plaintiff, on the one hand, and the zemindar, on the other. The decision should, we think, be taken to be limited between the Plaintiff and the Defendants Nos. 2 to 9, the tenant Defendants; and if that is the right view to take, there is clear authority to hold that under such circumstances the previous decision under sec. 106 of the Bengal Tenancy Act could not operate as *res judicata* in this case. We refer to the case of *Pundit Sardar v. Meajun Mirdha* (1). And in this connection we may also refer to the case of *Brojo Behari Mitter v. Kedar Nath Mozumdar* (2), where A had brought a suit against B, claiming certain property as tenant of C, who was also made a Defendant in the suit, and where the suit was on the merits decided in favour of B; and in a suit brought by C against B for possession of the same property, it was held that such suit was not barred by reason of sec. 13 of the Code of Civil Procedure.

(1) I. L. R. 21 Cal. 378 (1893).

(2) I. L. R. 12 Cal. 80 (1886).

Upon these grounds we think that the question of *res judicata* now raised ought to be decided against the Appellants. We accordingly dismiss the appeal with costs. Hearing-fee one gold mohur.

S. C. S.

*Appeal dismissed.*

H. P. C.

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM APPELLATE DECREE

No. 2037 OF 1898.

RAMMOY HAZRA,

BANERJEE, J.

Plaintiff, Appellant,

BRETT, J.

1901.

PREM CHAND NASKAR

21, January. [and others, Defendants,  
Respondents.

*Mortgage--Transferees from mortgagors--  
Transfer of Property Act (IV of 1882),  
sec. 85--Purchase with consent of mortgagee  
--Parties--Contribution--Frame of suit--  
Apportionment of debt--Redemption.*

*The heirs of a mortgagor, against whom a decree on the mortgage had been obtained by the mortgagee, and in execution of which the mortgaged property was sold and a part of which was purchased by the mortgagee himself, and a person who purchased a portion of the mortgaged property with the consent of the mortgagee are not necessary parties in a suit by the mortgagee for contribution or apportionment of the mortgage debt.*

*A suit by the mortgagee framed improperly for a declaration of the rights of the purchasers of portion of the mortgaged property of redemption to the properties purchased by them, who were not made parties in the mortgage suit and for declaration of the mortgagee's absolute right over those properties on the failure of such purchasers to redeem, and for khas possession will not lie.*

## RAMMOY HAZRA v. PREM CHAND NASKAR.

*The only relief to which the mortgagee in such a case is entitled to is a decree for apportionment of the mortgage debt on the property purchased by the purchasers account being taken in that apportionment as well of the property transferred by the mortgagor to other parties with the consent of the mortgagee; as of the portion of the mortgaged property purchased by the mortgagee himself.*

This was an appeal preferred on the 13th of October 1898, against a decree of Babu Rajendra Kumar Bose, Subordinate Judge of Zillah 24-Pergunnahs, dated the 22nd of July 1898, affirming a decree of Babu Nagendra Nath Mitter, Officiating Munsif of Alipur, 2nd Court, dated the 2nd of April 1898.

The facts of the case were as follows :—

One Behari Lal Ghose, since deceased, executed a mortgage bond for Rs. 200 on 8th Kartick 1294, B. S., in favour of the Plaintiff creating a charge on his properties described in schedule (*ka*) and (*kha*) of the plaint and subsequently sold the properties described in schedule (*kha*) of the plaint to one Raj Krishna Mondal free from Plaintiff's mortgage lien on payment of Rs. 100 to him with Plaintiff's concurrence in Bysack 1300, B. S. After the death of Behary Lal, this Plaintiff instituted suit No. 791 of 1894 against Noni Lal Ghose, the son and heir of Behary Lal and Srimonto Bacharsh and Prosunno Moyi Dassi, the purchaser of certain portions of the mortgaged property, and got a decree on this mortgage bond. In execution sale under that decree, the Plaintiff purchased the properties described in schedule (*ka*) for Rs. 175 on 18th July 1896 and obtained delivery of symbolical posses-

sion from Court on 17th December 1896. Thereafter when the Plaintiff went to take actual possession of the land in Choitra 1303, B. S., he was resisted by the Defendants who were the purchasers of lands given in schedule (*ga*) and (*gha*) respectively, and by Defendant No. 2 as a tenant of plot 2 of schedule (*ga*) under Defendant No. 1. The Plaintiff not having known of this alleged purchase of the Defendants from Behary Lal did not and could not make them parties in that case. Hence the Plaintiff instituted this suit for declaration of Defendants Nos. 1 and 3's rights of redemption to the properties described in schedules (*ga*) and (*gha*) of the plaint and for declaration of Plaintiff's absolute right over those properties on the failure of Defendants Nos. 1 and 3 to pay off the whole mortgage money within a fixed time, and for *khas* possession of these properties.

Both the Courts below dismissed the suit. The lower Appellate Court held that the suit in the form in which it was brought was not maintainable, that the suit was bad as neither the heirs of the original mortgagor nor the purchaser Raj Krishna by whom the (*kha*) lands which formed a part of the original mortgaged premises were purchased subsequent to the purchase of the Defendants Nos. 1 and 3 were not made parties, that the provisions of sec. 85 of the Transfer of Property Act were imperative, and it was therefore obligatory on the mortgagee in a suit relating to mortgage to join the mortgagor and all subsequent purchasers and encumbrancers as parties. It was further held that both the portions of the property (*ka*), which was held by the Plaintiff in right of purchase,

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as well as the portion of (*ka*) which was specified in schedules (*ga*) and (*gha*) should contribute to the mortgage debt payable to the Plaintiff, and which was claimed in suit No. 791, and that the suit was not framed on that line.

Plaintiff preferred this second appeal.

*Dr. Ashutosh Mukerjee* for the Appellant.

*Babu Bhuban Mohun Das* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

In this appeal, which arises out of a suit brought by the Plaintiff-Appellant to make certain properties in the hands of the Defendants Nos. 1 to 3, who are purchasers of the same from the mortgagor, liable for the mortgage debt in respect of which the Plaintiff had obtained a decree, two questions have been raised by the learned vakil for the Plaintiff-Appellant, *first*, whether the Court of Appeal below was right in dismissing the suit on the ground of defect of parties; and, *second*, whether that Court was right in dismissing the suit on the ground of its having been wrongly framed.

The persons whose non-joinder in the opinion of the lower Appellate Court amounts to a defect of parties, are the heirs of the original mortgagor, and one Raj Krishna, who is said to have purchased a portion of the mortgaged property with the consent of the Plaintiff. Now as regards the heirs of the mortgagor it cannot be said that they were necessary parties to this suit, as the Plaintiff has already obtained a decree on his mortgage against them, and has, in execution of the mortgage decree

already sold the mortgaged property and purchased it himself. And as regards Raj Krishna, he too was not a necessary party, because no relief could be claimed against him, seeing that he purchased a portion of the mortgaged property with the consent of the Plaintiff. Of course the effect of such purchase will be to release the Defendants Nos. 1 to 3 from liability for such portion of the mortgage debt as on apportionment is attributable to the property purchased by Raj Krishna. We are therefore of opinion that the first question raised in this appeal ought to be answered in the negative. There has not been, in our opinion, any real defect of parties.

It has been argued by the learned vakil for the Respondents that if, as the first Court has found, the Plaintiff was aware of the purchase by the Defendants Nos. 1 to 3 at the time when he brought his suit upon his mortgage, as he was bound to make those Defendants parties to that suit under sec. 85 of the Transfer of Property Act, his opinion to do so must be treated as a valid ground for the dismissal of this suit; and in support of this contention the case of *Ghulam Kadir Khan v. Mustakin Khan* (1) is relied upon. We do not think that the case cited bears very much upon the present question. Of course, upon the assumed state of facts, the omission of the Plaintiff to make the Defendants Nos. 1 to 3 parties to the original mortgage suit would have been a fatal objection to that suit. But we do not see how that circumstance can be a ground for the dismissal of this suit. Sec. 85 of the Transfer of Property Act does not

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lend any support to this contention; nor, as far as we can see, can it be held that sec. 43 of the Code of Civil Procedure would be a bar to the present suit by reason of the Plaintiff's omission to make the Defendants Nos. 1 to 3 parties to the former suit.

Coming now to the second question, namely, whether the lower Appellate Court was right in dismissing the suit on the ground of its being wrongly framed, we are bound to say that the prayers in the plaint are not so distinct as they ought to have been according to the only view of the case upon which this suit can proceed. The learned vakil for the Appellant freely admits that the only relief that the Plaintiff can be entitled to in this suit will be a decree for an apportionment of the mortgage debt on the property purchased by the Defendants Nos. 1 to 3, account being taken in that apportionment as well of the property purchased by Rajkrishna as of the portion of the mortgaged property purchased by the Plaintiff himself. The prayers in the plaint are not very distinct in asking for this relief, though at the same time we cannot say that they are incapable of being viewed as seeking for any relief of the sort we have indicated above. But having regard to the indistinct manner in which the prayers have been framed, we think that if the case goes back, as it ought, in our opinion, to go, to the first Court, that must be upon the condition of the Plaintiff-Appellant's paying to the Defendants-Respondents all the costs incurred by them up to date in all the Courts.

The result is that the decrees of the Courts below will be set aside, and the

case sent back to the Court of first instance to try it on the merits with reference to the points indicated above, upon the condition that the Plaintiff-Appellant pays to the Defendants-Respondents all the costs incurred by them up to date within a month from the date of the receipt of the record by the first Court. In default of payment of such costs within the time allowed, this appeal will stand dismissed with costs.

H. P. C.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 220 of 1900.

GHOSE, J. STEVENS, J. 1901. 12, March.	}	B. L. FRIZONI, Decree- holder, Appellant, v. RAJA RAM NARAIN SINGH, Judgment- debtor, Respondent.
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*Civil Procedure Code (Act XIV of 1882), sec. 583—Application for restitution of property—Execution of decree of Appellate Court—Decree, whether capable of execution against and binding upon person not a party to appeal—Assignment not subsequent to the decree—Lis pendens—Refund by assignee.*

*Under sec. 583 of the Code of Civil Procedure, the decree of the Appellate Court has to be executed and by the very scope of the section it can only apply to the parties to the appeal; it cannot be executed against a person who was no party to the decree of the Appellate Court and who has not derived any interest subsequent to such decree.*

BHAGWATI PRASAD v. JAMNA PRASAD  
(1) and SADIQ HUSAIN v. LALTA PRASAD  
(2) referred to and followed.

(1) I. L. R. 19 All. 186 (1896).

(2) I. L. R. 20 All. 189 (1897).



**B. L. FRIZONI v. RAJA RAM NARAIN SINGH.**

This was an appeal preferred on the 18th of June 1900 from an order of Babu Nepal Chandra Bose, Sub-Judge of Ranchi, dated the 7th April 1900, reversing an order of Babu Rajoni Kant Mukerji, Munsif of Hazaribagh, dated the 5th of December 1899.

The facts of the case appear from the judgment.

*Babu Jogesh Chunder De* for the Appellant.

*Babus Karuna Sindhu Mukerjee* and *Surendra Nath Ghoshal* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of an application under sec. 583 for restitution of property.

The facts are shortly these :—One Luchman Ram obtained a money decree against the father of Raja Ram Narain Singh on the 19th of January 1897. On the next day, (i.e.) on the 20th of January, this decree, or rather the interest of Luchman Ram in it, was transferred by him to one Frizoni. An appeal was preferred against the decree by the Defendant, but in that appeal Frizoni was not made a Respondent, Luchman Ram being the only Respondent in it. On the 8th March 1897 an application was made by Frizoni, as the assignee of the decree from Luchman Ram for execution thereof. This was objected to by the judgment-debtor, and he prayed for stay of execution. This prayer seems to have been rejected, and the judgment-debtor was referred to the Appellate Court. The execution was then allowed to proceed and certain

property of the judgment-debtor having been advertised for sale, he paid into Court the money covered by the decree on the 30th of June 1897, and the amount was withdrawn by Frizoni. Subsequently, on the 10th of February 1898, the Appellate Court, upon the appeal of the Defendant, reversed the decree of the Court of first instance, and remanded the case for retrial, and on the 6th June of the same year, the suit was dismissed by the Court of first instance.

We might here mention that, notwithstanding the order of the execution Court of the 10th April 1897, the judgment-debtor made no application to the Appellate Court for stay of execution, nor did he ask that Frizoni be added as a party Respondent to the appeal, the result being that the decree of the Appellate Court remanding the case for retrial was made in the absence of Frizoni, and likewise the decree of the first Court after remand dismissing the suit was also made in his absence. The present application was then made by Raja Ram Narain Singh under sec. 583 of the Code of Civil Procedure for execution of the decree of the Appellate Court, by which the decree of the 19th January 1897 was set aside, and for getting back the money which Frizoni had withdrawn from Court. This application was rejected by the Munsif to whom it was presented, but the Subordinate Judge, on appeal, has reversed the order of the Munsif, and made an order directing Frizoni to pay the amount to Raja Ram Narain Singh. It will be observed that under sec. 583 of the Code the decree of the Appellate Court has to be executed, and by the very scope of the section

B. L. FRIZONI *v.* RAJA RAM NARAIN SINGH.

it can only apply to the parties to the appeal; and so it has been held in the Allahabad High Court in the cases of *Bhagwati Prasad v. Jamna Prasad* (1) and *Sadiq Husain v. Lalta Prasad* (2). It has, however, been contended that Frizoni is bound by the decree of the Appellate Court upon the principle of *lis pendens*, and that it was his duty, if he was desirous to contest the appeal preferred by the judgment-debtor, to apply to the Court to make him a party in the appeal. It is perhaps not necessary to discuss the question whether the principle of *lis pendens* applies, for all that we are concerned with in the present instance is whether the application made under sec. 583 could succeed against Frizoni. We are of opinion that the decree of the Appellate Court cannot be executed against him, he being no party to that decree, and not having derived any interest from the Plaintiff in the suit subsequent to such decree. It will be borne in mind that the assignment to Frizoni was at a time when no proceeding was pending in any Court, but the fact of the assignment was clearly brought to the notice of the Defendant by the application made by Frizoni for execution of the decree, and the judgment-debtor was distinctly referred by the execution Court to the Appellate Court, and yet he took no steps to get Frizoni added as a party Respondent to the appeal, and if in these circumstances the decree of the Appellate Court was made in the absence of Frizoni, it would, perhaps, be straining the rule of *lis pendens* if we were to hold that under that rule

the decree of the Appellate Court was binding upon Frizoni, so that restitution might be had against him in execution of the decree of that Court. However that may be, and without expressing any decisive opinion on the matter, it is sufficient to say that Frizoni having been no party to the decree of the Appellate Court, and having derived no interest subsequent to such decree, it could not be executed against him under sec. 583 of the Code.

The result is that this appeal will be allowed, the order of the Court of first instance restored; but in the circumstances of the case each party will bear his own costs in all the Courts.

*Appeal allowed:*

*Order of first Court restored.*

H. P. C.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 868 OF 1900.

ANESH MOLLAH and 6  
others, 2nd party,  
Petitioners,  
v.

AMEER ALI, J.  
STEVENS, J.

1901.  
18, January.

EJAHAR UDDI MOLLAH,  
1st party, Ismile  
Munshi, 3rd party,  
Opposite Party.

*Criminal Procedure Code (Act V of 1898),  
sec. 145—Jurisdiction of High Court—Parties,  
non-joinder of necessary—Object of the law—  
Breach of the peace, apprehension and pre-  
vention of—Magistrate, jurisdiction of.*

*Under sec. 145 of the Code of Criminal  
Procedure a special jurisdiction is vested  
in the subordinate Criminal Courts under  
special circumstances and for a special*

(1) 1. L. R. 19 All. 136 (1896).

(2) 1. L. R. 20 All. 139 (1897)

**ANESH MOLLAH v. EJAHAR UDDI MOLLAH.**

*purpose ; when either the special circumstances do not exist or when the order made under the section does not attain the purpose for which the jurisdiction is created, then the special jurisdiction vested under the section falls to the ground.*

*The circumstances which give jurisdiction to a Magistrate are circumstances which give rise to an apprehension of a breach of the peace and if there is no apprehension of a breach of the peace, there is no jurisdiction to make an order under the section.*

*In enacting sec. 145, the purpose the legislature had in view was the prevention of a breach of the peace and if that object is not attained by an order purporting to be made under the section, it must be taken to have been without jurisdiction.*

*Non-joinder of persons concerned in a dispute whose presence is necessary for the purpose of preventing an apprehended breach of the peace involves a question of jurisdiction, and the High Court has power to set aside an order made in a proceeding under sec. 145, Cr. P. Code, in which such persons are not made parties.*

**LALDHARI SINGH v. SUKHDEO NARAIN SINGH** (1) referred to and followed.

This was a rule issued on the 20th November 1900, against the order of the Sub-divisional Magistrate of Madaripore, dated the 24th August 1900.

The facts of the case material to this report appear from the judgment.

*Mr. Hill and Babu Jogesh Chunder Roy and Moulvie A. K. Fuzlal Huq for the Petitioner.*

*Sir Griffith Evans and Babu Atulya Charan Bose for the Opposite Party.*

The JUDGMENT OF THE COURT was as follows :—

The facts which gave rise to the application upon which this rule was granted are shortly these. The land in dispute covers an area of over 200 bighas and was the subject of a proceeding between two sets of zemindars called respectively the Khororia and Shahapore Babus. An order was made in favour of the Khororia zemindars under sec. 145, C. Cr. P. A civil suit was then brought by the Shahapore zemindars in respect of the lands in question and they succeeded in obtaining a decree therefor. They obtained symbolical possession under their decree and then proceeded to give *pattahs* to various people who are now grouped as second party in the proceedings before us. The first party is one Ejahar Uddi and he claims to have been since a long time in occupation of the lands in dispute. He presented a petition to the Deputy Magistrate on the 7th April 1900 in which he stated that he was the tenant of the Khororia zemindars in respect of the lands in dispute and that he gave evidence in their favour, but, since the Shahapore zemindars had obtained possession, he was willing to attorn to them ; but that they are trying to oust him of his possession through members of the second party. The petition was referred to the Police for enquiry who made a report to the effect that, in consequence of these disputes, there was an apprehension of a breach of the peace. Upon the aforesaid petition and report, the Sub-divisional

(1) 4 C. W. N. 613 : s. c. 1. L. R. 27 Cal. 892 (1900).

## ANESH MOLLAH v. EJAHAR UDDI MOLLAH.

Officer, on the 12th April last, directed proceedings under sec. 145. On the 18th May, a proceeding was drawn up against Ejahar Uddi who was made the first party and against the various persons who had obtained *pattahs* from the Shahapore zemindars who were made the second party. On the 3rd June one Ismail Munshi came in and presented a petition to the effect that he was entitled to the land in dispute jointly with Ejahar Uddi. Accordingly he also was made a party and on the 18th June, the former proceeding was cancelled and a fresh proceeding was drawn up with Ismail as the third party.

The first, second and third parties filed their statements in accordance with the directions given to them. The second party stated that, since their zemindars had obtained possession of the land in dispute and had given them *pattahs*, they were in possession of these lands under separate documents from separate sets of the Shahapore zemindars, and that there was no connection between the several plots so held by them separately. They also contended that, as the Shahapore zemindars claimed possession of these lands, they as well as the Khororia zemindars were necessary parties to the proceedings. The Magistrate did not make the zemindars parties to the proceeding, but, on the 24th August, made an order under sec. 145 in favour of the first party Ejahar Uddi. The second party thereupon applied to this Court and obtained the rule now before us.

The three points urged in this Court are, first, that the Shahapore zemindars were necessary parties to the proceeding, and they not having been joined, the

order under sec. 145 is bad; secondly, that inasmuch as the dispute refers to various plots of land held by different persons grouped under the head of second party under different titles and under different allegations, there ought not to be one proceeding or one investigation and that therefore the order is bad. The third ground is that the order directing that Ejahar Uddi and Ismail Munshi, the first and third parties, do retain possession of these lands jointly in equal moieties is an improper order. The learned counsel, who appeared on behalf of the first party in showing cause, contended that none of these points raised any question of jurisdiction and that inasmuch as, since the amendment of the law, the power of this Court to revise orders under sec. 145 is confined to questions of jurisdiction, we ought not to interfere with the present order. Ordinarily speaking, an objection based upon non-joinder of parties does not involve a question of jurisdiction but in cases arising under sec. 145 the question relating to jurisdiction depends upon the provisions of that section. It appears to us that, under sec. 145, C. Cr. P., a special jurisdiction is vested in the subordinate Criminal Courts under special circumstances and for a special purpose; when either the special circumstances do not exist or when the order made under sec. 145 does not attain the purpose for which the jurisdiction is created, then the special jurisdiction vested under that section falls to the ground. It is sufficient to point out that the circumstances under which the jurisdiction springs up are circumstances which give rise to an apprehension of a breach of the peace

ANESH MOLLAH v. EJAHAR UDDI MOLLAH.

and if there is no apprehension of a breach of the peace, of course there is no jurisdiction to make the order. Again it seems to us that the purpose the legislature had in view was the prevention of a breach of the peace. If that object is not attained by an order purporting to be made under sec. 145, it must be taken to have been without jurisdiction.

Now in the present case, there was undoubtedly an apprehension of a breach of the peace and so far as the first part of the section is concerned, the Court had jurisdiction to take cognizance of the matter. The second part has reference to the proceeding in Court instituted for the purpose of attaining a definite object, namely, to prevent a breach of the peace. We think the present case falls exactly within the principle laid down in *Laldhari Singh v. Sukhdeo Narain Singh* (1). It was attempted to distinguish that case from the one before us. In *Laldhari Singh's* case a certain set of tenants was disputing about the possession of a particular piece of land claiming to hold it under one set of landlords whereas another set of tenants claimed to hold the same land under another set of landlords. A proceeding was first started in which the tenants were made parties regarding the possession of the land. It was afterwards altered into one in which the dispute was stated to be regarding the collection of rent as between the two sets of landlords. In this latter proceeding, the tenants were not made parties. It was held there that in altering the proceeding the Magistrate had

wrongly exercised his jurisdiction. That was one part of the case. It was also held that the lower Court was wrong in not making the tenants parties to the proceeding, inasmuch as they were persons concerned in the dispute and their presence was necessary for the purpose of preventing a breach of the peace which was apprehended. Stanley, J., in his judgment points out that—"The duty of the Magistrate was to deal with the dispute as it really was, namely, a dispute between one set of zemindars and their tenants on the one side and another set of zemindars and their tenants on the other, and accordingly to maintain in possession according to their respective interests the zemindars and their tenants whom he found on satisfactory evidence to have been in actual possession at the date of the order, if the evidence satisfied him that any of the parties to the dispute was in such possession." Then after referring to the cases on the point he went on to add "that the order is calculated to operate to the prejudice of the first party and their tenants, appears to me to follow from the fact that all disturbance of possession of the second party is prohibited by this order." The necessity of bringing into Court all the parties concerned in the dispute is pointed out again in p. 915. "But here two rival sets of tenants holding under two different sets of zemindars were contending about the actual possession of a strip of land. There was no question as to the collection of rent at all. The dispute, pure and simple, was which set of tenants was in actual occupation of the land. The tenants, thus, were the parties directly

(1) 4 C. W. N. 613 : s. c. I. L. R. 27 Cal. 892 (1900)

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concerned in the dispute. If the tenants of the first party were in possession, then the latter were in possession through them (to use the Sub-Inspector's language). If the tenants of the Nargu Babus were in possession, then these zemindars were in possession through them. It will be seen therefore, that whereas the tenants were directly concerned in the dispute the zemindar's concern was of an indirect character. The presence of the tenants was thus essentially necessary for the proper and effectual decision of the case." In the present case it is admitted that the Shahapore zemindars obtained symbolical possession from the Court and were in possession through their tenants who had given them *kabuliyats*. From the very objection pressed before us it seems that they were necessary parties to this proceeding. It was stated by Ejahar Uddi that he had long occupied the land but that the Shahapore zemindars were trying to do away with his possession by means of persons to whom they had given *pattahs*, in other words, the second party. If that be so, and that seems to be the case of the first party, it is quite clear that the dispute is not put an end to by merely making an order against the second party, for the zemindars are in no way bound by that order. They can come in at any moment and go upon the land or they may give *pattahs* to any body else they like with the object of retaining possession of the land. The tenants against whom the order has been made may abide by it, but that in no way puts an end to the dispute and in no way prevents the apprehension of a breach of the peace, the purpose for which alone

the law contemplates a proceeding of the special character provided for in sec. 145. We are of opinion, therefore, that this order is bad for non-joinder of the Shahapore zemindars. We do not think it necessary to express any opinion on the other questions upon which this rule was granted. We think that the present order must be set aside and we set it aside accordingly. This order, however, will not stand in the way of the Magistrate, if he considers that there is still an apprehension of a breach of the peace to take such steps as he may be advised.

Rule made absolute :

H. P. C.

Order set aside.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1019 OF 1900.

DEBENDRA CHANDRA  
CHOWDHURY, Complain-  
ant, Petitioner,  
v.

AMEER ALI, J.  
PRATT, J.

1901.

18, February.

MOHINI MOHAN CHOW-  
DHURY, Accused,  
Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 423, 522—Right of way, interference with—Order for preserving statu quo ante on conviction, if proper—Appellate Court, power of, to set aside such order—Penal Code (Act XLV of 1860), sec. 341—Wrongful restraint.*

*Where a person blocked up a private way, along which the complainant had a right to go, by raising a wall and was convicted of the offence of wrongful restraint under sec. 341 of the Penal Code and an order was passed by the trying Magistrate directing the accused to remove the obstruction and not to interfere with the complainant's right of way and, on appeal,*

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following a case mentioned in Belchambers' Practice, p. 263, held that no case had been made out for a change and refused the application with costs; against this order the Plaintiff through his next friend appealed.

*Mr. Garth* (with him *Mr. A. Chaudhuri*) for the Respondents.—The appeal is wrongly entitled; it should be headed, "In the matter of an application in the suit." Besides there is no appeal from such an order, which is a mere matter of procedure.

*Sir Griffith Evans* (*Mr. Knight* appearing with him) for the Appellant contended that there was an appeal under cl. (15) of the Letters Patent. See the cases of *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (6) and *Hadjee Ismail v. Hadjee Muhomed* (7). The decisions, following which the order appealed against was made, were unsound in law. No practice of the Court can override the right which every suitor has to change his attorney when he desires so to do, and the position of a next friend is not different from that of an ordinary suitor.

*Mr. Garth*.—There has been a series of decisions of this Court from the time of Norman, J., that the next friend is in a fiduciary position and cannot be allowed to change from one attorney to another without sufficient cause. See *Ram Chunder Roy v. Poorno Chunder Roy* (2), *Sarat Chunder Dawn v. Kristo Dhone Dawn* (3). Leave of the Court is necessary under the rules to obtain a change

of attorney, and any order asked for in an infant's suit should be shown to be for the benefit of the infant. Here the charges made against the attorney have been proved to be without any foundation. They are merely colorable. The attorneys on the record do not want to continue, but they are anxious that they should be discharged of the imputations made against them.

The JUDGMENTS OF THE COURT were as follows :—

MACLEAN, C. J.—This is a summons taken out by the infant Plaintiff in the suit asking for an order that upon payment of their taxed costs, including the costs of, and incidental to the application, to Messrs. Wilson, Chatterjee and Mitter, the attorneys on record for the Plaintiff, the name of Babu Priya Nath Sen be placed on record in the said suit as such attorney for the Plaintiff, with directions for taxing the costs.

Upon that summons being served upon them, the solicitors, Messrs. Wilson & Co., intimated to the Plaintiff's solicitor that he should appear by counsel at the hearing of the application and in consequence, apparently, of that intimation the Plaintiff said that he would file an affidavit showing grounds of application; and in consequence a long affidavit was filed on behalf of the Plaintiff making certain charges against the solicitors, and that affidavit was replied to by the solicitors in repudiation of the charges. The matter came on under these circumstances before Mr. Justice Pratt, then sitting as a Vacation Judge.

Mr. Justice Pratt following, and properly following, certain decisions of this

<sup>\*</sup>(2) 4 C. W. N. clxxv (1900).

(3) 5 C. W. N. lxxxiii (1901).

(6) 8 B. L. R. 433 (1872).

(7) 13 B. L. R. 91 (1874).

DINENDRA NATH DUTT v. T. H. WILSON & Co.

Court to the effect that the next friend of an infant Plaintiff was not entitled to change his solicitor unless he could satisfy the Court that, either owing to the misconduct of the solicitor, or for some other cause, the change was for the benefit of the infant, dismissed the application with costs. Hence the present appeal by the Plaintiff through his next friend, who is his father. There is nothing to indicate that the father is actuated by any improper or sinister motive in desiring to change his solicitors, nor has anything been said against the solicitor whom he desires to appoint. It is, however, abundantly clear that, rightly or wrongly, he has ceased to place confidence in his present solicitors, the present Respondents.

I ought to mention—it is a minute matter—that the heading of the Paper-book is wrong: it ought to have been entitled “In the suit and in the matter of the present application” and in this respect it ought to be amended.

It has been objected that in a case of this nature, no appeal lies.

We have not had the advantage of hearing Mr. Garth on this point, owing to the shape which the discussion before us has taken, but it would, I think, have been difficult to convince us that no appeal lay.

The Appellant contends that the next friend of an infant Plaintiff, although, no doubt, he must, under the rules, come to the Court if he desire to change his solicitor and to have a new solicitor placed upon the record in the place of the old one, is entitled to change that solicitor if he desires so to do, just as much as an ordinary litigant, who is *sui juris*.

The contention of the solicitors is that that is not so, that according to certain decisions to which I will refer in a moment, the next friend of an infant Plaintiff is not entitled to change his solicitor as of right, but that he must make out a case of something approaching misconduct on the part of the solicitor and satisfy the Court that the change is for the benefit of the infant.

There are no doubt authorities to that effect in this Court. The first is an unreported case before Mr. Justice Norris, dated the 23rd August 1883, the case of *Manick Lal Seal v. Sarat Kumari Dasi* (1). There, Mr. Justice Norris held, after consultation, as he tells us, with Mr. Justice Pigot, that the next friend of an infant Plaintiff was not entitled to change his solicitor unless he made out a case warranting such a change. Mr. Justice Norris says that he was following a similar decision of Mr. Justice Norman. Speaking with every respect for this judgment, I am unable to follow the reasoning upon which it is based, nor does it convey to my mind the impression of a carefully considered judgment. Mr. Justice Norris says that he does not agree with Mr. Bonnerjee, who was making the application, that a next friend is in the same position as an ordinary suitor. He says that “the next friend is in a fiduciary position.” I suppose he means in relation to appointing his own solicitor. I doubt if the expression is directly pertinent in that connection: and I would prefer to say that the next friend is bound to do his very best to protect the interests of the infant Plaintiff.

(1) Unreported. Suit No. 338 of 1883, Norris, J., 23rd August 1883.



DEBENDRA CHANDRA CHOWDHURY v. MOHINI MOHAN CHOWDHURY.

*the Appellate Court set aside the order directing the removal of the obstruction and preventing the accused from interfering with the complainant's right :*

Held—*That the order of removal of the obstruction was a necessary corollary to the previous conviction of the accused and was a proper order.*

*That though an Appellate Court has, under sec. 423 of the Code of Criminal Procedure, the power of making any amendment or any consequential or incidental order that may be just and proper, such Court cannot make an order which would make the entire proceeding infructuous and absurd.*

*That the order of the Appellate Court setting aside the order of removal of obstruction was neither proper nor just.*

This was a rule issued on the 22nd December 1900, against the order of the District Magistrate of Dacca, dated the 26th October 1900.

The facts of the case material to this report appear from the judgment.

Babu Sarat Chandra Basak for the Petitioner.

Mr. C. R. Das for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This rule was issued on the Magistrate of the District to show cause why his order setting aside the order made by the Sub-Deputy Magistrate under sec. 522 of the Criminal Procedure Code should not be set aside as having been made without jurisdiction, or why such other order should not be made as to this Court may seem fit and proper.

The opposite party appeared by counsel and although objection was raised to his

being heard, we have had the advantage of his argument.

There seems to be some misconception about the order made by the Deputy Magistrate ; although perfectly right in form, and, as the necessary result of the conviction of the accused, it was not properly made under sec. 522 of the Criminal Procedure ; and it seems to us that the District Magistrate fell into an error on that ground.

It appears that the Petitioner in this Court had a private right of way which the accused blocked up by raising a wall in the complainant's absence. The Petitioner brought a charge against the accused, and the latter was convicted of wrongful restraint under sec. 341 of the Indian Penal Code and sentenced to pay a fine of hundred rupees. The natural result of that conviction was that the accused should be directed not to interfere with the complainant any further by stopping him from proceeding in the direction he was entitled to go. The order, therefore, directing him to remove the obstruction was a natural consequence, a corollary, of the previous conviction of the accused. It has nothing to do with the restoration of any property to the complainant which is contemplated by sec. 522 of the Criminal Procedure Code. For example, supposing the accused was to stop the way of the complainant by placing a moveable obstruction, upon the conviction, he would be directed to remove it so as not to interfere with the freedom of action of the complainant ; and that was what the Deputy Magistrate intended to do, and what he has purported to do, by his order.

## DEBENDRA CHANDRA CHOWDHURY v. MOHINI MOHAN CHOWDHURY.

The District Magistrate, on appeal, thinks that the order was made under sec. 522 of the Criminal Procedure Code and inasmuch as no criminal force was used by the accused, the order could not be maintained, and he accordingly set aside the Deputy Magistrate's order.

No doubt under sec. 423 of the Code of Criminal Procedure, an Appellate Court has the power of making any amendment, or any consequential, or incidental order that may be just or proper; but in this case the result of the District Magistrate's order would be to make the entire proceeding infructuous and absurd. In our opinion the order which has been made by the District Magistrate is neither proper nor just. We therefore set it aside and restore the order of the Deputy Magistrate, expunging from it the words "under sec. 522."

*Rule made absolute.*

H. P. C.

## [APPEAL FROM ORIGINAL CIVIL JURISDICTION.]

No. 34 OF 1900.

MACLEAN, C. J.	DINENDRA NATH DUTT,
PRINSEP, J.	Appellant,
	v.
HILL, J.	T. H. WILSON & CO.,
1901.	and
6, February.	KALLY PROSONNO
	GHOSE, Respondents.

*Practice—Attorney, change of, application by next friend of an infant for—Grant of such application as a matter of course—Appeal from an order refusing change—Appeal, heading of.*

*A next friend of an infant is entitled to an order for change of attorney on the same terms as any other litigant sui juris.*

*It is not necessary for him to shew that such change is for the benefit of the infant, though the Court will interfere and remove the next friend if it appears that in the matter of such an application he was acting in a manner detrimental to the interests of the infant.*

*So long as he continues to be the next friend, he is entitled to appoint and change his own solicitor.*

PEYTON v. BOND (4) referred to.

MANICK LAL SEAL v. SARAT KUMARI DASI (1), RAM CHUNDER ROY v. POORNO CHUNDER ROY (2), and SARAT CHUNDER DAWN v. KRISTO DHONE DAWN (3) *dis-sented from.*

*Semble—An appeal lies from an order refusing change of attorney.*

On the 19th September last an application was made to the Vacation Judge, Mr. Justice Pratt, on behalf of the Plaintiff, who is an infant, for change of attorney from Messrs. Willson, Chatterjee and Mitter to Babu Priya Nath Sen.

When the Registrar's summons for the application was served, it was not accompanied by any grounds. On the returnable date of the summons, the applicant's counsel obtained an adjournment in order to put in grounds. Later on an affidavit was filed by the next friend making certain allegations against the infant's attorneys on the record. The attorneys filed an affidavit in reply to meet these charges. Mr. Justice Pratt held that the charges made against the attorneys had been satisfactorily answered and

(1) Unreported. Suit No. 338 of 1888.

Norris, J., 23rd August 1883.

(2) 4 C. W. N. clxxv (1900).

(3) 5 C. W. N. lxxxiii (1901).

(4) 1 Sim. 390 (1827).

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decree of J. Windsor, Esq., District Judge of Zillah Burdwan, dated the 7th of September 1898, reversing the decree of Babu Gobinda Chunder Dey, Munsif, 1st Court at Katwa, dated the 11th of December 1897.

The facts of the case appear from the following order of reference made by Rampini and Pratt, JJ. :—

"In this case the question is whether the Plaintiff is entitled to interest on arrears of rent at the rate specified in the *ijara kabuliyat* executed in his favour by the Defendant, viz., Rs. 3-2 per month or whether he is restricted to the rate of 12 per cent. per annum, allowed by sec. 67 of the Tenancy Act. The lease is a permanent *mokurari* lease, and it is contended on behalf of the Plaintiff that sec. 179 of the Tenancy Act renders the provisions of sec. 67 inapplicable to such leases. The Judge in the Court below has held, on the authority of the case of *Atulya Churn Bose v. Tulsi Das Sarkar* (2), that the Plaintiff is entitled to the rate contracted for with him by the Defendant. The ruling in this case fully supports the view held by him. On the other hand, it is urged by the learned pleader for the Appellant, that this case is in conflict with that of *Basunta Coomar Roy Chowdhri v. Promotha Nath Bhuttacharjee* (1) in which it has been laid down that a contract by a tenant holding under a permanent *mokurari* lease to pay interest on arrears at a higher rate than 12 per cent. per annum is not enforceable in law. The rulings in the two cases are in direct conflict. We are therefore

bound to refer this case to a Full Bench, which we accordingly do.

We may add that we are of opinion that the ruling in the case of *Atulya Churn Bose v. Tulsi Das Sarkar* (2) is correct. One of the members of this Bench was a party to the decision in *Basunta Coomar Roy Chowdhri v. Promotha Nath Bhuttacharjee* (1), but he concurs in the opinion that that case was not rightly decided.

We are fortified in the view we take of the question at issue by the ruling in the case of *Krishna Chandra Sen v. Sushila Soondury Dassee* (3), which, though not directly in point, yet lays down that the provisions of sec. 74 do not control sec. 179, but the contrary.

The questions we propound for the decision of the Full Bench are—

*First.*—Whether the Plaintiff in this case is entitled to interest at the rate specified in the *kabuliyat* executed by the Defendant, or whether sec. 67 of the Tenancy Act controls the provisions of sec. 179 of the same Act; and

*Second.*—Whether the case of *Basunta Coomar Roy Chowdhri v. Promotha Nath Bhuttacharjee* (1) had been rightly decided."

*Dr. Rash Behari Ghose and Babu Nalini Ranjan Chatterjee* for the Appellants.

*Mr. O'Kinealy, Moulvie Serajul Islam, and Moulvie Mustafa Khan* for the Respondents.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—If it had not been

(1) 3 C. W. N. 36: s. c. I. L. R. 26 Cal. 130 (1898).

(2) 2 C. W. N. 543 (1895).

(1) 3 C. W. N. 36: s. c. I. L. R. 26 Cal. 130 (1898).

(2) 2 C. W. N. 543 (1895).

(3) I. L. R. 26 Cal. 611 (1899).

MATUNGINI DEBI *v.* MAKRURA BIBI.

for the view entertained by my learned colleague, I should have thought that this was a reasonably clear case. The question submitted to us is whether the Plaintiff in this case is entitled to interest at the rate specified in the *kabuliyat* executed by him, or whether sec. 67 of the Bengal Tenancy Act controls the provisions of sec. 179 of the same Act. Construing the Act by the ordinary rules of construction applicable to statutory enactments, the case does not to my mind present any real difficulty. Sec. 67 is general: sec. 179 is particular and specific, and by it the Legislature has thought fit, to make special provision in relation to permanent tenures in permanently settled areas.

The location of sec. 179 is not without some importance in relation to the question we are now discussing: for it comes after sec. 67, and after cl. (h) of sub-sec. 3 of sec. 178, and the section says:—"Nothing in this Act,"—I pause there for a moment to point out that "nothing in this Act" must cover the provisions of sec. 67,— "shall be deemed to prevent the proprietor or holder of a permanent tenure in a permanently settled area from granting a permanent *mokurari* lease on any terms that may be agreed on between himself and his tenant." The language is clear and precise: why are we not to give its ordinary meaning to it? I can find no good reason nor have I heard any valid argument against our so doing. The provision in the case before us as to payment of interest is, speaking with all respect to the view taken by the learned Judges who decided the case of *Basunta Coomar Roy Chowdhri v.*

*Promotha Nath Bhuttacharjee* (1) undoubtedly a term agreed upon between the landlord and his tenant, and I am quite unable to accept the subtle but unconvincing reasoning as to what the expression "term" means, as suggested in the last-mentioned case. To my mind if we were to accept the view laid down in that case, and from which view, it is not unimportant to mention, that one of the learned Judges has already resiled, we might just as well strike sec. 179 out of the Act.

The language of the section is plain and clear, and there is nothing in any other part of the Act to warrant us in qualifying it, or putting a construction upon it which the words read in their ordinary acceptance, do not bear.

The question ought to be answered by saying that the Plaintiff is entitled to the interest specified in the *kabuliyat*, that sec. 67 does not control the provisions of sec. 179, and that the case of *Basunta Coomar Roy Chowdhri v. Promotha Nath Bhuttacharjee* (1) has not been rightly decided.

The result is that the appeal must be dismissed with costs including the costs of this reference.

PRINSEP, J.—The question submitted to the Full Bench in this case is whether, in granting a permanent lease, within the terms of sec. 179 of the Bengal Tenancy Act, a condition that interest shall be payable at a higher rate than 12 per cent. per annum, as allowed by sec. 67 of that Act, is permissible. It is strange that in sec. 178 of the Act it should be declared in cl. (h) of sub-

(1) 3 C. W. N. 36; s. c. L. L. R. 26 Cal. 180 (1898).

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I am unfortunately unable to accept either the reasoning or the conclusion of Mr. Justice Norris. That case was followed by Mr. Justice Sale in the case of *Ram Chunder Roy v. Poorno Chunder Roy* (2) and also by Mr. Justice Stanley in the case of *Sarat Chunder Dawn v. Kristo Dhone Dawn* (3), but neither of these learned Judges would appear to have considered the matter independently, but rather to have regarded themselves as bound by Mr. Justice Norris' view as laying down the practice of the Court. I respectfully dissent from these decisions, as, in my opinion, the next friend of an infant Plaintiff is as much entitled to change his solicitor as any other Plaintiff who is *sui juris*. To my mind the difficulty has arisen through a confusion between the rights and the obligations of the next friend. His right is such as I have stated: his obligation is not to make such an appointment as would be detrimental to the interest of the infant Plaintiff, and if the next friend were to come to the Court and ask for a change of solicitors, and it was made apparent to the Court that he was asking for such change from some sinister motive, that he was proposing, for instance, to appoint as his solicitor, one who was acting for Defendants with interests adverse to those of the infant Plaintiff, or that he was colluding with the Defendants, or generally that he was not acting in the matter for the benefit of the infant, I entertain no doubt but that the Court has ample power to interfere and would interfere to protect the infant; but the

proper course to my mind in such a state of circumstances would be, as was done in the old case of *Peyton v. Bond* (4) to apply for the removal of the next friend, and for the substitution of a new next friend on the ground that the next friend was not doing his duty. As long as he continues next friend, I think he is entitled to appoint his own solicitor.

Before the suit is instituted he can appoint his own solicitor, and it has never been suggested that it was necessary that such appointment should be sanctioned by the Court after the suit was instituted. Yet logically this ought to be done if Mr. Justice Norris' decision be well founded.

No authority in the English Courts has been cited in support of Mr. Justice Norris' decision and, personally, I have never known of such a case. The case of *Brown v. Brown* (5) has no bearing on the present case, though, if at all, it tends inferentially to support my present view.

I may add that I do not think it can be for the benefit of the infant that the solicitor should continue fastened upon the next friend, when the latter has lost confidence in the former.

Is it likely that, in such a condition of affairs, the suit can be beneficially conducted for the infant? I should say no.

This is the first occasion upon which the point has been submitted to the Court of Appeal here, and, speaking with every respect, I think, the view hitherto taken is erroneous.

The appeal must therefore succeed."

(2) 4 C. W. N. clxxv (1900).

(3) 5 C. W. N. lxxxiii (1901).

(4) 1 Sim. 390 (1827).

(5) 11 Beav. 562 (1849).

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This being so, it is not strictly necessary to go into the question of the charges made against the solicitors: but I propose to do so as it is important upon the question of costs and only fair to the solicitors themselves.

We are all satisfied that there is no ground whatever for the imputations or *quasi*-imputations which were made against them.

The only question then is the question of costs, and that has caused me some difficulty.

In the first instance, in my view of the law, the next friend was right in making this application, as he did, but then he was wrong and inconsistent in making the charges against the solicitors, and equally the solicitors were not well advised in not offering to retire when their clients were unwilling to retain their services any longer. At the same time, there is some force in the view they took, that, having regard to the authorities I have mentioned, their removal might be taken to imply some imputation upon them, and that they wished to clear themselves of such imputations. This they have done and very properly, through their counsel, have now desired to retire. Under all these circumstances, feeling as I do that the difficulty has arisen from the above decisions, and although one ought to be very careful as to throwing the burden of costs on an infant's estate, I am of opinion that the costs of both parties in both Courts must come out of that estate.

It would be unjust, under the circumstances, to make the solicitors pay any costs.

The result is that the appeal must be

allowed and an order must be made in terms of the summons, with such order as to costs as I have intimated.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I agree.

*Babu Priya Nath Sen*, Attorney for the Appellant.

*Messrs. Wilson, Chatterjee & Mitter*, Attorneys on the Record.

*Appeal allowed.*

S. R. D.

#### [CIVIL APPELLATE JURISDICTION.]

[Full Bench.]

#### APPEAL FROM APPELLATE DECREE

No. 2562 of 1898.

MACLEAN, C. J. MATUNGINI DEBI and  
PRINSEP, J. others, Defendants,  
BANERJEE, J. Appellants,

AMEER ALI, J.

v.

RAMPINI, J. MAKRURA BIBI and  
1901. another, Plaintiffs,

12, February.

Respondents.

*Bengal Tenancy Act (VIII of 1885), secs. 67, 179—Interest at a higher rate than 12 per cent. per annum—Permanent lease—Contract.*

(Held by the Full Bench—AMEER ALI, J., dissenting) that sec. 67 of the Bengal Tenancy Act does not control the provisions of sec. 179 of the same Act.

*That in granting a permanent lease within the terms of sec. 179 of the Bengal Tenancy Act, a condition that interest shall be payable at a higher rate than 12 per cent. per annum, as allowed by sec. 67 of that Act, is permissible.*

BASUNTA COOMAR ROY CHOWDHRI v. PROMOTHA NATH BHUTTACHARJEE (1) over-ruled.

This was an appeal preferred on the 16th of December 1898, against the

(1) 3 C. W. N. 36: s. c. I. L. R.  
26 Cal. 130 (1898).

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sec. 3, that nothing in any contract made between a landlord and a tenant after the passing of the Act shall affect the provisions of sec. 67 relating to interest payable on arrears of rent, and that following on that section, sec. 179 should declare that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokurari* lease on any terms agreed on between him and his tenant. It seems to me however that having regard to the words, nothing in this Act shall be deemed to prevent such person from granting a permanent *mokurari* lease on any terms agreed on between him and his tenant, really conclude the matter, though they are inconsistent with the terms of cl. (h) of sub-sec. 3 of sec. 178 which precede that section.

BANERJEE, J.—I am of the same opinion. The question which we have to determine in this case is, whether sec. 67 of the Bengal Tenancy Act controls the provisions of sec. 179 of the same Act; in other words, whether the contract for the payment of interest on arrears of rent at a higher rate than twelve per cent. per annum, entered into between a zemindar and a permanent tenure-holder under him is enforceable by law.

The question has been referred to the Full Bench by reason of the conflict between the cases of *Atulya Churn Bose v. Tulsi Das Sarkar* (2) and *Basunta Coomar Roy Chowdhri v. Promotha Nath Bhattacharjee* (1).

The determination of the question

must depend upon the language of sec. 179 of the Bengal Tenancy Act. That section enacts that "nothing in this Act shall be deemed to prevent a proprietor or holder of a permanent tenure in a permanently settled area from granting a permanent *mokurari* lease on any terms agreed on between him and his tenant."

Now sec. 67 of the Act which provides that "an arrear of rent shall bear simple interest at the rate of twelve per cent. per annum," is a provision of the Act; and so also is cl. (h) of sub-sec. 3 of sec. 178 which enacts that "nothing in any contract made between a landlord and a tenant after the passing of this Act shall affect the provisions of sec. 67 relating to interest payable on arrears of rent." And these are the provisions in the Act, which, if they stood alone, would have prevented a proprietor or a holder of a permanent tenure from recovering from his under-tenant interest otherwise than in accordance with the provisions of sec. 67. But sec. 179 expressly enacts that nothing in the Act shall be deemed to prevent the landlord from granting a permanent *mokurari* lease on any terms agreed on between him and his tenant. It was, therefore, competent to the parties in this case to enter into a contract stipulating for the payment of interest on arrears of rent at any rate agreed upon between them, even if it was higher than that mentioned in sec. 67.

It was argued that if this be the true effect of sec. 179, it would render nugatory the provisions of sec. 67, and cl. (h) of sub-sec. 3 of sec. 178. But that does not at all follow. The last-mentioned provisions relate to tenants generally; sec. 179 relates to a particular

(1) 3 C. W. N. 36; s. c. I. L. R. 26 Cal. 180 (1898).

(2) 2 C. W. N. 543 (1895).

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class of tenants, namely, the holders of permanent tenures or under-tenures; and it is a general rule of construction, that of two clauses, one having a general application, and the other applying only to a particular class of cases, the latter shall control the former, and not the reverse. The opposite view would render sec. 179 nugatory.

It was next contended that, in construing sec. 179 of the Bengal Tenancy Act, we must bear in mind the reason for its insertion in the Act, and if we bear that in mind, we shall find reason for holding that it was not intended to control any of the earlier provisions of the Act. And the reason for the enactment of sec. 179, according to the argument of the learned vakil for the Appellant, was this, that the Tenancy Act repealed Regulation V of 1812, which authorized proprietors of estates to grant permanent leases, and having repealed that Regulation, the Legislature thought it necessary to re-enact the provisions of the repealed Regulation in sec. 179 of the Tenancy Act, which was an amending and a consolidating enactment. But although that may account for the existence in the Tenancy Act of some provision authorizing proprietors and holders of permanent tenures to create permanent under-tenures, there was no reason why sec. 179 of the Tenancy Act should contain the words, "on any terms agreed on between him and his tenant," if the Legislature did not intend to authorize the granting of permanent leases on any terms agreed upon.

It was lastly argued that if sec. 179 be construed in the way we are construing it, it would render nugatory a statu-

tory provision of the law intended for the protection of tenants, the provision, namely, that interest upon arrears of rent shall not be allowed at a higher rate than twelve per cent. per annum. I think that it is a sufficient answer to this argument to say that, although the Legislature might have thought this provision necessary to protect certain classes of tenants, chiefly raiyats, it might not have felt that the same necessity existed for the protection of the interests of a different class of tenants, namely, permanent tenure-holders.

AMEER ALI, J.—The question which has been referred to us is one purely of interpretation.

When the case of *Basanta Kumar Roy Chowdhri v. Promotha Nath Bhattacharjee* (1) came before me and Mr. Justice Pratt we dealt with it as *res integra* and in construing sec. 179 of the Bengal Tenancy Act expressed ourselves with reserve, as will appear from the concluding words of our judgment which are as follows—

"For these reasons, as at present advised, we think that the conclusion arrived at by the Subordinate Judge in this case is correct, and this appeal must be dismissed with costs."

Having regard to the arguments of learned counsel for the Respondent, speaking for myself, I should have liked to have had some opportunity of considering the matter further. Although the judgments of my learned colleagues make me feel some doubt regarding the view I then expressed, it seems to me that sec. 179 of the Tenancy Act requires to be recon-



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ciled with the other provisions of the Tenancy Act. As I have ventured to point out in my judgment in *Basunta Kumar Roy Chowdhri* (1) it is a well-recognized principle in the interpretation of statutes that an Act of the Legislature should be so construed as to give effect, so far as possible, to all its enactments, nor must it be so construed as to allow one provision to stultify another. I have not heard any argument to-day to induce me to alter that opinion. Sec. 179 of the Bengal Tenancy Act therefore has to be reconciled with the provisions of cl. (h) of the third proviso of sec. 178. And I think the only way in which we can reconcile them is by reading sec. 179, as suggested by Dr. Rash Behari Ghose, in other words, sec. 179 should be read as follows:—"That nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokurari* lease on any terms agreed on between him and his tenant so far as they are not in conflict with the provisions of this Act."

RAMPINI, J.—I think it is sufficient for me to say that I agree with the views of the majority of the learned Judges constituting this Bench, and I would accordingly answer the first part of the question referred to us in the affirmative, that is to say, I consider that the Plaintiff is entitled to recover interest at the rate specified in the *kabuliyat* executed by the Defendant, and I would answer the second part of the question in the negative, that is to say, I do not consider that sec. 67 of the Bengal Tenancy Act con-

trols the provisions of sec. 179 of that Act, but, on the contrary, that sec. 179 controls the provisions of sec. 67. I also consider that the case of *Basunta Coomar Roy Chowdhri v. Promotha Nath Bhutta-charjee* (1) has not been rightly decided.

*Appeal dismissed.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 201 OF 1899.

UMA CHARAN DAS,

MACLEAN, C. J.

Opposite Party,

BANERJEE, J.

Appellant,

STEVENS, J.

1900.

MUKTA KESHI DAS,

6, July.

Applicant,

Respondent.

*Probate and Administration Act (V of 1881), secs. 51, 86, 90—Order granting permission to dispose of immovable property.*

*The word "hereby" in sec. 86 of the Probate and Administration Act means "by the whole Act" and not merely by the chapter in which the section occurs. An order made by a District Judge granting permission to dispose of immovable property under the Probate and Administration Act is appealable.*

This was an appeal preferred on the 7th of June 1899, against the order of F. F. Handley, Esq., District Judge of Zillah 24-Pergunnahs, dated the 17th of April 1899.

The facts appear from the judgment.

*Babu Sarat Chandra Dutt* for the Appellant.

*Babu Dasarathi Sanyal* for the Respondent.

(1) 3 C. W. N. 36 : s. c. I. L. R.  
26 Cal. 130 (1898).

(1) 3 C. W. N. 36 : s. c. I. L. R.  
26 Cal. 130 (1898).

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The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This appeal must succeed. A preliminary objection has been taken that an appeal does not lie to this Court from an order of the District Judge, in a case such as the present. I am unable to accept that view. Sec. 86 of the Probate and Administration Act says that “every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him, shall be subject to appeal to the High Court.”

The order now appealed against is an order made by the District Judge, but it is said that an appeal does not lie because the expression “hereby” only applies to powers conferred under the chapter which contains the section, and this argument rests upon the position in which the section is placed in the Act itself. I am unable to accept that view: there is nothing in the Act to narrow the meaning of the expression “hereby” which to my mind means “by the whole Act” and not merely by the chapter in which the section appears. An appeal therefore lies. Upon the merits, the question is whether the Petitioner has made out the existence of such a debt such as would justify the Court in allowing her, as administratrix of her son, whose property it was, to sell. It is for her to make out that case. The present objector, who claims to be the reversioner, says she has made out no such case. It is quite clear that letters of administration were not taken out till some thirty or five and thirty years after the death of the Respondent's son, and it is not disputed that they were taken

out for the express purpose of obtaining an order to confer power on her to sell the property. The story of the Plaintiff herself, who is an old woman, and of her nephew, whose mother lent the money is, that about nine years ago she borrowed not a small sum, but a substantial sum of Rs. 300, which has, since, increased by interest to Rs. 400. That is her case; that is her nephew's case; a loan of 300 some 9 years ago. The nephew was not present when any money was lent but only heard of it, and “did not once see the lending of the money.” Upon that evidence it is clear that the loan was made nine years ago, and though there are certain loose statements as to interest, there is nothing to show that any interest was ever paid, or, at any rate, up to what date or when it was paid. Upon that evidence the Judge in the Court below finds that the Respondent used to get small loans, but the evidence is quite to the opposite effect. She got Rs. 300 in one loan—a large sum for persons in this position of life to advance or to receive—there was no security nor is any document produced to evidence the existence or creation of the loan. Then the Judge says the debt is not barred by the statute because “it is a running account.” What he means by a running account, I really do not know. There is no evidence upon the record to substantiate a case of a running account or the payment of any interest and the loan was made 9 years ago. The debt is clearly statute-barred. In my opinion the Petitioner has not made out the existence of this debt or any case which would warrant the Judge in making the order which he has made.

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The appeal must be allowed with costs in both Courts, the hearing fee in this Court being fixed at two gold mohurs.

BANERJEE, J.—I am of the same opinion. I only wish to add a few words with reference to the preliminary objection taken that no second appeal lies against the order in question. The provision in the Probate and Administration Act in regard to appeals is sec. 86 which provides that, "every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court," &c. It is true that the order appealed against is an order granting the Respondent permission to dispose of immoveable property, and the section of the Act which speaks of such permission is sec. 90 which is contained in Ch. VI of the Act which follows Ch. V in which sec. 86 occurs. But sec. 90 does not say anything about the power of the District Judge to grant permission to dispose of immoveable property, and the power which the District Judge has to grant such permission must be that conferred upon him by sec. 51 which precedes sec. 86 and which provides that the District Judge shall have jurisdiction in granting and revoking probate and letters of administration in all cases within his district. The power to grant permission to an administrator to dispose of immoveable property must be considered as ancillary to the power vested in the District Judge in granting letters of administration.

STEVENS, J.—I also think that an appeal lies in this case and that the appeal on the merits should be allowed.

S. C. S.

*Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2581 of 1898.

CHHOTU MAHTON and

others, Plaintiffs,

Appellants,

v.

RAMPINI, J.

BRETT, J.

1901.

15, March.

MUSST. SHEOBARTI KOER  
and another, Defendants,

Respondents.

\* *Specific Relief Act (I of 1877), sec. 42—Suit to set aside a mortgage—Reversionary heirs—Dispute as to nearer heir—Mortgage for a small amount which may be repaid by widow—Maintainability of suit—Declaration in a dismissed suit.*

*Where a Hindu widow mortgaged a portion of her husband's estate for a small sum of money which might be paid off by the widow in her life-time, a suit by the reversionary heirs, specially when there is a dispute as to who the nearer reversionary heir or heirs are, is premature and not maintainable.*

*A Civil Court has ample discretion under sec. 42 of the Specific Relief Act to exercise jurisdiction vested in it and to decline to set aside, during her life-time, an alienation made by a Hindu widow when no proper case has been made out by the party seeking to have such alienation set aside.*

UPENDRA NARAIN MYTI v. GOPEENATH BERA (1) and ISRI DUT KOER v. HANSBUTTI KOERANI (2) distinguished.

*A declaration affecting the Plaintiff in a suit which is dismissed is not legal.*

This was an appeal preferred on the 17th of December 1898, against the decree of Babu Jadupati Banerjee, Officiating Subordinate Judge of Chupra, dated

(1) I. L. R. 9 Cal. 817 (1883).

(2) I. L. R. 10 Cal. 824 (1883).

CHHOTU MAHTON v. MUSST. SHEOBARTI KOER.

the 10th of September 1898, preferred on appeal from the decision of Babu Baroda Prosad Roy, Munsif of Motihari, dated the 4th of March 1898.

The facts of the case material to this report appear from the judgment.

*Babu Dwarka Nath Mittra* for the Appellants.

*Babu Jnanendra Nath Bose* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the Subordinate Judge of Chupra, dated the 10th September 1898.

The suit, out of which this appeal arises, is one brought by five persons, who allege themselves to be the reversionary heirs of one Kodai, the son of Khursihal, to set aside a mortgage of 2 bighas of land executed by Sheobarti, the widow of Khursihal, in favour of the Defendant No. 2 to secure Rs. 150 for arrears of rent in respect of the *kasht* land referred to in the mortgage and to pay costs for the *sradh* of her deceased husband.

The Subordinate Judge has disallowed the suit upon the ground that it involved intricate questions of law and fact and that as the jurisdiction imposed on him by sec. 42 of Act I of 1877 is a discretionary one, he has not thought fit to exercise that discretion in favour of the Plaintiffs in this case.

The pleader for the Appellants contends that the learned Subordinate Judge is wrong in not exercising his discretion in this case; and in support of this contention he has cited the rulings in the case of *Upendra Narain Myti v. Gopeenath Bera* (1) and *Isri Dut Koer v. Hansbutti*

*Koerani* (2). In the first of these decisions it is laid down that "where the person who is the next reversioner after the death of a Hindu widow sues during the lifetime of the widow for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the Plaintiff may not succeed for many years to the possession of the property or that some of the property is of a perishable nature."

The case of *Isri Dut Koer v. Hansbutti Koerani* (2) lays down that a suit brought during the lifetime of a Hindu widow by the presumptive heir, entitled on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life is among the exceptions to the general rule established by decision upon Act VIII of 1859, sec. 15, viz., that except in certain cases a declaratory decree is not to be made unless the Plaintiff allows a title to, though he does not ask for, consequential relief.

But neither of these cases seems applicable to this case, because it is by no means certain that the Plaintiffs are the next reversionary heirs to the estate of the widow's husband, seeing that it has been alleged by the Defendant that there is a nearer reversionary heir, Mirsu, and this person undoubtedly would be a nearer reversioner, if legitimate.

Now, the legitimacy of Mirsu is in dispute. The first Court has decided that point against Mirsu and held that he is illegitimate. The Subordinate Judge has not affirmed the decision of the first

(1) I. L. R. 9, Cal. 817 (1883),

(2) I. L. R. 10 Cal. 324 (1883).

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Court upon this point; and, even if he had done so, it will be apparent that, inasmuch as Mirsu is not a party to the suit, no finding on this point in the case can settle that question for ever. For it will always be open to Mirsu, at some future period, to come forward and establish as against the Plaintiffs and the persons in possession of the property that he, and not the Plaintiffs, is the next reversionary heir to the estate of Kodai.

In these circumstances we think that the Subordinate Judge was quite justified in declining to exercise the discretion imposed on him by sec. 42 of Act I of 1877 and in refusing the declaratory decree sought for by the Plaintiffs. Furthermore, the Subordinate Judge has pointed out that the transaction which the Plaintiffs in this case have impugned is a mortgage for a very small sum. It may be paid off by the widow in her lifetime; and then the Plaintiffs will have no cause of action at all, and will have no reason to complain of the proceedings of the widow. The Plaintiffs' suit is therefore premature.

In the next place, the Subordinate Judge has come to a finding which, however, seeing that he has dismissed the suit, will not be binding on the Plaintiffs, namely, that the alienation was for legal necessity and justified in the circumstances of the widow. However this may be, we think it proper to say no more upon this point, because when the suit is dismissed entirely on this ground on which the lower Appellate Court has dismissed it, this finding must not be regarded as binding in any way, or as precluding the Plaintiffs from, at some

future time, raising the plea as to want of legal necessity for the mortgage.

For these reasons we affirm the decree of the Subordinate Judge and dismiss this appeal with costs.

*Appeal dismissed.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1015 OF 1900.

AMEER ALI, J. ) ABDUL SIKDAR and anr.,  
Pratt, J. Petitioners,

1901. MATHU SINGH, Opposite  
18, February. Party.

*Criminal Procedure Code (Act V of 1898), sec. 79—Warrant, validity of—Endorsement by initials if sufficient—Arrest made in execution of such warrant—Resistance or obstruction to arrest—Penal Code (Act XLV of 1860), secs. 224, 353.*

*An endorsement in a warrant of arrest should be made properly in accordance with law. When an endorsement is made only by initials which are proved or identified to be of the proper person, the warrant does not become invalid by reason merely of the endorsement being by initials.*

This was a rule issued on the 19th of December 1900, against an order of the Deputy Magistrate of Perozepur, dated the 29th of September 1900, which order was, on appeal, affirmed by the Additional Sessions Judge of Backergunge, on the 12th of November 1900.

The facts of the case were as follows :—

The warrant under which the arrest was made was addressed to the Court Sub-Inspector. He endorsed it to the officer in charge of the Sharupkati station and that officer endorsed it by name to a constable who made the arrest. The initials

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below the last endorsement appear to be on comparison with other signatures on the record to be of the Sub-Inspector of Sharupkati thana, the officer in charge of that station. The constable did notify the substance of the warrant to the person to be arrested, showed it to him and gave him an opportunity to give bail, which he declined to do.

The Petitioner Kaminuddi Sikdar was sentenced, under sec. 353, I. P. C., to 9 months' rigorous imprisonment and the Petitioner Abdul Sikdar to 6 months' rigorous imprisonment under sec. 224, I. P. C. The first question raised in the rule was whether the arrest of the Appellant Abdul was a legal arrest so as to make a resistance or obstruction or escape, or assault or use of criminal force an offence either under sec. 224 or 225 or 353, I. P. C.

*Moulvie A. K. Fuzlul Huq* for the Petitioners.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

This rule was issued upon the Magistrate of the district to show cause why the conviction of and sentence passed on the Petitioners by the Sub-divisional Magistrate of Perozepur should not be set aside on the ground that the warrant of arrest under which the constable purported to act was not duly endorsed and, therefore, the constable was not

legally competent to arrest the accused, and secondly that the conviction is wrong inasmuch as the Sub-divisional Officer refused the application of the Petitioners to recall the witnesses for the prosecution for cross-examination, or why such other order should not be made as to this Court may seem fit and proper.

We have heard the pleader for the Petitioners in this case, and also have had the warrant translated and placed before us. We are satisfied that the warrant fulfils the requirements of the law. Although one of the endorsements is only by initials, it seems to us that as those initials have been identified upon the evidence, there is no validity in the first objection. It is desirable, however, that initials should not be allowed, and probably a direction from the District Magistrate would be sufficient for the purpose.

But the second ground remains and seems to us to be well-founded.

We accordingly set aside the conviction of and sentence passed on the Petitioners, and direct that the case be retried before the Sub-divisional Officer if he is in the station, or before any other Magistrate competent to try the same, who may be nominated by the District Magistrate, giving to the accused the opportunity of cross-examining the witnesses for the prosecution.

*Rule made partly absolute.*

H. P. C.

## PRIVY COUNCIL.

[APPEAL FROM THE CALCUTTA HIGH COURT.]

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1901.

Heard, 20, February.

Judgment, 21,

February.

THE EAST INDIA

RAILWAY

COMPANY

Appellant,

v.

KALIDAS

MUKERJEE,

Respondent.

*Railway Company—Passenger, carriage of, obligation as to—Reasonable care and diligence and safe carriage—Negligence—Explosion in railway carriage—Burden of proof—Passenger's luggage, duty to search—Damages, suit for against Railway Company—Common carriers—Dangerous goods, carriage of, duty to prevent.*

*There is no obligation upon a Railway Company to carry a passenger safely; they are only bound to carry him with reasonable care and diligence.*

COLLET v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (1) explained.

*In a suit for damages for loss of a son who helped his father and whose death was caused by an explosion in a railway carriage, the onus is upon the Plaintiff to prove that the accident was due to a want of reasonable care and diligence on the part of the Railway Company.*

*Where the explosion was caused by certain fireworks taken in some parcels into the carriage by some fellow-passengers, and there was no evidence to show that the parcels exhibited such signs of their real nature as ought to have called the attention of the railway servants to them, there was no obligation on the Railway Company to prevent such goods from being carried.*

*Railway Companies are not "common*

*carriers" of passengers and it is not for them to prove beyond doubt that they are not responsible for the accident. Evidence must be given of their want of care and diligence.*

This was an appeal from a decision of the High Court of Bengal (the Chief Justice, Mr. Justice Prinsep and Mr. Justice Ameer Ali), dated the 17th of February 1899, which had affirmed the decree of Mr. Justice O'Kinealy, dated the 8th of June 1898.

The action was brought by the Respondent against the Railway Company to recover damages for the loss he had sustained by the death of his son Atindranath; which death he charged was due to the negligence of the Appellant Company.

The facts found by both Courts on which their judgments were based were as follows:—

One Atindranath, who was a clerk, aged 20 years in the service of the Government of India in the Government Arsenal at Rawalpindi, and who, out of his earnings as such clerk, maintained the Respondent, who is a paralytic, and unable to maintain himself, started from Bally, a station on the Appellant Company's railway, on or about the 25th day of April 1896, on his return journey, after a holiday to resume the duties of his said office at Rawalpindi aforesaid. When the train by which the said Atindranath was travelling was running from Secunderabad, on the said line, to Dadri, another of the stations on the Appellant Company's line, an explosion took place in the carriage in which the said Atindranath was travelling, whereby he was so burnt and injured that he expired on the 5th day of May 1896, in consequence of such injuries.

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The explosion was caused by certain fireworks which were placed under the seat of the compartment in which Plaintiff's son was travelling by a fellow-passenger.

The Appellate High Court found the following facts established :—

(a) That it was established by the evidence that the deceased, Atindranath, on the 25th of April 1896, took a third class ticket from the Appellant Company for the journey from Bally to Rawalpindi and that on the 27th April 1896, while on his journey the carriage in which he was travelling caught fire, and he was badly burnt and injured by the said fire and explosion and by falling through the floor of the carriage subsequently died of those injuries.

(b) That the said fire resulted from an explosion of fireworks carried by some of the fellow-passengers of the injured man in the compartment in which he was travelling.

(c) That when such explosion took place there was a large quantity of fireworks in the said carriage, that these fireworks exploded, and that by such explosion, and the resulting fire, the said Atindranath was seriously injured and died of such injuries.

(d) That the facts proved in the case established a *prima facie* case of want of such care on the part of the Appellant Company as might reasonably be required of them, and thus cast upon them the onus of rebutting such evidence and proving that they had taken all reasonable precautions to prevent the occurrence of such an accident as did happen, whereas they had not produced any such evidence, nor attempted to prove that they had taken all reasonable care and precaution in the matter.

(e) That no evidence was tendered by the Appellant Company to show that any care or precaution was taken to prevent passengers who might be suspected of carrying dangerous goods from taking them into a passenger compartment.

(f) That under sec. 59 of the Indian Railways Act (IX of 1890) the Appellants' servants had power to examine passengers' luggage if there was reason to believe that it contained dangerous goods.

(g) That the month of April was the Hindu marriage season, a time at which it is notorious that fireworks were in demand for marriage festivities, and when the Railway authorities might be expected to be on the alert to detect such traffic.

(h) That the Plaintiff in this case had established by evidence circumstances from which it might fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precautions which the Appellant Company might and ought to have taken, and that the Appellant Company had produced no evidence to show that they had in fact taken such precautions and were therefore liable in damages to the Respondent.

The facts were not disputed on the appeal to His Majesty in Council. The Appellants stated that the facts found by both Courts, were so found by their having put upon the Appellants the onus of showing that they took due precautions to prevent the introduction of the explosives, and that no such evidence being forthcoming judgment was given for Plaintiff. This the Appellants' counsel contended was wrong. The onus on the facts found was on the Plaintiff. If the facts found were consistent with negligence as with no negligence, then it



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was on Plaintiff to prove the negligence. Those fireworks were not in the Defendants' control, and whether they could have been so had not been shown by the Plaintiff; *Scott v. London Dock Company* (2) did not apply. Among the other authorities cited and commented on were *Wakelin v. London and South Western Railway* (3), *Walfare v. L. B. and S. C. R.* (4), *Daniel v. Metropolitan Railway Co.* (5), *Cotton v. Wood* (6).

*Mr. Haldane, K. C., Mr. Bray, K. C., and Mr. Rowlatt* for the Appellants.

*Mr. Asquith, K. C., and Mr. Branson* for the Respondent.

THEIR LORDSHIPS' JUDGMENT was delivered by

THE LORD CHANCELLOR.—In this case the Plaintiff, who is entitled to bring the action, sues the Defendant Company for the death of his son, who was killed by an explosion in a railway carriage. The explosion was caused by the bringing into the carriage of a quantity of fireworks. The carriage was one in which smoking was permitted; and a small charcoal stand was there for the accommodation of the smokers. The two persons responsible for bringing in the combustibles, themselves became the victims of the explosion; but the action is brought against the Railway Company upon the allegation that they were guilty of negligence in permitting the explosives to be brought into the carriage.

No precise evidence was given as to

the course of business at the station at which the two persons in question got in. The fact that the fireworks were brought in was clear. But it is contended that it was the duty of the Company to see that dangerous articles such as fireworks, should not be permitted to be brought into a passenger train. That it would be negligence knowingly to permit such articles to be carried in a passenger carriage is obvious enough, but it is not suggested, so far as the Railway Company or their servants, are concerned, that they were knowingly permitted to be brought in.

The sole question is whether, upon such facts as are here proved, their Lordships can find reasonable evidence of a neglect of duty on the part of the Company, in not detecting the nature of the parcel or parcels which it is presumed that one, or both, of the persons who brought the fireworks to the train had with them when they passed the ticket barrier at the station at which they got into the train.

No evidence is given by anyone of the appearance, or even the bulk, of the parcel, or parcels. No evidence is given by the Railway Company of any inspection of any passenger's luggage at the station in question. The parcel, whatever it was, was placed under the seat of the carriage; and some expert evidence was given that the extensive explosion which occurred, and in which the two people responsible for carrying the fireworks were themselves killed, might be caused by half-a-dozen bombs such as are usually used on such an occasion, as these fireworks were intended for, namely, a Hindu marriage; and these bombs are described

(2) 3 H. of L. C. 596 (1865).

(3) L. R. 12 App. Cas., p. 41 (1886).

(4) L. R. 4 Q. B. 693 (1869).

(5) L. R. 5 E. & I. App. 45 (1871).

(6) 8 C. B. N. S. 568 (1860).

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as being about the size of ordinary cricket balls.

There is no evidence, direct or indirect, of the dimensions of the parcel or parcels; and it seems to have been assumed on both sides that the practice of passengers carrying some of their own parcels into the carriages in which they travel prevails in India as in England.

The question then is reduced to this; whether there is any proof that the parcels carried by the two passengers exhibited such signs of their real nature as ought to have called the attention of the railway servants to them, and thus prevented such dangerous goods being carried. Their Lordships can find none. If one puts into plain words the duty, the neglect of which is relied on, it at once discloses the absence of evidence on the part of the Plaintiff. The duty is to prevent dangerous goods from being carried. What evidence is there that any servant of the Company knew, or had any opportunity of knowing, or enquiring, what these parcels contained? It has been already pointed out that there is no evidence of what they looked like, or whether any part of them was so uncovered as to suggest danger to anyone.

Their Lordships cannot think that the Railway Company were under the obligation to disprove what was not proved, i.e., to disprove that these were dangerous looking parcels, when not a shred of evidence has been given that they were dangerous looking. It was not indeed contended, as it could not be, that it was the duty of the Company to search every parcel which every passenger carried with him.

One source of error which their Lord-

ships think has been committed in the judgments below is an apparent misunderstanding of what has been decided in the Courts of this country as to the true obligation which exists on the part of a Railway Company towards its passengers. The learned Judge, Ameer Ali, in terms says:—"Now it may be regarded as settled law that, in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely." Their Lordships observe that in the course of Mr. Asquith's argument yesterday, he used the same phrase; that the extent of the obligation of a Railway Company is to carry safely; in short that they are common carriers of passengers. That is not the law. It appears to have given rise to the impression that, that being the state of the law, it was for the Railway Company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because if they were carriers of passengers in the sense of being common carriers they would be responsible, quite independently of any question whether there was negligence, or not. It would be enough to show that the passenger had not been carried safely, which would at once establish liability. The learned Judge appears to have been misled by an observation of Lord Campbell in the case that he quotes of *Collett v. The London and North Western Railway Company* (1). That turned upon the duty of the Railway Company, which was set out in the declaration, to carry a Post Office clerk under certain provisions of Railway

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Legislation. It was demurred to, upon the ground that there was no contractual relation between the Post Office clerk and the Railway Company. The judgment upon demurrer is sufficiently explained if one looks at the allegations in the declaration, and the judgment upon it. But unfortunately Lord Campbell used a phrase which the learned Judge Ameer All quotes, that the Railway Company were under an obligation to carry safely, which their Lordships think has been the origin of the error. Lord Campbell says:—"I am of opinion that there is no difficulty in the question which has been raised. The allegation that it was the duty of the Company to use due and proper care and skill in conveying is admitted," admitted, that is to say, by the demurrer. "That duty does not arise in respect of any contract between the Company and the persons conveyed by them, but is one which the law imposes. If they are bound to carry, they are bound to carry safely." That probably is the origin of the error which their Lordships think the learned Judges below have fallen into. What Lord Campbell is saying there is that they are not relieved from the ordinary obligations which would exist by contract because by statute they were compelled to carry the Post Office clerk; and he goes on to say that the obligation is not satisfied by carrying a man's corpse, and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all; and he practically says: "You must take as much care of him as if he was a passenger who contracted with

you." Whatever may be the difficulty that arises about such a phrase in Lord Campbell's mouth, there is no difficulty whatever if one looks at the Declaration and the Assignment of the breach of duty, where the duty is set up, as, indeed, Lord Campbell, in the earlier parts of his judgment, points out, to carry with reasonable care and diligence; and the allegation in the Declaration, corresponding to the duty which exists, is that they did not do so; and then the assignment of breach is not that the man was not carried safely, which according to the argument would be sufficient, but the allegation is that they did not use proper care and skill in the carrying. If one looks at that, as indeed at the two other cases which the learned Judge, Ameer All, quotes as justifying the onus that he throws upon the Railway Company, it is intelligible enough. In the one case it was a child under three years of age, between whom and the Railway Company, of course, there was no contract, and the other is a case of the same character. It is important, perhaps, to observe what runs through the judgments, and to observe that Mr. Asquith, naturally enough, used the same phrase yesterday in his argument as enforcing the necessity of the Railway Company discharging themselves by any conceivable evidence by saying that their contract was to carry safely. Their Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that, in their Lordships' judgment, there is no such obligation on the part of the Railway Company.

Their Lordships will therefore humbly

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advise His Majesty that the judgments appealed from must be reversed, and judgment entered for the Defendants in both Courts below; but, having regard to what fell from counsel at their Lordships' Bar, without disturbing any directions given in India as to costs.

Solicitors: *Messrs. Freshfields* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

*Appeal allowed.*

C. W. A.

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 699 OF 1896.

HARINGTON, J.      RAJ NARAIN GHOSH  
1901.                      and anr.,  
8, February.              v.  
                                 ABDUR RAHIM and ors.

*Evidence Act (I of 1872), sec. 68—Transfer of Property Act (IV of 1882), sec. 59—Attesting witness—Mortgage—Writer of the deed.*

*A person who is present and witnesses the execution of a deed and whose name appears on the document, though he is therein described merely as the writer of the deed, is a competent witness to prove the execution of the deed. He need not be described in the deed as an attesting witness.*

RADHA KISSEN v. FATEH ALI RAM (1) referred to.

This was a suit on a mortgage. The persons who were described in the deed as attesting witnesses were not called to prove the execution. The Plaintiff, however, called a person who was described in the deed as the writer of the mortgage. His evidence went to show that

he was present at the time of execution and that the two attesting witnesses named in the mortgage as such were also present and saw the executant sign.

*Mr. Bagram* for the Plaintiff.

*Mr. A. C. Banerjee* and *Mr. A. K. Ghose* for the adult Defendants.

*Mr. Gregory* for the infant Defendant.

The JUDGMENT OF THE COURT was as follows:—

HARINGTON, J.—This is a mortgage suit, and the only substantial question between the parties is whether the four mortgage deeds which have been tendered have been proved as being properly executed.

Sec. 59 of the Transfer of Property Act provides that a mortgage such as in the present case can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Sec. 68 of the Evidence Act provides that if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.

In the present case the witnesses who have been called to prove the due execution of the mortgage deeds have been described as the persons who wrote the deeds; in the case of the first deed Johur Ally and in the case of the last three deeds a man named Gopal Chandra Sen.

The objection taken by counsel for the infant Defendant is that these two persons are merely the respective writers

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of the deeds in question and cannot be regarded as attesting witnesses. The objection, as I have understood it, is that the writers were not attesting witnesses. The objection was the same in all four deeds except that the writer of one deed was different from the writer of the other three. The question as to what constitutes the attestation of a document, was considered in an old case decided in London in 1850. It is there stated that attestation means that the person shall be present and see what passes. The question has also arisen in this country in the case of *Ridha Kissen v. Fatch Ali Ram* (1), which was decided in the Allahabad High Court. It was held there that if the scribe of the bond had in fact witnessed the execution of it he would be a competent witness for the purpose of proving the execution.

Neither in the Evidence Act nor in the Transfer of Property Act is there a definition of what is meant by attestation. Nor is there any form given of an attestation clause. In the absence of anything to show that it is incumbent upon the attesting witness to be described as such in a deed which he attests, I am of opinion that a person who was present and witnessed the execution and whose name appears on the document is a competent witness to prove the execution. I further hold that in this case it has been shewn that the provisions of the Transfer of Property Act have been complied with because it indicates that affirmative evidence is called to show that not only did the witnesses of the deeds in question in fact witness the execution, but that also

another person was present who also witnessed the signing of the deeds in question by the executant.

It is shown that two persons were present and saw the executant sign the deeds, they were present and saw what passed; one of them, namely, the writer of the one deed and the writer of the three other deeds, one of the persons present has been called to prove what passed. In my opinion the proof that he has given is sufficient and the execution of the mortgage deeds is good.

As that is the only issue raised, the Plaintiff will be entitled to the usual mortgage decree.

*Messrs. Gregory & Jones*, Attorneys for the Plaintiff.

*Messrs. O'Connell and Remfry & Son*, Attorneys for the Defendants.

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

APPLICATION FOR LEAVE TO APPEAL  
TO H. M. IN COUNCIL  
No. 4 OF 1901.

MACLEAN, C. J.	} MUSST. SAKALBOTI
PRINSEP, J.	
HILL, J.	
1901.	
5, February.	} MANDARAIN, Appellant, v. BABULAL MUNDAR and ors., Respondents.

*Appeal to His Majesty in Council—Leave to appeal—Concurrent findings of fact—Civil Procedure Code (Act XIV of 1882), sec. 596.*

*Where there are concurrent findings of the lower Court and of the High Court upon questions of fact and no question of law arises, a certificate granting leave to appeal to His Majesty in Council should not be granted.*

This was an application for leave to

(1) I. L. R. 20 All. 582 (1898).

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appeal to His Majesty in Council against the decree of this Court (Rampini and Pratt, JJ.), dated the 24th of July 1900, on appeal preferred on the 7th January 1898 from the decree of Babu Jogesh Chunder Mitter, Subordinate Judge, 2nd Court, of Zillah Bhagulpore, dated the 4th of November 1897.

The facts of the case are as follows —

Plaintiff brought a suit to prove her right to and recover possession of a 2 ans. share in Mouzah Belo. Plaintiff alleged that her husband purchased the property in the *benami* of Dursi Mandar who was her brother and who had died before the institution of the suit. Defendants Nos. 1 and 2 are the sons of Dursi Mandar. The Defendant No. 3 is a transferee from them. It was alleged that Plaintiff's husband lent money to one Kiran Narain and to Samputbatl, his sister-in-law, in the name of Dursi Mandar to enable them to carry on a litigation with one Gopal Singh who laid claim to a property named Kumar Khad. The condition of the loan was that Guru Dayal was to get 3 ans. of Belo if Kiran Narain and Samputbatl were successful and half anna of it if they lost. It is said that Guru Dayal became entitled to obtain only half-anna of Belo ; Guru Dayal then lent Rs. 336 to Kiran Narain on a mortgage bond and assigned his rights to the bond to Dursi Mandar. In execution of the decree obtained on this bond the remaining  $1\frac{1}{2}$  ans. in Belo was put up to sale and Dursi Mandar purchased it himself. One Datta Sahu had previous to this purchased the  $1\frac{1}{2}$  ans. of Belo in execution of the decree for money, and relinquished his rights in favour of Dursi Mandar by a deed of relinquishment.

Plaintiff alleged that all these transactions were *benami*, that is to say, the assignment of the mortgage bond to Dursi Mandar, his sale and purchase, as well as the loan by Datta Sahu, his decree, execution, purchase and relinquishment in favour of Dursi Mandar. The Defendants contended that all these transactions were real. The Subordinate Judge dismissed the suit holding that though there might be a suspicion that some of the transactions are *benami*, but the Plaintiff had entirely failed to substantiate her plea that they were so. On appeal to the High Court it was urged that the finding of the Sub-Judge was against the weight of evidence, and that the Sub-Judge was in error in holding that the Plaintiff was barred from bringing this suit. The High Court held that it was not clear that the suit was bad in consequence of the property being placed in the name of Dursi Mandar and that the plea in any case applied to the  $1\frac{1}{2}$  ans. of Belo. But on the view their Lordships took they did not think it necessary to consider it further. It was contended that the Subordinate Judge was wrong in holding that the suit was barred by sec. 317, C. P. C. ; their Lordships were of opinion that the Sub-Judge had not meant to hold this and even if he did he was wrong. On the merits their Lordships considered the findings of the Sub-Judge to be correct.

The suit and appeal was valued at Rs. 12,880.

*Babu Dwarka Nath Chuckerbutty* for the Petitioner.

*Babu Karuna Sindhu Mukerjee* for the Opposite Party

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The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—We do not think that this is a case in which a certificate ought to be granted. It appears to us that the view taken in the case of *Gopinath Birbar v. Goluck Chunder Bose* (1) must be taken to have been subsequently overruled by the decision of the Privy Council in the case of *Tulsi Pershad Bhakt v. Binayek Misar* (2).

In the latter case their Lordships of the Judicial Committee sum up their conclusion in this language: "Their Lordships think that no question of law, either as to construction of documents or any other point, arises on the judgment of the High Court, and that there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them. That being so, the present appeal cannot be entertained."

In the present case there are concurrent findings of the lower Court and of this Court upon questions which are merely questions of fact, and upon those findings as they stand it is conceded that no question of law arises. The case, therefore, appears to us to be covered by the Privy Council authority to which I have referred—an authority as to the true meaning of sec. 596 of the Code of Civil Procedure.

According to that view it is not open to us to grant a certificate in the present case.

The application must be dismissed with costs 3 gold mohurs.

S. C. S.

*Application refused.*

(1) 1 L. R. 16 Cal. 292 (1884).

(2) 1 L. R. 23 Cal. 918 (1896).

# [CRIMINAL REVISIONAL JURISDICTION.]

[Full Bench.]

REV. No. 599 OF 1900.

MACLEAN, C. J.

PRINSEP, J.

GHOSE, J.

HILL, J.

SALE, J.

HARRINGTON, J.

BRETT, J.

1901.

15, February.

*Presidency Magistrate—Warrant-case—Discharge—Re-hearing of warrant-case after discharge of accused person—Criminal Procedure Code (Act V of 1898), Ch. XXI—Judgment.*

(Held by the Full Bench, GHOSE, J., dissenting)—*That a Presidency Magistrate is competent to re-hear a warrant-case triable under Chap. XXI of the Code of Criminal Procedure, in which he has discharged the accused person.*

QUEEN EMPRESS v. DOLE GOBIND DASS (1), OPOORNA KUMAR SETT v. PROBODH KUMARY DASSI (3) *approved of.*

This was a reference made by Ameer Ali and Stevens, JJ., to the Full Bench in Revision No. 599 of 1900.

The reference was as follows :—

"A charge of criminal breach of trust under sec. 406 of the Indian Penal Code was laid before the Presidency Magistrate of the Northern Division, Syed Ameer Hossin. On the case coming on for hearing on the 26th May 1900, the Magistrate recorded the following order :—

"Complainant is absent. Defendant

(1) 5 C. W. N. 169 (1900).

(3) 1 C. W. N. 49 (1898).

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denies the charge. Dismissed. Defendant is discharged."

That order could not be legally passed under sec. 259 of the Code of Criminal Procedure, because the offence of criminal breach of trust is not one of those which may be lawfully compounded under the provisions of sec. 345 of the Code.

It appears that the complainant applied that the case might be revived and the Magistrate passed the following order on the 26th June 1900 :—

"Heard both the parties at length.

The complainant in this case was absent, when his name was called, by few minutes. It is, I think, fair that this case should be revived. The ruling of the High Court in the case of *Opoorba Kumar Sett v. Prabodh Kumary Dassi* (3) (Honorable H. T. Prinsep and Trevelyan, JJ.) gives me such power.

I therefore revive the case and order the issue of *summons*."

The accused then applied to this Court to have the order of revival set aside; but as the setting aside of that order would have had the effect of restoring the illegal order of dismissal, Stevens and Pratt, JJ., before whom the application was made, directed that a rule should issue to show cause why both the orders should not be set aside, so that the trial of the charge might proceed regularly, as if the order of dismissal had not been made.

On the rule coming up before us for hearing it appeared to us that there was a conflict of authority on the question of the competence of a Presidency Magistrate to revive a warrant-case in which he has made an order of discharge.

In the case of *Opoorba Kumar Sett v. Prabodh Kumary Dassi* (3), cited by the Magistrate of the Northern Division, it was held by Prinsep and Trevelyan, JJ., that a Presidency Magistrate was competent to revive a case after making an order of discharge, the reasons for the decision being, as we understand, *first*, that an order of discharge cannot operate as an acquittal and is therefore not a bar to subsequent proceedings, and, *secondly*, that the provisions of secs. 436 and 437 of the Code of Criminal Procedure, which in the case of Magistrate other than Presidency Magistrate provide for the re-opening upon the order of a superior authority of a case in which an order of discharge has been improperly made, do not apply to a Presidency Magistrate.

On the other hand we have been referred to two cases in which the contrary view has been expressed.

The first is the case of *Damini Dassi v. Hurry Mohun Mukerjee* (16), in which it was held by Ameer Ali and Hill, JJ., that the Presidency Magistrate of the Northern Division after discharging an accused person under sec. 259 of the Code of Criminal Procedure "clearly had no jurisdiction to revive the case."

The other is the case of *Ram Coomar v. Ramjee and another* (17), in which Stevens and Pratt, JJ., upon a reference made by certain Honorary Presidency Magistrates under the provisions of sec. 432 of the Code of Criminal Procedure held that an order of the Presidency Magistrate of the Northern Division reviving

(3) 1 C. W. N. 49 (1898).

(16) 4 C. W. N. 46 (1898).

(17) 4 C. W. N. 26 (1898).

(3) 1 C. W. N. 49 (1898).



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a non-compoundable warrant-case which he had dismissed for default was bad as being without warrant of law, inasmuch as the Code of Criminal Procedure contains no provisions empowering him to make such an order of revival.

The view expressed in these two cases, with which we agree, seems to us to be in direct conflict with the decision in the case of *Opoorba Kumar Sett v. Probodh Kumary Dassi* (3). With great respect to the learned Judges who decided that case we do not find ourselves able, in the absence of any provision of law conferring a power of revival upon a Presidency Magistrate, to accept the view that such a power is to be inferred from the fact that the provisions of secs. 436 and 437 do not apply to such Magistrates. We would observe, moreover, that it has been repeatedly held that, apart from those provisions of law, this Court has authority to interfere with an improper order of discharge made by a Presidency Magistrate. We may refer to the cases of *Colville v. Kisto Kishore Bose* (18) and *Charoobala Dabee v. Empress* (9) (decided on different grounds from the preceding case) and the unreported case of *Nemy Chand Kundu v. Nibaran Chunder Dheria and others* (19), Criminal Revision Case No. 205 of 1900, decided on the 30th March 1900, as instances in which that authority has been exercised and indeed it would seem that in the case of *Opoorba Kumar Sett v. Probodh Kumary Dassi* (3) the learned Judges intended to convey

that if an application had been made to this Court to set aside the Presidency Magistrate's order of dismissal, the Court would have had power to do so under the Charter Act.

In view of the conflict of authority that we have noticed we refer to a Full Bench the question :—

Whether a Presidency Magistrate is competent to revive a warrant-case triable under Chap. XXI of the Code of Criminal Procedure in which he has discharged the accused person.

*Mr. M. R. Mehta* (with him *Babu Amarendra Nath Chatterjee*) for the Petitioner.—In the cases of *Komal Chandra Pal* (11) and *Opoorba Kumar Sett v. Probodh Kumary Dassi* (3) it was laid down that a Mofussil Magistrate cannot of his own accord revive a complaint as secs. 436 and 437, C. Cr. P., give the power of ordering further enquiry and setting aside an order of discharge to superior tribunals. But sec. 439, C. Cr. P., read with sec. 423, C. Cr. P., gives the High Court power to order further enquiry and set aside order of discharge made by Presidency Magistrates, as was laid down in the Full Bench case of *Haridas Sanyal* (4) and the cases of *Empress v. Ram Lal Singh* (20),\* *Girish Chandra Roy v. Agurwalla* (15), *Colville v. Kisto Kishore Bose* (18), though Mr. Justice Prinsep doubted it in the cases of *Opoorba Kumar Sett v. Probodh Kumary Dassi* (3) and *Charoobala Dabee v. Empress* (9).

(3) 1 C. W. N. 49 (1893).

(4) I. L. R. 15 Cal. 608 (1881).

(9) 3 C. W. N. 601 (1899).

(11) I. L. R. 24 Cal. 286 (1897)

(15) 1 C. W. N. 870 (1897)

(18) 3 C. W. N. 598 (1899)

(20) I. L. R. 6 All. 40 (1898)

(8) 1 C. W. N. 49 (1893).

(9) 3 C. W. N. 601 (1899).

(18) 3 C. W. N. 598 (1899).

(19) 4 C. W. N. clix (1900).

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Hence, I submit, if secs. 436 and 437, C. Cr. P., prevent Mofussil Magistrates from reviving complaints, then secs. 439 and 423 likewise prevent Presidency Magistrates from reviving complaints.

Further, secs. 436, 437 and 439 necessitate the inference that an order of dismissal or discharge must be first set aside by a superior tribunal before proceedings are re-opened. See cases of *Opoorba Kumar Sett v. Pro'odh Kumary Dass* (3), *Nil Ratan Sen v. Jogesh Chunder Bhattacharjee* (10), *Girish Chandra Roy v. Agurwalla* (15), *Komal Chandra Pal* (11) and Weir's Law of Offences and Criminal Procedure, pp. 874 and 875. If a Magistrate can revive proceedings of his own accord, it would tantamount to reviewing his own previous order. But in the cases of *Empress v. Durga Charan* (21), *Empress v. Fox* (22), *F. W. Gibbons* (23) it was laid down that the High Court cannot review its own order; much less, therefore, can a Presidency Magistrate.

An order discharging an accused person is, I submit, a judgment and that, by sec. 369, C. Cr. P., the same Court cannot alter or review it. The Code is defective inasmuch as the word "judgment" is not defined.

**MR. JUSTICE PRINSEP** :—Isn't it defined by sec. 367, C. Cr. P.?

**Mr. Mehta** :—I submit sec. 367, C. Cr. P., enacts what the language and contents of a judgment should be, but

(8) 1 C. W. N. 49 (1893).

(10) 1 C. W. N. 57; s. c. I. L. R. 23 Cal. 983 (1896).

(11) I. L. R. 24 Cal. 286 (1897).

(15) 1 C. W. N. 370 (1897).

(21) I. L. R. 7 All. 672 (1885).

(22) I. L. R. 10 Bom. 176 (1885).

(23) I. L. R. 14 Cal. 42 (1886).

does not define judgment. The word "judgment" is defined by the Civ. P. C. as "the statement given by the Judge of the grounds of a decree or order" and in Stroud's Judicial Dictionary it is stated that "judgment" does not merely mean the final judgment in criminal cases, but includes any decision in such cases, such as taxation of costs, refusal to quash a Magisterial conviction, refusing to admit to bail, or to grant a *certiorari*. Hence an order of discharge is, I submit, clearly a judgment.

In the case of *Empress v. Dole Gobind Dass* (1) the learned Chief Justice says that a Magistrate is bound to hear a complaint under sec. 252, C. Cr. P., but it is respectfully submitted that sec. 252 relates to original complaints and not to rehearing of complaints.

The fact that there is nothing in the Code directly enabling Presidency Magistrates to reopen proceedings, I submit, clearly shows that the Legislature never intended to give such a power to Presidency Magistrates.

That this is so, will, I submit, be apparent if the Code of 1872 be compared with the present Code. The former Code by sec. 215, Expl. II, expressly authorised the institution of fresh proceedings, whilst in the present Code there is an omission of such authority.

The cases answering the question before your Lordships in the negative are *Girish Chandra Roy v. Agurwalla* (15), *Ram Coomár v. Ramjee* (17), *Damini v. Hurry Mohun Mukerjee* (16) and in the affirmative are *Opoorba Kumar Sett v.*

(1) 5 C. W. N. 169 (1900).

(15) 1 C. W. N. 370 (1897).

(16) 4 C. W. N. 46 (1898).

(17) 4 C. W. N. 26 (1898).

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*Probodh Kumary Dass* (3), *Empress v. Dole Gobind Dass* (1).

*Babu Amarendra Nath Chatterjee*.—In the recent Allahabad case of *Queen v. Adam Khan* (12), Blair and Burklitt, JJ., followed the Calcutta case of *Girish Chandra Roy* (15), and used almost the same language as Ghose and Gordon, JJ.

Further, there was distinct provision both in secs. 147 and 215, Expl. II of the Code of 1872 and in secs. 32 (2) and 87 of the Presidency Magistrate's Act (VII of 1877) that a discharge was not a bar to the revival of a prosecution for the same offence—a provision which is not found in the present Code. The intention of the Legislature was, I submit, to curtail such a power of revival. The High Court, moreover, has the power to send for the record of the case in which a Presidency Magistrate has discharged the accused and to order further enquiry into the case. See the unreported case of *Nemy Chand Kundu v. Nibaran Chandra Dheria and ors.* (19), in which your Lordship Mr. Justice Prinsep set aside an order of discharge made by a Presidency Magistrate and directed a further enquiry. The accused would be harassed by several prosecutions if after a discharge made by a Magistrate, the same Magistrate can reopen the proceedings.

No one appeared to shew cause.

THE JUDGMENTS OF THE COURT were as follows :—

MACLEAN, C. J.—I have heard nothing

in the argument addressed to us to warrant me in changing or even qualifying the opinion I expressed in the ruling in the case of the *Queen Empress v. Dole Gobind Dass* (1), and I adhere to that ruling. The argument in this case, however, has led me to doubt whether the principle I have enunciated ought not to be held to apply to the case of a Mofussil Magistrate equally with that of a Presidency Magistrate, and whether the authorities which would appear to decide the contrary are well-founded in law. That question is not before us to-day.

I answer the question by saying that a Presidency Magistrate is competent to rehear—I do not like the expression “revive,” though I am aware it has been frequently used—a warrant-case triable under Chap. XXI of the Code of Criminal Procedure in which he has discharged the accused person.

PRINSEP, J.—I am of the same opinion. I think it necessary however to add a few words on my own behalf in connection with the question raised before us.

I have, since 1877, in the case of *Queen Empress v. Donnelly* (2), invariably held the opinion that there was no restriction to a Magistrate trying a case in which there had not been a final order, such as an order of acquittal or conviction. There is however one case, *Oloorba Kumar Sett v. Probodh Kumary Dass* (3), which has been brought to my notice in which a different opinion has been expressed. That, however, was not a point necessary for the decision of that case; and I may state that this

(1) 5 C. W. N. 169 (1900).

(3) 1 C. W. N. 49 (1898).

(12) I. L. R. 22 All. 106 (1899).

(15) 1 C. W. N. 370 (1897).

(19) 4 C. W. N. clix (1900).

(1) 5 C. W. N. 169 (1900).

(2) I. L. R. 2 Cal. 405 (1877).

(3) 1 C. W. N. 49 (1898).

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observation escaped my notice, I certainly never intended to modify the opinion that I had formerly expressed on the subject.

The question incidentally arose, again, in the case of *Haridas Sanyal v. Sarikatullah* (4), and while agreeing with the majority consisting of six Judges of this Court on the point referred to the Full Bench, I differed on another point which is the point now under consideration; this had been incidentally noticed in the judgment of the Court which was pronounced by Mr. Justice Wilson, and formed a portion of the statement of the law. I then expressed the opinion that there was nothing in the law to prevent a second Magistrate from hearing a complaint in a proceeding, in which an order dismissing it or discharging an accused person had been made, that not being a final order in the case which could be pleaded in bar. The point has been again raised in the present case, although it was not one on which the reference was made.

The learned counsel, who appeared in support of the rule—and it is much to be regretted that there was no argument on the other side—contended that inasmuch as no Provincial Magistrate was competent to revive, or, stating it more correctly, to hear the complaint in a matter which had been already dealt with by an order of dismissal, or discharge, the same rule would apply to a Presidency Magistrate. If the case law on the subject be examined, it will be seen that under the Code of 1872; it was frequently held that a Magistrate could hear a complaint under such circum-

stances, but this Court thought proper to restrict the exercise of this power to cases in which fresh evidence was forthcoming. The cases to which I refer are *Hari Singh v. Danish Mahomed* (5), *Kistoram Mohora v. Anis & ors.* (6), *Reg. v. Devama* (7), *Queen-Empress v. Donnelly* (2), and *In the matter of Dijabur Dutt & ors.* (8). In this respect, as in the case now before us which has led to this reference, the High Court has interposed so as to prevent the exercise of jurisdiction by a Magistrate where the law itself has expressed no intention, directly, so to limit it. Sec. 403 of the Code of Criminal Procedure, which is the only section dealing with this subject, declares, that an order of acquittal or conviction shall be a bar to further proceedings, and it specially excepts from these terms a case such as the one now before us.

But it has been argued that an order dismissing a complaint or discharging an accused person is a judgment within the terms of Ch. XXVI of the Code of Criminal Procedure, and that by reason of sec. 364 the Court which passed the judgment is unable to alter or review it. Now, here, I would state that in my opinion such an order is not a judgment within the terms of Ch. XXVI. Sec. 367 explains what constitutes a judgment, and it clearly indicates to my mind that a judgment within that chapter is only a judgment of acquittal or of conviction. In the case of an order of discharge, or in the case of an order dismissing a complaint, it is expressly required by the law

(2) I. L. R. 2 Cal. 405 (1877).

(5) 20 W. R. 46 (1878).

(6) 20 W. R. 47 (1878).

(7) I. L. R. 1 Bom. 64 (1875).

(8) I. L. R. 4 Cal. 647 (1879).

(4) I. L. R. 15 Cal. 608 (1888).

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that the Magistrate shall state his reasons, and I therefore take it that, if it had not been so required, it would have been unnecessary for a Magistrate to state any reasons for his order. Consequently in this point of view, the order would not constitute a judgment. And it seems to me, also, that the expression judgment itself indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal.

In regard, also, to the argument which has been addressed to us on the subject, I would draw attention to the terms of sec. 437 of the Code of Criminal Procedure, which enable a superior Court to order a further enquiry into a complaint that had been dismissed under sec. 203 of the Code, that is, summarily dismissed, merely on the examination of the complainant, without hearing his witnesses, or under sec. 204, sub-sec. 3, that is to say, a complaint which has been dismissed on default of the complainant to pay the necessary process-fee within a reasonable time, or in a case in which the accused has been discharged. It seems to me, therefore, that any argument which may be directed towards any one of these orders, must be equally applicable to all three. I cannot understand, from this point of view, why it is necessary to apply to a superior Court before a Magistrate can hear a complaint in which he has acted arbitrarily or hastily in dismissing it on the ground that the process-fee has not been paid within the time fixed by him, if he should be afterwards satisfied that the delay was not due to neglect, but was due to some reasonable cause. I cannot understand

why obstacles should be placed in the administration of justice, and why a complainant should not be entitled to require a Court to try a case before it, and to hear all his evidence if he can satisfy it that he has good grounds for his complaint. What would be the position of any Magistrate, say, another Magistrate, if, after an order dismissing a complaint, or discharging the accused, had been passed, the complainant appeared before him with another complaint and asked for its trial. The order of dismissal or discharge could not be pleaded as a bar to the proceedings under sec. 403. But it is the law, as it has been declared by the reported cases, that has raised an impediment. The High Court has thought proper to hold that such an order must be set aside by a superior Court before any Magistrate can proceed to hear such a complaint. But I have never been able to agree to this view, for it has seemed to me that there is nothing to set aside. There is no bar to further proceedings under the law, and, therefore, a Magistrate, to whom a complaint has been made under such circumstances, is bound to proceed in the manner set out in sec. 200, that is, to examine the complaint, and unless he has reason to distrust the truth of the complaint, or for some other reasons expressly recognised by law, such as if he finds that no offence had been committed, he is bound to take cognizance of the offence on a complaint and unless he has good reason to doubt the truth of the complaint he is bound to do justice to the complainant, to summon his witnesses and to hear them in the presence of the accused,

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The argument which seems to have been freely used, to support this point of view, is, that the accused might be constantly brought before the Courts to hear the evidence on which two opinions may be formed by different Courts and thus be put to considerable inconvenience and harassment. In the exercise of such a power, as well as in the exercise of many other powers, if a reasonable discretion is not exercised, an injustice to the parties may be done. That is a matter which may be set right by a superior Court. It, certainly, is not a matter which to me seems to require that the exercise of powers which the law confers on a judicial officer should be curtailed, generally, and in all cases. This argument, moreover, would not apply to a case in which the complaint had been summarily dismissed under sec. 203 or dismissed on default to pay process-fees under sec. 204 (3) and such cases are also within the terms of sec. 437. There can be no distinction in respect to the powers of a Magistrate in dealing with such cases. This power to act under sec. 437 is only as it were on a mandamus to order proceedings to be taken where a case has been dropped and not to restrict the powers conferred by law.

In conclusion, I would only refer to the judgment of the Full Bench in *Haridas Sanyal v. Sariatullah* (4) which has been pressed on us as settling the matter now under consideration. If reference be made to the report of the case, it will be seen that this was not one of the points on which the opinion of the Court was desired on the reference. It did not necessarily arise on the reference nor

did it form the subject of argument at the Bar. The opinion expressed by the learned Judges on this subject was only in the course of reasoning to explain how they dealt with the entire matter. It cannot, in respect, of the matter now under consideration, be regarded as finally dealing with it. I cannot, therefore, consider that the opinion so expressed is absolutely binding, though, of course, it is entitled to the greatest respect, seeing that it is the opinion of six Judges of this Court, all of whom are Judges of great experience and learning. Whether, therefore, this point arises, or not, I desire to express my opinion in this matter which is still open to discussion. On the point stated on the reference I agree with the answer which my Lord the Chief Justice proposes to give.

GHOSH, J.—The question referred to the Full Bench is “whether a Presidency Magistrate is competent to revive a warrant case triable under Chap. XXI of the Code of Criminal Procedure in which he has discharged the accused person.” This question is rather general, and applies to any case where an order of discharge, upon whatever ground and at whatever stage of the trial it might be, is made.

It seems to me that if we were to confine ourselves to the circumstances, in which the order of discharge was made in the present case, the general question referred to hardly arises.

It appears that a charge of criminal breach of trust under sec. 406 of the Penal Code was laid before one of the Presidency Magistrates of Calcutta on the 12th of May 1900. The accused was

(4) I. L. R. 15 Cal. 608 (1888).

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thereupon summoned, and on the 26th May when the matter was taken up for trial, the complainant was absent, though the Defendant was present; and the latter having denied the charge, the complaint was dismissed and the Defendant was discharged without any trial. A few minutes after this order was made, the complainant came into Court, and applied that the case might be "restored or revived," stating that, on account of illness, he was unable to be punctual. The Magistrate thereupon, on the 26th of June of the same year, ordered that the case be revived, and summons on the accused do issue.

There can be no doubt that the order of the 26th May 1900 which apparently was made under sec. 259 of the Code of Criminal Procedure, was illegal, because it was a warrant-case, and the offence for which the accused was charged could not lawfully be compounded; but then the question that arises is, whether he had authority to revive the complaint, and order fresh summons to issue upon the original complaint.

Sec. 369 of the Code provides that "no Court other than a High Court, when it has signed its judgment, can alter or review the same, except as provided in secs. 295 and 484, or to correct a clerical error." The sections specifically referred to have no application to the present case, and therefore may be left out of consideration.

The question is, whether the order of the 26th of May 1900 was a judgment which could not be altered or reviewed by the Magistrate.

Sec. 403 of the Code lays down that when a person is once acquitted or con-

victed of any offence he shall not be tried again for the same offence. And there is an explanation attached to it which runs thus:—

"The dismissal of a complaint, the stopping of proceedings under sec. 249, the discharge of the accused on an entry made on a charge under sec. 273, is not an acquittal for the purposes of the section."

There can be no doubt that the discharge of the accused could not operate as an acquittal, and it follows from this that if the Magistrate in this particular case was authorized under the law to alter or review his own order, he could rightly make the order that he did make on the 26th June 1900.

Sec. 369 of the Code, as already stated, prohibits a judgment, when once pronounced being altered or reviewed; and by implication it may be taken that if an order is not a judgment, it may be altered or reviewed.

The Code does not define what a judgment is. Sec. 367, however, so far as the Provincial Criminal Courts are concerned, lays down what a judgment should contain, but sec. 370, as applicable to a Presidency Magistrate provides a different form for the recording of a judgment. It only provides for certain particulars being mentioned in the judgment, and that in all cases in which the Magistrate inflicts imprisonment, or a fine exceeding Rs. 200, brief statement of the reasons therefor should be recorded. Upon examination of the various provisions of the Code, it will be found that it is only after the Magistrate investigates the merits of the complaint, either by examination of the complainant, or by

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taking such evidence as may be produced, that the Magistrate is in a position to pronounce a judgment, or, in other words, that the case should reach a stage which entitles or requires him to pronounce a decision upon the guilt or innocence of the accused. And if he then makes his order, either convicting the accused or discharging him, it would, I think, be a judgment within the meaning of the Code. In this respect, there is a difference between a summons and a warrant-case. Confining myself to a warrant-case, and referring to secs. 203, 252, 253 and the following sections in Chap. XXI of the Code, it seems to me clear that it is only when the Magistrate, after investigating into the merits of the complaint, pronounces an order, it is a judgment. In the present case, however, the Magistrate did not so investigate the merits, but as expressed by himself, it was "struck off in the absence of the complainant," on the day fixed for trial. It is obvious that the case did not reach that stage which entitled him to pronounce an opinion as to the guilt or innocence of the accused. I am, therefore, inclined to think that the order of the 26th May 1900 is not a judgment within the meaning of sec. 369 of the Code; and that being so, the Magistrate was entitled to alter or review it, as he did by his order of the 26th of June of the same year.

The view that I have just expressed would be sufficient to dispose of the reference before us, but as already mentioned the question referred to the Full Bench is a larger question, and refers generally to all warrant-cases, in which the accused has been discharged; and

the arguments addressed to us have been rather upon that larger question; and as the learned Chief Justice has expressed his views upon it I feel it incumbent upon me to state what my views on the subject are and I proceed to do so shortly.

I have already referred to the section of the Code which lays down that a judgment of a Criminal Court if once pronounced cannot be altered or reviewed; and I have also tried to explain in what cases the order of a Magistrate would be a judgment. Take the case of an order under sec. 203 which provides—

"The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint, if, after examining the complainant and considering the result of the investigation (if any) made under sec. 202, there is in his judgment no sufficient ground for proceeding. In such a case he shall briefly record his reasons for so doing."

The Magistrate in such a case has to give reasons for his order dismissing the complaint. In like manner, in making an order under sec. 253 discharging the accused after examining the complainant, or after taking such evidence that may be produced in support of the prosecution, he has to record his reasons. Such an order would, in my opinion, be a judgment. Sec. 370 of the Code, as applicable to a Presidency Magistrate, though in terms does not lay down that the reasons for making an order of discharge should be recorded, yet I take it that it is to be read with the other sections to which I have just referred; and in this view of the matter, I should



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think that, when after examining the complaint or after taking certain evidence, however incomplete such evidence may be, the Magistrate exercises his judgment upon the merits of the complainant, and makes an order of discharge, it is a judgment, which under sec 369 cannot be reviewed or altered by himself.

But it has been said that sec. 367 of the Code, as applicable to Provincial Criminal Courts, does not speak of an order of discharge, but only of conviction and acquittal. And therefore such an order, though containing the reasons for making it, is not a judgment. I am unable to accede to this view; for it seems to me that the first paragraph of that section is applicable to all orders which are passed after a Criminal Court exercises its judgment upon the merits of the complaint, though no doubt the following paragraphs speak of conviction or acquittal. But, however that may be, the argument that may be drawn from the wording of this section is hardly applicable to a judgment as referred to in sec. 370.

But it is said that the discharge of the accused being not an acquittal, and there being nothing in the Code of Criminal Procedure prohibiting the Magistrate from entertaining a fresh complaint, either upon the same facts, or upon additional facts, he is competent to take fresh cognizance of the case. So far as this particular argument bears upon the present case, it cannot be applicable; for the simple reason that the application that was made to the Magistrate after the complaint was dismissed was simply for a revival and not

a fresh complaint. But perhaps this is rather a technical view of the matter. I therefore pass on to the question of the general applicability of the argument.

Referring to sec. 87 of the Presidency Magistrate's Act IV of 1877, which was repealed by the Criminal Procedure Code of 1882, I find that a provision similar to sec. 259 of the present Code was contained in it. Explanation I of that section provides—

“The absence of the complainant, except when the offence may lawfully be compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.” And then Explanation II laid down:—“A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.” The words in Explanation II “and does not bar the revival of a prosecution for the same offence” have not been incorporated in the present Code, and all we have in it is that the discharge of the accused does not operate as an acquittal. I may further refer to the 2nd paragraph of sec. 32 of the same Act, which is analogous to sec. 203 of the present Code, with this difference that in that paragraph there was an express provision for a revival after dismissal, whereas there is no such provision in the present law. What do these omissions, to which I have just referred, indicate? Do not they indicate that the Legislature intended that the Magistrate, when once he has discharged the accused, should not have, on his own authority, the power to revive a complaint or take fresh cognizance of it? On the other hand, instead of any pro-

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vision like that which was contained in the Act of 1877, we have in Chap. XXXII of the present Code secs. 435 to 439, which give the superior criminal authority, including the High Court, the power to set aside an order of discharge improperly made by a Magistrate, and to order further inquiry. It is however said that secs. 436 and 437 do not apply to Presidency Magistrates [see the observations of the learned Chief Justice in *Empress v. Dole Gobind Dass* (1)]; but conceding that this is so, there can be, I think, no doubt that secs. 435 and 439 are applicable, and they confer upon the High Court the power of sending for the record of any inferior tribunal, and reversing the order of the Magistrate, including the power of ordering a further inquiry in the case of an improper discharge. And this was the view that was adopted in respect to an order made by a Provincial Magistrate in the Full Bench case of *Haridas Sanyal* (4). It will be observed that the said Chap. XXXII refers to Presidency Magistrates, as also to Provincial Magistrates, and though it may be said that sec. 435 does not in terms refer to Presidency Magistrates, yet the words "any inferior Criminal Court" would include a Presidency Magistrate's Court, and the High Court is by the terms of sec. 439, read with sec. 423 of the Code, empowered to set aside the order of discharge, and direct a further inquiry. I am here confronted by certain observations of Sir Henry Prinsep and Hill, JJ., in the case of *Charooballa Dabes* (9), where, in re-

ferring to the powers of the High Court under sec. 439, read with sec. 423, they stated that the latter section "does not enable a Court of Appeal to direct that further enquiry be made into a case in which an order of discharge or dismissal may have been passed. Sec. 423 confers a power to direct a further enquiry, only in respect of a case of an appeal from an order of acquittal, and that the power is so limited is shewn by an express enactment in sec. 437 to provide for such orders being passed." To this I need only say that this view is opposed to the decision of the Full Bench in the case of *Haridas Sanyal* (4), to which I have already referred. I shall only quote here a few lines bearing upon this point. Wilson, J., in delivering the judgment of the majority of the Court, says, "thirdly, though I am inclined to agree with the contention urged before us that the mention of the High Court in sec. 437 was not strictly necessary, and that, if it had not been mentioned, it would have had, under secs. 435 and 439, the same powers which are here expressly given to it, still I think the mention of the three tribunals together, the High Court, the Court of Session, and the District Magistrate, tends to show that the Legislature intended them to have the same power with regard to the matter dealt with in the section." If these sections to which I have just referred were intended only to apply to the Provincial Magistracy, it is to my mind simply incomprehensible, why the Legislature, while they omitted in the present Code the reservation in favour of a revival as embodied in Explanation II

(1) 5 C. W. N. 169 (1900).

(4) I. L. R. 15 Cal. 608 (1888).

(9) 3 C. W. N. 601 (1899).

(4) I. L. R. 15 Cal. 608 (1888).

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of sec. 87 of Act IV of 1877, and in sec. 32, para. 2 of the same Act and made distinct provisions in secs. 435 to 439 for setting aside an improper order of discharge by a Magistrate, should have made no such provision as regards orders made by Presidency Magistrates. And in this connection, I may refer to secs. 147 and 215 of the Code of 1872, which contained provisions similar to Explanation II of secs. 87 and 32 of the Presidency Magistrate's Act, viz., that the dismissal of a complaint or the discharge of the accused shall not prevent subsequent proceedings, which proviso has also been omitted in the corresponding secs. 203 and 403 of the present Code. It seems to me obvious therefore that both the Presidency Magistrates, and the Provincial Magistrates have, under the Code of 1882, been placed on the same footing, and the omission of the provisions as contained in both the Presidency Magistrate's Act, and the Code of 1872, just referred to, is significant as indicating the intention of the Legislature to take away from Magistrates the power which they hitherto possessed of reviving on their own authority, a complaint which has once been dismissed, or where the accused has been discharged. It has been repeatedly held in this Court that, after an order of discharge has been made by a Provincial Magistrate, it is not open to him to reopen the proceeding without an order of a superior authority, and this has been held by not less an authority than Sir Henry Prinsep. In the case of *Opoorba Coomar Sett v. Probodh Kumary Dassi* (3), that learned Judge referring to Mofussil Magistrates,

expressed himself in these terms "no doubt the power to reopen criminal proceedings after an order of discharge is not open to every Magistrate unless an order from some superior authority is passed directing further inquiry or commitment. To the same effect is the case of *Nil Ratin Sen* (10) as also the case of *Komal Chunder Pal v. Gour Chand Audhikari* (11). These two latter cases have been quoted with approval by the Allahabad High Court in the recent case of *Empress v. Adam Khan* (12). And I would also refer in this connection to a case in the Madras High Court reported in Weir's Law of Offences and Criminal Procedure, page 874.

If then what has been repeatedly held in this Court as to the want of authority in the Provincial Magistrate's reopening proceedings after an order of discharge has been made, be correct, it is to my mind impossible to hold (arguing by analogy) that a Presidency Magistrate in similar circumstances, is possessed of that authority.

Then is there anything in the Code itself to favour the view that has been propounded on the other side? The Code of Criminal Procedure is but an enabling Act (see e.g., sec. 5); and it seems to me that, before such an authority as is claimed for a Presidency Magistrate is held to exist, it must be shown that there is express provision in the Code giving him that authority.

There may not be any express provision in the Code that the dismissal of

(10) 1 C. W. N. 57; s. c. I. L. R. 23 Cal. 983 (1896).

(11) I. L. R. 24 Cal. 286 (1897).

(12) I. L. R. 22 All. 106 (1899).

(3) 1 C. W. N. 49 (1898).

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complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed; but on the other hand, as Banerjee, J., has observed in the case of *Nil Ratan Sen* (10), "there is no express provision to the contrary, not even such as there was in sec. 147 of the former Code," while secs. 435 to 439 of the Code authorize the superior criminal authority to revise the order of dismissal, and to direct a further inquiry. I do not desire to import anything in the Code which does not exist there; but I do say, what is there in the Code which authorizes a Magistrate, when once he has dismissed a complaint or discharged an accused to reopen proceedings, either on the same complaint, or on a fresh complaint? Secs. 190 and 252 of the Code, no doubt, authorize a Magistrate to take cognizance of an offence in one of three ways, and to investigate the same; but these sections, with all deference to the contrary opinion that has been expressed, can only refer to one and the same complaint, and to the same set of facts presented to the Magistrate at the time of the initiation of proceedings; otherwise the accused would be in peril of being prosecuted upon the same facts, first of all, under a complaint, then upon a police-report, and lastly upon the Magistrate's own initiation provided only there has been no acquittal on the charge. The mischief of such a course was pointed out in the case of *Mohesh Mistree* (13), where the accused was prosecuted three times for the same offence under the

old Code. And I think it is not unreasonable to suppose that, having regard to the mischief that sometimes arose under the old Code, the Legislature took away from the Magistrates the power they possessed of reviving proceedings after a discharge, on their own authority.

But it is said that an order of discharge being not an acquittal, there is nothing to alter or set aside; and therefore a Magistrate is competent to take cognizance of the same matter notwithstanding the provisions of sec. 369. No doubt, such an order is not an acquittal, and does not bar subsequent proceedings—but supposing that the reviving of proceedings, after an order of discharge, is not practically to alter or set aside the previous order, the question yet arises whether the Magistrate could do so on his own authority<sup>2</sup>—and whether, so far as he is concerned, he is empowered to take further proceedings in respect of the same matter, without the orders of a superior Court.

The learned Chief Justice, in his judgment in the case of *Queen-Empress v. Dole Gobind Dass* (1), has, in support of the view he expressed therein, relied upon among other matters, which I have already discussed, to three cases, and which I now proceed to notice.

The first case is of *Hari Singh v. Danish Mahomed* (5). That was a case under the Code of 1872, which authorized, as I have already stated, the revival of proceedings after a discharge (see sec. 215, Expl. II, and sec. 147). Moreover, in that particular case, it was the District Magistrate who directed fresh

(10) 1 C. W. N. 57: s. c. L. L. R.

28 Cal. 988 (1896).

(13) I. L. R. 1 Cal. 282 (1876).

(1) 1 C. W. N. 169 (1900).

(5) 20 W. R. 46 (1873).

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proceedings being taken after an order of discharge made by a Subordinate Magistrate, and it was held by Couch, C. J., that he had authority to do this. The same power exists also in the present Code, and the case therefore, in my opinion, does not help us in the decision of the point at issue in the present reference.

The next case is that of *Empress v. Donnelly* (2). This was also a case under the Code of 1872, which as I have already noticed, expressly authorized the institution of fresh proceedings. The learned Judges, however, drew a distinction, which is of importance, in the consideration of the question now raised before us, viz., that a District Magistrate cannot direct the revival, by his own authority, of a case in which there has been a discharge, where there is no further evidence forthcoming. Under the present Code, however, as expounded by the majority of the Court in the case of *Haridra Sanyal* (4), there is a power given to the District Magistrate of directing a further enquiry upon the same facts.

The last case is of *Queen v. Poran* (14). That case, no doubt, is authority for the proposition that a Magistrate, after an order of dismissal under sec. 203, is not precluded from entertaining again the complaint upon the same state of facts. But this, I may observe, is against the current of rulings in this Court, where it has been held that this could only be done under the orders of a superior authority.

The only other case that I need notice is the case of *Girish Chantra Roy* (15).

(2) I. L. R. 2 Cal. 405 (1877).

(4) I. L. R. 15 Cal. 608 (1888).

(14) I. L. R. 9 All. 85 (1886).

(15) 1 C. W. N. 370 (1897).

In that case the accused had been discharged by an Honorary Magistrate, and subsequently one of the stipendiary Magistrates upon an application being made to him, ordered a revival of the case. And I held that this was, in effect, dealing by one Magistrate with the order of another Magistrate of co-ordinate jurisdiction, as if he were an appellate authority and that this he was not empowered to do. The learned Chief Justice, I observe, in the case of *Empress v. Dola Gobind Dass* (1) expressed his dissent, both from my reasoning and the conclusion I arrived at in that case. He was of opinion that under sec. 252 of the Code, the Magistrate was bound to hear the case upon the fresh complaint made to him, and that there was nothing in the Procedure Code to preclude him from so doing. In the earlier part of my judgment I have discussed this particular point, and I need not therefore repeat here what I have already said. I may, however, in this connection, refer to the recent case of *Queen v. Adam Khan* (12), decided by the Allahabad Court (Blair and Burkitt, JJ.), where precisely the same view, which I expressed, has been approved of and adopted. The learned Judges observed:—

“We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance, deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority.

For all these reasons I should answer

(1) 5 C. W. N. 69 (1900).

(12) I. L. R. 22 All. 106 (1899).

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the general question referred to the Full Bench in the negative subject, of course, to the reservation as indicated in the early part of my judgment. And this is the view that was adopted by no less than six Judges of this Court, including the two Judges who have referred this case.

HILL, J.—I think that this reference should be answered in the manner proposed by my Lord, and I have little to add. Confining myself to the question arising out of the proceedings before the Magistrate, the case of *Opoorba Kumar Sett v. Prooth Kumary Dassi* (3) was, I think, rightly decided and ought to be followed. It would amount virtually to a *reluctio ad absurdum*, were it to be held that if the complainant had renewed his complaint, after the order of discharge had been made, the Magistrate might have proceeded with the prosecution, notwithstanding that order, as there can be no doubt he might have done [see the judgment of the Chief Justice in the case of *Empress v. Dole Gobind Dass* (1)], but that he was precluded by that order, which, it is to be observed, was not made on the merits, and was an altogether illegal order, from taking further action in consequence of the circumstances that the complaint was not formally repeated by the complainant. The jurisdiction, moreover, does not rest exclusively on complaint. See the remarks of Markby, J., in the case of *Empress v. Donnelly* (2), which were accepted in principle by Mr. Justice Prinsep.

I may add that the case of *Damini*

*Dassi v. Hurry Mohun Mukerjee* (16) to the decision of which I was a party proceeded so far as I was concerned on what I conceived to be the practice of the Court rather than upon principle. None of the cases bearing upon the question now before us were cited. The decision cannot, I think, be sustained.

SALE, J.—I also agree in the answer proposed to be made in the reference by the Chief Justice and for the reasons stated in his judgment. It seems to me that under the Criminal Procedure Code an order of discharge in a warrant-case is no bar to further proceedings on the same charge and that this is so irrespective of the circumstances under which the order of discharge was made.

HARINGTON, J.—I agree that the question propounded to us ought to be answered in the terms stated by my Lord. The answer depends on whether the order of discharge is a "judgment," or not; and though there is no definition that I can find of what constitutes "judgment"; there is, in sec. 29 of the Penal Code, a definition of what constitutes a Judge, who is defined as every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment; and, amongst the illustrations, it is pointed out that a Magistrate exercising jurisdiction in respect of a charge on which he has power to sen-

(1) 5 C. W. N. 169 (1900).

(2) I. L. R. 2 Cal. 405 (1877).

(3) 1 C. W. N. 49 (1893).

(16) 4 C. W. N. 46 (1898)

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tence to fine or imprisonment, with or without appeal, is a Judge. In this case it appears to me that at the stage of the proceedings at which this charge was dismissed, the Magistrate could not be accurately described as a Judge, because he had not, at that stage of the proceedings, jurisdiction to pass a sentence of fine or imprisonment. All that he had jurisdiction to do was this; if no *prima facie* case was made, he was entitled to discharge the accused; if, on the other hand, a *prima facie* case was made out, he was called upon to determine whether if a charge were framed on the facts disclosed he could inflict an adequate punishment and if he could, he was bound to frame a charge under sec. 254 of the Code of Criminal Procedure, and call upon the accused to plead to that charge and then proceed to try it. In my opinion, until the charge had been framed and the accused called upon to plead to it, the Magistrate could not accurately be described as a Judge and any order that he made previous to the framing of the charge could not be described as "judgment." For that reason I think that the order of discharge was not a judgment. And, indeed, it is difficult to understand how in proceedings under Ch. XXI of the Criminal Procedure Code an order of discharge could be called a judgment, when at the time it was made no charge had been framed on which a "judgment" could be passed, and the accused had not been called upon to plead. It could under no circumstances be "definitive" for it does not operate as an acquittal under sec. 403 of the Code of Criminal Procedure. That section shows what constitutes a definitive judgment in a criminal case.

There is only one other point on which I desire to add an observation, and that is this; it was open to argument that when the Magistrate had passed the order of discharge, he became *functus officio*, and therefore was unable to re-hear the case without a fresh complaint or information. As to this, I desire to say that that question is not the question referred to us; and, in this particular case, it is clear that the Magistrate had not discharged the duties which were imposed on him by sec. 252 of the Code of Criminal Procedure, and, therefore, he could not be said to be *functus officio*, and moreover there is nothing to show that, when the parties appeared before him, on the 26th of June, when the case was re-heard and a fresh summons issued, the conditions requisite for initiating proceedings were not fulfilled and the Magistrate therefore was not empowered to take cognizance of the case under secs. 190 and 200 of the Code of Criminal Procedure.

For the reasons I have given, I agree in thinking that the answer which should be given to this question should be the answer stated by my Lord.

BRETT, J.—I would answer the question referred to us in the manner suggested by the learned Chief Justice for the reasons given by him in the case of *Empress v. Dole Gobind* (1), and in his judgment just delivered with which I agree. I agree with the broad principle therein laid down that when a Magistrate is empowered by law to entertain a complaint he should exercise that power unless there is any bar to prevent his doing so. Sec. 190, C. Cr. P., gives

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that power to all Presidency Magistrates, and an order of discharge cannot operate as a bar to the exercise of that power (see sec. 403, Cr. P. C.). Nor can the provisions of sec. 435 or 439, Cr. P. C., which are enabling sections operate to limit the powers given to a Presidency Magistrate otherwise under the law.

H. P. C. *Rule discharged.*

**[CIVIL REVISIONAL JURISDICTION.]****Full Bench.**

RULE NO. 1217 OF 1900.

MACLEAN, C. J.	AMRITA LAL BOSE,
PRINSEP, J.	Decree-holder,
BANERJEE, J.	Petitioner,
AMEER ALI, J.	
RAMPINI, J.	NEMAI CHAND MUKHO-
1901.	[PADHYA and anr., Claim-
13, February.	ants, Opposite Party.

*Bengal Tenancy Act (VIII of 1885), sec. 170—Civil Procedure Code (Act XIV of 1882), sec. 278—Claim adverse to the tenure or holding, if maintainable, when attached in execution of a decree for arrears of rent.*

Held by the Full Bench (BANERJEE, J., dissenting)—*That sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278, P. C., to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, and, the operation is not confined merely to claims to the tenure or holding but extends to claims based on the ground that the property claimed does not form part of the tenure or holding attached.*

JAGABUNDHU CHATTOPADHYA v. DEENU PAL (1) overruled.

MAKBUL AHMED v. RAKHAL DAS HAZRA (2) approved of.

This was a rule obtained by the decree-holder against the order of Babu Sarat Chandra Pal, Munsif of Barnipur, dated the 21st of April 1900.

The Petitioner obtained a decree for arrears of rent against one Pitambar Chakravarti and in execution of the same attached the defaulting tenure whereupon the opposite party preferred a claim under sec. 278, C. P. C., to the tenure attached. In the first Court a preliminary objection was raised as to whether a claim could be preferred under sec. 278 to a tenure attached in execution of a decree for arrears of rent. The Court held that the claimants claimed under an adverse title to the tenure and decided the question in favour of the claimants and relied upon the case of *Jagabundhu Chattopadhyaya v. Deenu Pal* (1) (Civil Rule No. 1370 of 1886).<sup>\*</sup>

The decree-holder made an application under sec. 622, C. P. C., and obtained the present rule.

It was contended on behalf of the decree-holder that under sec. 170 of the Bengal Tenancy Act the provisions of sec. 278, C. P. C., are excluded and declared not to be applicable to proceedings in execution of rent-decrees, and that the recent case of *Makbul Ahmed v. Rakhal Das Hazra* (2) (Civil Rule No. 201 of 1900, decided by Rampini and Pratt, JJ.), was in favour of this contention; and that this case being in conflict with the case of *Jagabundhu Chattopadhyaya v. Deenu Pal* (1) the question should be referred to a Full Bench.

Rule I of Ch. V of the High Court

(1) 4 C. W. N. 784 (1887).

(2) 4 C. W. N. 782 (1900).

(1) 4 C. W. N. 784 (1887).

(2) 4 C. W. N. 782 (1900).



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Rules on its Appellate Side was also referred to.

It was contended that although the cases of *Makbul Ahmed v. Rakhal Das Hazra* and *Jagabandhu Chattopadhyaya v. Deenu Pal* had not been reported, yet, in view of the conflict, the question should be referred to a Full Bench under Rule 1 of Ch. V of the High Court Rules.\*

Maclean, C. J., and Banerjee, J., who heard the rule, referred it to the Full Bench. The following is the order of reference:—

In this rule the first question that arises for decision is—

Whether sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached.

Upon that question there is a clear conflict between the decisions of this Court in the cases of *Jagabandhu Chattopadhyaya v. Deenu Pal* (1) and *Makbul Ahmed and others v. Rakhal Das Hazra* (2).

The question must, therefore, be referred to a Full Bench for determination, and as the question arises in a rule, the whole case must be so referred.

(1) 4 C. W. N. 734 (1887).

(2) 4 C. W. N. 732 (1900).

\* These cases have since been reported at 4 C. W. N., pp. 732 and 734. See on this point *Mahomed Ali v. Mir Nazur*, 5 C. W. N., p. 326.—Ed.

*Babu Bankim Chunder Sen* for the Petitioner.

*Babu Sarat Chandra Roy Chowdhry* for the Opposite Party.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—The question submitted for our consideration is, whether sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached.

There are, as has been pointed out in the reference, two conflicting decisions upon the point, the one *Jagabandhu Chattopadhyaya v. Deenu Pal* (1) and the other *Makbul Ahmed v. Rakhal Das Hazra* (2).

The question is not free from difficulty and the answer is dependent upon the true construction of sec. 170 of the Bengal Tenancy Act, sub-sec. 1, which is in these terms:—“Secs. 278 to 283 (both inclusive) of the Code of Civil Procedure, shall not apply to a tenure or holding attached in execution of a decree for arrears of rent due thereon.” What is meant by the words, “shall not apply to a tenure or holding attached in execution of a decree for arrears of rent due thereon?” The person making a claim or raising an objection under sec. 278 is entitled in the first instance to prefer such claim or objection, and the

(1) 4 C. W. N. 734 (1887).

(2) 4 C. W. N. 732 (1900).

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onus then lies upon the other side to show that sec. 170 is a bar to the further prosecution of that claim. He must show that the tenure or holding has been attached in execution of a decree for arrears due thereon. But if he produces the decree under which he is proceeding in execution and that decree upon the face of it shows that it is a decree for arrears of rent due upon the tenure or holding attached in execution of the decree, it seems to me that he has sufficiently discharged such onus, and that the Court ought not to proceed further with the investigation of the claim under sec. 278; otherwise this somewhat extraordinary result would ensue, *viz.*, a long and possibly intricate enquiry under sec. 278 not for the purpose of investigating the claim or objection under that section, but with the preliminary object of ascertaining whether sec. 170 was or was not a bar to the proceeding under sec. 278. If that were so in the majority of, if not in all, cases, sec. 170 would become almost a dead letter and I feel much hesitancy in placing such a construction upon sec. 170 as would tend to so abortive a result. In other words the claim or objection under sec. 278 would in effect be investigated under color of the preliminary enquiry whether or not the decree was one for arrears due on the tenure or holding attached. This, to my mind, is not what the Legislature intended by sec. 170.

Upon these grounds I answer the question referred by saying that sec. 170 of the Tenancy Act does bar a claim under sec. 278 of the Code to a tenure or holding attached in execution of a decree for arrears of rent due thereon in all

cases where it is shown that the decree was one for such arrears, and I answer the alternative question in the negative.

The result will be that the rule will be made absolute with costs including the costs of this reference, the hearing fee being fixed at three gold mohurs for both hearings.

PRINSEP, J.—I am of the same opinion. I merely wish to add that I believe that this point has arisen in several unreported cases before me in which judgment has been delivered in the way in which My Lord the Chief Justice proposes to answer this reference to the Full Bench. I do not recollect a single instance in which the correctness of this view of the law has been impugned. This can cause no injustice to a party placed in the position of the Petitioner in this matter, for there are other remedies provided by the law which would equally enable him to maintain his possession or be restored to his possession notwithstanding what may be a fraudulent decree conferring a right to possession of the land.

BANERJEE, J.—I regret very much that I am unable to agree with my learned colleagues in this case. The question referred to us for decision is, whether sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether its operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached. And the necessity for this reference to a Full Bench arose from the fact of there

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being a conflict of decisions upon the point between the cases of *Jagabandhu Chattopadhyaya v. Deenu Pal* (1) and *Makbul Ahmed v. Kakhil Das Hazra* (2).

The determination of this question depends upon the language of sec. 170 of the Bengal Tenancy Act, and this is what sub-sec. 1 of that section says:—“Secs. 278 to 283 (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon.” The section thus bars the application of secs. 278 to 283 of the Code of Civil Procedure to certain classes of cases, namely, those in which the tenure or holding is attached in execution of a decree for arrears due thereon. Upon a claim under sec. 278 of the Code of Civil Procedure being preferred, it, therefore, lies upon the party opposing the claim to show that the claim is barred by sec. 170. He can show that by showing that, upon the claimant's own case, sec. 170 applies to it, and bars the application of sec. 278. That will be the case where the claim is of this nature, namely, that the claimant admits that the tenure or holding attached is held under the decree-holder, that arrears of rent are due thereon and that the decree is in respect of such arrears, but contends that the decree ought not to be allowed to be executed by the attachment and sale of the tenure, because it was obtained against a wrong person, that the claimant was the person entitled to the tenure or holding and that, unless and until the landlord sues him and obtains a decree against him, the tenure or hold-

ing cannot be sold. Where that is the nature of the claim, sec. 170 will bar the claim upon the claimant's own case. But where the claim is of this nature, namely, that the tenure or holding attached, or rather I should say the land said to constitute the tenure or holding attached, was not held by the claimant under the decree-holder, but was held by him under an independent right, and that the decree for arrears is, consequently, not a decree for arrears due in respect of such land, there the decree-holder cannot say that, upon the claimant's own showing, sec. 170 is a bar to the claim being entertained. Nor can it be said that the case is one of a tenure or holding attached in execution of a decree for arrears due thereon, as the decree sought to be enforced would go to show. For that would be so only as between the decree-holder and the judgment-debtor. If the claimant is to be treated as a party to the proceedings, and if the order rejecting the claim on the ground of sec. 170 of the Bengal Tenancy Act being a bar to it, is to be made in his presence, he must be allowed to say that the decree itself cannot be decisive of the question. For, if that be so, it would make the decree-holder in many cases, and the decree-holder and judgment-debtor acting in concert in all cases, the arbiter of the question. A decree-holder, with the view of defrauding a party of his land, may, in collusion with a tenant, or an alleged tenant, aver, in his plaint, in a suit for arrears of rent, that the arrears are due in respect of a tenure or holding comprising such land, and he may obtain a decree in a suit so brought; and, then, if the view contended for by

(1) 4 C. W. N. 734 (1887).

(2) 4 C. W. N. 732 (1900).

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the other side be correct, the third party, whose property has in this fraudulent manner been included in the tenure or holding will be deprived of the summary remedy provided by sec. 278 of the Code of Civil Procedure, without having any opportunity of showing that the decree was not for arrears really due in respect of the property attached. The decree, therefore, cannot, in my opinion, be treated as settling the question. The question must be determined in the presence of the claimant, and, if necessary, upon evidence. No doubt, this would be open to the objection that, in determining whether a claimant is barred under sec. 170 of the Tenancy Act, a preliminary enquiry will have to be gone into; but such preliminary enquiry may have to be gone into for the purpose of determining whether the preliminary objection ought to prevail, unless it can be shown that upon the very case of the party, against whom the objection is taken, the objection should succeed. It may also be said, on the other side, that, if this view be correct, it would lead to the very investigation which sec. 170 is intended to prevent, and that it would, after all, leave little scope for sub-sec. 1 of sec. 170. But, as I understand the section, I do not think it would lead to any such anomalous results as these. The preliminary enquiry will be directed, not towards determining whether or not the claimant is entitled to the property, but towards determining whether the arrears, in respect of which the decree has been obtained, were due in respect of the property attached. If that is made out, the claim will have to be at once rejected, without any further

investigation as to the case put forward by the claimant. Nor will the view I take make sec. 170 nugatory. As I have already observed, the object of that section, as I understand it, is to prevent any claim being advanced by a party who admits that the property attached constitutes a tenure or holding as alleged by the decree-holder, and that the decree is for arrears due thereon, and whose only objection is, that such tenure or holding held under the decree-holder belongs not to the judgment-debtor, but to the claimant. It is to exclude claims in this class of cases that sec. 170 was enacted. That will appear also, from a reference to the old law on the subject, sec. 63 of Act VIII (B. C.) of 1869. Therefore the view I take is not only in accordance with the words of the section, but is supported also by a reference to the law on the subject as it stood before.

Reference was made to sec. 174 of the Bengal Tenancy Act, sub-sec. 3, which provides that sec. 313 of the Code of Civil Procedure shall not apply to any sale of a tenure or holding under the Tenancy Act, as showing that the Legislature intended to make several provisions of the Code of Civil Procedure inapplicable to the attachment and sale of a tenure or holding in execution of a decree for arrears of rent. I think that a reference to this provision rather tends to support an inference the other way. For it would not be reasonable to suppose that the Legislature meant to increase the number of inoperative execution sales and thus enhance the risk of auction-purchasers by leaving open the claims of parties against whom fraud might have been committed, without giving

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them an opportunity of coming under sec. 278 of the Code and having their property released from attachment, when it debarred auction-purchasers from having any remedy under sec. 313 of the Code.

Then it has been said that a claimant, situated as this claimant was, would suffer no injury by the sale of the tenure or holding, as his rights could not possibly pass by such a sale. That is quite true; but that would be no reason why he should be deprived of the remedy under sec. 278, when other claimants of whom also the same thing might be said are allowed the benefit of that remedy.

For these reasons, I respectfully dissent from the view taken in the case of *Makbul Ahmed v. Rakhal Das Hazra* (2) and agreeing with the decision in the case of *Jogabundhu Chattopadhyaya v. Deenu Pal* (1) I would answer the first branch of the question referred to the Full Bench in the negative, and the second branch of it in the affirmative.

AMEER ALI, J.—I am also of opinion, and for the reasons given by the learned Chief Justice, that sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon. I only wish to add one other ground in support of the view already expressed. When a landlord obtains a decree against his tenant for arrears of rent due upon his alleged tenure or holding, the decree is unquestionably binding upon the parties and on the tenure or holding; supposing that in the

course of the execution of that decree a third party comes forward and alleges that either in whole or in part he is entitled to that tenure or holding, as the case may be, his claim amounts to this that the property attached in execution of the decree is not liable to such attachment, which brings the matter clearly under sec. 278 of the Code of Civil Procedure. Now, if we refer to the provisions of sec. 170 of the Bengal Tenancy Act, we find that without any exception secs. 278 to 283 (both inclusive) of the Code of Civil Procedure are declared not to be applicable to a tenure or holding attached in execution of a decree for arrears due thereon. I said without exception, because whether the claim is adverse to the tenure or holding, or whether it is for the tenure or holding, all claims to the property attached on the ground that it was not liable to such attachment, which can only be put forward under sec. 278 of the Code, are excluded from the purview of the Court by sec. 170. To hold otherwise would be to open the door to the difficulties which, it must be taken, the Legislature intended to avoid, and to launch the holder of a decree for arrears of rent in a complicated enquiry, the result of which may, after all, be wholly infructuous. The tenant against whom a decree for arrears of rent has been obtained may put forward a number of people to claim either in whole or in part the tenure or holding and thus prevent the landlord from reaping the fruits of his decree. As regards sec. 63 of Act VIII (B. C.) of 1869 to which reference was made by the learned vakil for the opposite party, I may observe

(1) 4 C. W. N. 784 (1887).

(2) 4 C. W. N. 732 (1900).

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that that section seems to strengthen the view I have expressed. The Legislature presumably, if not certainly, had that section before it. And still deliberately proceeded to enact sub-sec. 1 of sec. 170 of the present Tenancy Act barring in all cases claims under sec. 278 of the Civil Procedure Code.

RAMPINI, J.—I concur in the views of the majority of the Judges constituting this Bench. I am of opinion that sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon in all cases, and that its operation is not confined to claims to the tenure or holding, but does extend to claims based on the ground that the property attached does not form part of the tenure or holding attached.

The determination of this question would seem to me to depend upon the construction of the provisions of sec. 278 of the Code of Civil Procedure read in conjunction with those of sec. 170 of the Bengal Tenancy Act. Sec. 278 of the Code of Civil Procedure prescribes how a claim preferred to, or an objection made to the attachment of any property attached in execution of a decree is to be investigated, and sec. 170 of the Bengal Tenancy Act provides that the provisions of sec. 278, amongst others, of the Civil Procedure Code shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon. The two sections when thus read together would seem to me to imply that when a tenure or holding is attached in execution of a decree for arrears of rent due thereon, no third party is to

be at liberty to prefer any claim of any kind or to intervene in any way in the proceedings in execution of a decree for arrears of rent.

The same conclusion, I think, follows when the question is considered from another point of view, namely, as to whether a third party, who seeks to prefer a claim under sec. 278 of the Code to a tenure or holding, is in any way affected by the proceedings taken in execution of a decree for arrears of rent. It seems to me that he is not. He is no party to the decree for arrears of rent; he is not affected by it; he cannot be affected in any way by any proceedings taken by the landlord, the decree-holder, as against the tenant the judgment-debtor. The rent-decree and the proceedings taken in execution cannot make any question arising between the parties to that decree and a third-party, the claimant, *res judicata*.

Then, it is to be remembered that it is not of the essence of a tenure or holding in this country that it should consist of any particular area of land situated within definite boundaries. A tenure or holding may have definite boundaries, or it may not, or it may have no boundaries at all. At any rate the essence of a tenure or holding in this country is that it is the subject of a contract, express or implied, between the parties concerned, *viz.*, the landlord and the tenant, and when a tenure or holding is sold in execution of a decree for arrears of rent, what passes at the sale is the subject-matter of the contract between the contracting parties, which is hypothecated for the rent under the provisions of sec. 65 of the Bengal Tenancy Act, and the

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right of the tenant in such subject-matter, and nothing more.

Then, I would point out that the purchaser of a tenure or holding at a sale held in execution of a decree for arrears of rent is not necessarily entitled to possession of the tenure or holding which he has purchased. If he attempts to take possession, the person in actual possession of that tenure or holding has his remedy. He can first of all raise an objection under sec. 331, C. C. P., which is a portion of the Code not excluded by sec. 170 of the Tenancy Act, and if his objection is overruled, he still has a further remedy in a regular suit.

Then I would point to the provisions of sec. 63 of the former law, Act VIII (B. C.) of 1869 which are founded on those of sec. 106 of Act X of 1859. According to those provisions a claimant who wished to raise an objection to the attachment of any under-tenure was by the old law obliged, before he could be heard, to pay the decretal amount into Court. If the view of the learned pleader who appears for the opposite party in this case be correct, then such claimant would be entitled to come in and to have his claim heard without, first, depositing the decretal amount. It is generally understood that one of the objects of the Bengal Tenancy Act was to give landlords greater facilities for the collection of their rents in consideration of the greater rights bestowed upon tenants by that Act, and it would seem to me to be an anomaly if such being the avowed intention of the Tenancy Act, the effect of one of its clauses were to be to remove the restrictions imposed by the former law on the preferment of claims

in execution of decrees for rent and so to place obstructions in the way of, instead of affording facilities for the collection of arrears of rent by landlords.

I would finally advert to the provisions of sec. 174 of the Bengal Tenancy Act, cl. 3 of which provides that sec. 313 of the Code of Civil Procedure shall not apply to any sales under this chapter, that is Chap. XIV. Now sec. 313 of the Code of Civil Procedure gives a purchaser the right to apply to a Court to set aside a sale on the ground that the person against whom the decree was passed had no saleable interest whatever in the property sold. The Tenancy Act, however, provides that the purchaser at a sale in execution of a decree for arrears of rent is not at liberty to apply for the setting aside of a sale on this ground. It seems very strange that a purchaser, whose rights may be affected, because if the judgment-debtor had no saleable interest, the purchaser must lose his money, should have no right to come in and object to the sale on this ground, and yet that a person whose interests are not affected should have the right to come in at a preliminary stage of the execution proceedings, and demand that the proceedings be stayed until his claim has been enquired into and determined.

S. C. S.

*Rule made absolute.*

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 452 OF 1897.

	HEM CHUNDER MISRI and another,
O'KINEALLY, J.	{ Defendants, Appellants,
GUPTA, J.	
1898.	RAJAH SIR SOURINDRA
4, May.	MOHAN TAGORE
	BAHADUR, Plaintiff,
	Respondent.

*Suit for rent—Assignment by landlord of portion of interest to a mortgagee—Registered proprietor—"Rent due"—Right of mortgagee, whether may be set up in defence—Bengal Tenancy Act (VIII of 1885), secs. 3, cl. (2), 60.*

*In a suit for rent by a proprietor registered under the Land Registration Act (VII, B. C., of 1876) the Defendants are precluded, by reason of sec. 60 of the Bengal Tenancy Act from pleading as a defence to the claim that the rent is due to a mortgagee to whom the landlord has assigned a part of his interest but whose name has not been registered under the Land Registration Act.*

This was an appeal preferred on the 23rd of March 1897, against the decree of B. G. Geidt, Esq., District Judge of Bankura, dated the 23rd of December 1896, reversing the decree of Babu Poresb Nath Chatterjee, Munsif of Khatra, dated the 10th of December 1895.

The facts of the case material to this report and the points raised in the case appear from the judgment of the lower Appellate Court which was as follows:—

This was a suit for rent. The defence set up was that the rent had been paid to Muktarām, a mortgagee of that part of the estate in which Defendants' holding is situated. The Plaintiff's name is registered as proprietor. Muktarām's

name is not registered. *Prima facie*, therefore, the Defendants under sec. 60 of the Tenancy Act cannot plead that rent is due to Muktarām. But the Munsif considers that proprietor must mean proprietor of the whole estate, and as Plaintiff is not proprietor of the whole estate, the Munsif thinks that sec. 60 is not applicable. This interpretation of the section is not correct, as will be seen by reference to the definition in cl. (2), sec. 3 of the Act, where proprietor is defined as a person owning an estate or a part of an estate. Then the Munsif thinks that as the Defendants have paid to Muktarām, the rent cannot be said to be due to him. The word due here means no more than payable. The Munsif's decision is wrong. The appeal is allowed. The Plaintiff will get a decree for the rent and cesses of the years under claim. But I allow no interest or damages. The Plaintiff will get his costs in both Courts.

The Defendants preferred this second appeal.

*Babu Harendra Narayan Mitra* (for *Babu Digambar Chatterjee*) for the Appellants.

*Babu Lal Mohan Das* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from a decision of the District Judge of Bankura, dated the 23rd December 1896.

The Plaintiff is the proprietor of the village in which the tenure in dispute lies, and he got his name registered under sec. 55 of Act VII (B. C.) of 1876. Of that there is no dispute. The Defendants admittedly are tenants, and ordi-



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narily the rent would be due from them to the proprietor, but they say that the landlord has assigned part of his interest to a mortgagee, and that he is the person entitled to the rent. The mortgagee has not been registered. Before the Rent Act of 1885, it was decided in this Court that a person who was registered could not obtain rent unless the relation of landlord and tenant existed between him and the person whom he sued for rent. Then came sec. 60 of the new Rent Act which was not the law before. It runs as follows:—"Where rent is due to the proprietor, manager, or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorized in that behalf, shall be a sufficient discharge for the rent; and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. But nothing in this section shall affect any remedy which any such third person may have against the registered proprietor, manager or mortgagee." The mortgagee not having been registered under Act VII (B. C.) of 1876, the Defendants are, we think, precluded from pleading as a defence to the claim that the rent is due to any other third person, or, in other words, is due to the mortgagee. What would be the effect if it had been found in the lower Court that the Defendants had, without knowledge of the registration of the proprietor, paid to the mortgagee, is a question not raised in this case, and we desire to guard ourselves against it being thought that we

have decided anything that has not been raised.

We think that the Defendants are not entitled to set up the mortgagee as between themselves and the proprietor to whom the rent would ordinarily be due, and we accordingly dismiss the appeal with costs.\*

H. P. C.

*Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1030 OF 1898.

MUSST. BHUGWANBUTTI	
RAMPINI, J.	CHOWDHURANI, Plaintiff,
PRATT, J.	Appellant,
1900.	v.
- 21, June.	A. H. FORBES,
	Defendant, Respondent.

\* *Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—Decisions in two suits not open to appeal in the same way—Joinder of several causes of action—Claim for cess.*

*To make a matter res judicata it is not necessary that the two suits should be open to appeal in the same way.*

*A Plaintiff cannot be allowed to evade the provisions of sec. 13 of the Civil Procedure Code by joining several causes of action against the same Defendant in one suit and by bringing his suit in a Court of superior jurisdiction.*

This was an appeal preferred on the 20th of May 1898, against the decree of D. Cameron, Esq., Judge of Zillah Pubna, dated the 10th of February 1898, affirming the decree of Babu Chakrodhur Prosad, Subordinate Judge of Purneah, dated the 11th of August 1897.

The suit, out of which this appeal arose, was one in which the Plaintiff sought to recover the sum of Rs. 1,138-13

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on account of cesses, etc., from the Defendant, who was the holder of a *putni* lease under her. The Defendant did not dispute his liability. He only contested the rate at which he was sued.

The point in regard to which the parties were at issue was as to the rate at which the Defendant was to pay road-cess and public works cess. The Plaintiff contended that the Defendant was liable to pay these cesses at the rate of Rs. 415-10 per annum. The Defendant maintained that it was decided in a previous litigation between the parties that he was not bound to pay on that account more than Rs. 165-15 per annum.

The Courts below found in favour of the Defendant. The Plaintiff then preferred this second appeal.

*Mr. Hill* (with him *Mr. Gregory*) for the Appellant.—The suit in which the question of the Defendant's liability to pay road-cess, etc., was previously decided was one of a Small Cause Court nature; the High Court accordingly held in that suit that no second appeal lay; hence the Court in which the suit was originally decided was not a Court competent to decide the present one; the former suit was instituted in the Court of a Munsif who would have been incompetent to decide the present suit; the claim was for an amount in excess of the pecuniary jurisdiction of a Munsif and was therefore instituted in the Court of a Subordinate Judge. To make a matter *res judicata* the two suits must be open to appeal in the same way; see *Bhola v. Adesang* (1), *Govind v. Dhondbrar* (2) and *Vithilinga v. Vilbilinga* (3).

(1) I. L. R. 9 Bom. 75 (1884).

(2) I. L. R. 15 Bom. 104 (1890).

(3) I. L. R. 15 Mad. 111 (1891).

*Mr. Bonnerjee* (with him *Babu Umakali Mukerjee*) for the Respondent referred to *Rai Charan Ghose v. Kumud Mohun* (4).

The JUDGMENT OF THE COURT was as follows:—

The suit, out of which this appeal arises, is one in which the Plaintiff sought to recover the sum of Rs. 1,138-13 on account of cesses, etc., from the Defendant who is the holder of a *putni* lease under her. The Defendant does not dispute his liability. He only contests the rate at which he is sued.

The point with regard to which the parties are at issue in this second appeal is as to the rate at which the Defendant is to pay road-cess and public works cess. The Plaintiff, (second Appellant before us) contends that the Defendant is liable to pay these cesses at the rate of Rs. 415-10. The Defendant maintains that it has already been decided in a previous litigation between the parties that he is not bound to pay on this account more than Rs. 165-15 per annum.

The District Judge found in favour of the Defendant, hence this second appeal.

*Mr. Hill* on behalf of the Plaintiff contends (1) that the suit in which the question of the Defendant's liability to pay road-cess, &c., was previously decided was one of a Small Cause Court nature and that this Court accordingly held that no second appeal lay to it. Hence the Court in which the suit was originally decided was not a Court competent to decide the present one. (2) He points out that the former suit was instituted in the Court of a Munsif who would have been incompetent to decide the present suit, in which the claim was for an

(4) I. L. R. 25 Cal. 571 (1898).

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amount in excess of the pecuniary jurisdiction of a Munsif and which was therefore instituted in the Court of a Subordinate Judge. Mr. Hill in support of his first contention has cited the cases of *Bhola Bhai v. Adesang* (1), *Govind bin Lakshmanshet v. Dhondbrar bin Ganvbarar* (2) and *Vithilinga Padayachi v. Vilbilinga Mudali* (3), which, it is said, lay down that to make a matter *res judicata* the two suits must be open to appeal in the same way. Mr. Bonnerjee on the other hand has called our attention to the case of *Rai Charan Ghose v. Kumud Mohun* (4), which is a decision of this Court and in which the contrary view has been held. We agree with the views expressed in this last-mentioned case and must therefore follow it.

As to the objection on the ground of the incompetency of the Munsif who decided the former suit to decide a suit of the value of the present suit, it appears that the claim on account of road-cess and public works cess was below Rs. 1,000 and was therefore within the competency of a Munsif to try. The Plaintiff in this suit joined several causes of action against the same Defendant together and hence instituted her suit in the Subordinate Judge's Courts. She therefore joined together several suits. She cannot be allowed to evade the provisions of sec. 13 in this way. It would have been perfectly competent for a Munsif to try the Plaintiff's present suit for road-cess and public works cess.

The appeal therefore fails. We dismiss it with costs.

S. C. S.

*Appeal dismissed.*

(1) I. L. R. 9 Bom. 75 (1884).

(2) I. L. R. 15 Bom. 104 (1890).

(3) I. L. R. 15 Mad. 111 (1891).

(4) I. L. R. 25 Cal. 571 (1898).

# [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2457 of 1898.

PURNA CHANDRA

GHOSE, J.

SARKAR, Plaintiff,

PRATT, J.

Appellant,

1901.

v.

10, January.

NIL MADHUB NANDI,

Defendant, Respondent.

*Civil Procedure Code (Act XIV of 1882), sec. 375—Compromise decree—Extraneous matter.*

*The admission of a review presented out of time without any sufficient cause is a good ground of appeal under sec. 629, cl. (c) of the Code of Civil Procedure.*

*In granting a review the Court should not travel beyond the grounds mentioned in the application for review.*

*A decree passed on a compromise cannot be regarded as ultra vires simply because it goes beyond the subject-matter of the suit and contains other conditions.*

*The other conditions, if they are the considerations for the compromise of the subject-matter of the suit, must be incorporated in the decree; but if the other conditions are independent of it they may be regarded as surplusage.*

This was an appeal preferred on the 6th of December 1898, against a decree of Babu Chandi Charan Sen, Additional Subordinate Judge of Burdwan, dated the 29th of September 1898, passed on appeal from the decision of Babu Bepin Behari Ghose, Additional Munsif of Rani-gunge, dated 31st July 1895.

The facts of the case appear from the judgment.

*Babu Nalini Ranjan Chatterjee* for the Appellant.

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*Babus Lal Mohan Das and Debendra Chunder Mullik* for the Respondent.

THE JUDGMENTS OF THE COURT were as follows :—

PRATT, J.—This appeal arises out of a suit brought under sec. 77 of the Registration Act whereby the Plaintiffs sought to compel the Defendant to register a *kabuliyat*. The first Court decreed the Plaintiff's suit. While the appeal was pending, the parties came to a compromise and filed a petition of compromise on the 31st January 1898. In that petition it was set forth that the *kabuliyat* in suit will be upheld; that the Plaintiffs would withdraw certain pending suits; that they would grant a settlement to the Defendant of certain noabadi and waste lands, and would admit him as the holder of certain other *mal* lands. A decree was passed in accordance with the compromise on the 23rd February 1898, the terms of the *solenama* being embodied in full in the decree. On the 8th June 1898 the Defendant presented an application for review. The application was admitted, the compromise decree was set aside, and the appeal reheard, the result being that the decree of the first Court was reversed, and the suit dismissed.

The only grounds taken before us in this appeal to which it is necessary to advert are two: *first*, that the review was admitted after the expiration of the period of limitation prescribed therefor, and without sufficient cause, and, *secondly*, that the review was admitted on a ground not stated in the application.

As regards the first point, it would

appear that neither in the application of the Defendant nor in the judgment of the Appellate Court is any reason given for presenting the application for review after the expiration of 90 days from the date of the decree. We therefore think, having regard to the terms of sec. 629, cl. (c), Code of Civil Procedure, that this is a good ground of appeal before us.

As regards the second contention, we observe that the application for review was made on the ground of fraud, deceit and coercion, and also that the Plaintiffs had failed to carry out the terms of the *solenama*. The learned Subordinate Judge held that the allegations of fraud and coercion had not been made out, but he granted the review because he thought there was a clear misunderstanding by both parties as to the terms and meaning of the *solenama*. It has been frankly admitted before us by the learned *vakil* for the Respondent that the meaning of the *solenama* is perfectly clear. Moreover it is manifest from the application for review that a misapprehension of the terms of the *solenama* was not a ground upon which the application for review was made. It is true that the Defendant in a supplementary written statement made certain allegations from which the Subordinate Judge thought he was at liberty to find that the Defendant did not understand the terms of the *solenama*; but we think that the Subordinate Judge has travelled beyond the purpose of the application before him, not only because the alleged misunderstanding was not an express ground for review, but also, as we have already indicated, because the terms of the

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*solenamā* are clear and definite and not capable of being misunderstood. The learned pleader for the Respondent has urged before us that, notwithstanding the objections which have been taken to the judgment of the Subordinate Judge, we ought to hold that the compromise decree was a nullity, because it goes beyond the subject-matter of the suit, and that therefore on this ground we ought not to allow it to be affirmed. No doubt, the compromise, besides affirming the *kabuliyat*, refers to certain lands which are not mentioned in that document, but it may well be contended that the conditions embodied in the *solenama* were the consideration for which the Defendant agreed to concede that the *kabuliyat* was a valid document. Under sec. 375 of the Code of Civil Procedure the decree is "final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction." Therefore whether the whole of the decree is capable of execution or not, it is evident that it is a good decree at least so far as regards the validity of the *kabuliyat*. The other terms of the decree are concessions in favour of the Respondent, and he would not wish them to be struck out while the validity of the *kabuliyat* is affirmed, as we think it must be. The argument for the Respondent therefore fails and the appeal should be decreed with costs, the compromise decree being restored.

GHOSH, J.—I agree in the judgment which has just been delivered by my learned brother. There is one remark, however, that I desire to add with regard to the argument which was last pressed upon us by the learned vakīl for the

Respondent, upon the question of the validity of the compromise decree which was made between the parties on the 31st January 1898. As pointed out by my learned brother, that decree affirms the *kabuliyat* for the enforcement of which the suit was brought by the Plaintiffs, and, in the second place, it refers to various other conditions which the parties agreed to in respect of other lands not covered by the *kabuliyat*. It seems to me (and indeed that was the position taken by the learned vakīl for the Respondent himself) that these other conditions were either the consideration for the affirmance of the *kabuliyat*, for which the suit was brought, or they were conditions independent thereof. In the first-mentioned case, the whole of the conditions must be incorporated in the decree: in the latter case, the decree, according to the view presented by the learned vakīl himself, so far as it incorporates only the first condition, namely, as to the *kabuliyat*, must be upheld, and therefore the portion of the decree incorporating the other conditions may be regarded as surplusage. But the decree cannot be regarded as *ultra vires*, simply because the other conditions were inserted in it. It seems to me that in either view of the matter, the argument addressed to us by the learned vakīl for the Respondent cannot stand.

The appeal will be allowed, and the compromise decree affirmed, with costs.

*Appeal allowed.*

S. C. S. .

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. No. 1030 of 1900.

SALE, J.

AYEN MAHMAD AKAND,

PRATT J.

Petitioner, .

1901.

v.

12, February.

THE KING-EMPEROR,

Opposite Party.

*Criminal Procedure Code (Act V of 1898),  
secs. 190, 528—Cognizance of offence against  
persons accused but not sent up for trial—  
Refusal by trying Magistrate to issue processes  
against such accused persons—Transfer by  
District Magistrate of case—Warrants, issue  
of, against accused not sent up—Pending  
case—Jurisdiction.*

*Where several persons were accused of  
rioting, and only one of the accused was  
sent up by the Police and convicted of the  
offence, and the trying Magistrate, on  
application made for summoning the  
others, refused to summon them, and the  
District Magistrate transferred the case  
to his own file and directed the issue of  
warrants against the accused persons  
originally charged but not sent up for  
trial :*

*Held—That the order of the trying  
Magistrate refusing to summon the other  
accused persons did not finally dispose of  
the case so as to remove it from his file  
altogether ; and the District Magistrate  
had ample jurisdiction to transfer the case  
to his own file under sec. 528 of the Cri-  
minal Procedure Code.*

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(1) referred to and followed.

*That even if the case be treated as not  
pending in the Court of the trying Magis-  
trate at the date of his order refusing to  
the other accused persons, the  
District Magistrate had jurisdiction to  
take cognizance of the case as against the*

(1) 4 C. W. N. 239 (1898).

*other accused persons under sec. 190 of the  
Code.*

This was a rule issued on the 20th  
December 1900, against the order of the  
District Magistrate of Bogra, dated the  
17th October 1900, transferring the case  
of Kristo Chandra Pal to his own file,  
as well as against his order, dated the 3rd  
November 1900.

The facts of the case material to this  
report appear from the judgment.

*Babu Sarat Chunder Roy Chowdhury*  
for the Petitioner.

*Mr. Leith* for the Crown.

The JUDGMENT OF THE COURT was as  
follows :—

The two orders which are complained  
of in this case are the orders of the Dis-  
trict Magistrate of Bogra, dated respec-  
tively the 17th October and 3rd Novem-  
ber 1900. It is said that these orders  
were made without jurisdiction and  
ought to be set aside. It appears that,  
on the 15th March 1900, an information  
was filed against 20 persons charging  
them with the offence of rioting.

On the 26th March, the Police sent  
up an A. form against one of the persons  
whose names appeared in that informa-  
tion, Kristo Chandra Pal. He was tried  
and convicted and sentenced to pay a  
fine of Rs. 50. On the 12th May, the  
complainant applied for processes against  
the other accused persons who had not  
been sent up by the Police. The Deputy  
Magistrate, after considering the evidence  
in the case, thought, as he says, that  
the details of the occurrence were not  
satisfactory and he therefore refused to  
issue further processes. The matter was  
then brought before the District Magis-  
trate who called for a report from the

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right or interest in the mortgaged properties to redeem them by depositing the decretal amount in Court. The applicants' pleader contends that under sec. 91 of the Transfer of Property Act the applicants having interest in the mortgaged properties have this right. I cannot accept this contention. Sec. 9, no doubt, gives the right of redemption to certain persons, but it does not in any way affect the law of procedure as laid down in sec. 86 of the Act. It merely invests certain persons with a right of redemption. If the party having such right wants to redeem the properties mortgaged by depositing the decretal amount in Court within the statutory time, he must conform to the laws of procedure as laid down in secs. 86 to 90 of the Act; and under these sections nobody except the Defendant has a right to deposit the decretal amount in Court. It is accordingly ordered that the application be rejected.

Against this order an application was made and the present rule was obtained.

*Babu Bhuban Mohan Das* for the Petitioners.

*Babus Hari Mohun Chakravarti* and *Karuna Sindhu Mukerjee* for the Opposite Parties.

THE JUDGMENT OF THE COURT was delivered by

RAMPINI, J.—This is a rule calling upon the opposite party to show cause why the order complained of in this case should not be set aside. The order complained of is one under sec. 437, C. P. C. refusing to make one of the applicants a party in a redemption suit.

The facts are these:—The opposite party obtained a preliminary decree for foreclosure against one Surja Kumar Chatterjee, who is the brother of the applicant, Akhoy Kumar Chatterjee, and is the executor under their father's Will. Surja Kumar therefore fully represents the estate. Surja Kumar alone was made a party to the redemption suit and the preliminary order for foreclosure was

passed against him. After this preliminary order was passed, one of the present applicants, Akhoy Kumar Chatterjee, prayed to the Court to be made a party to the suit, so that he might redeem the property before the final decree. His application was dismissed under sec. 437, C. P. C. Now Akhoy Kumar Chatterjee and a purchaser from Akhoy have appeared before this Court and obtained this rule. They have asked to be made parties to the suit so that they may redeem the property.

We think that there is really no reason why we should make the order prayed for. Surja Kumar Chatterjee was the only executor named in his father's Will and he fully represented the father's estate. There was no necessity for the opposite party to have made the present applicant Akhoy a party to the suit and further it appears to us that as Akhoy has transferred a considerable portion of his interest in the property which he obtained under his father's Will to the transferee, the other applicant, whose name is Mohananda Chatterjee, he has little or no interest in redeeming the property. The person who is really interested in redeeming the property is Mohananda Chatterjee, and he has no right to be made a party to the proceedings in the redemption suit.

Furthermore, we are told that Mohananda had made a previous attempt to intervene in these proceedings. He tried to be made a party to the probate case before the District Judge and his application was refused. For these reasons he has no right to be made a party to the redemption proceedings and has no right to redeem the property.

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The rule is discharged with costs two gold mohurs.

S. C. S.

Rule discharged.

### PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.]

LORD ROBERTSON.

SRIMATI RANI PAR-

LORD LINDLEY.

BATI KUMARI DEBI,

Heard,

Appellant,

12, 13, November,

v.

1901.

JAGADISH CHUNDER

Judgment,

DHABAL and another,

22, February,

Respondents.

1902.

*Hindu law—Mitakshara School—Family custom, personal and geographical—Presumption arising from origin of family—Evidences of custom—Succession—Impartible estate, savings from, whether ancestral or self-acquired.*

*Case in which it was held on the evidence, that the family though located in Bengal was governed by the Mitakshara law.*

*The question in such cases being primarily one of personal as distinguished from geographical custom, it is of the first importance to enquire into the origin of the family. The origin, ascertained, gives rise to the presumption that the family preserves the customs of its place of origin. Of evidences, which go to prove or rebut this presumption, the most direct are instances of succession in the family, and next, ceremonies at marriages, births and shraddhs.*

*Under the Mitakshara law, the ancestral estate of a childless person passes, at his death, to his brother to the exclusion of his widow.*

*Property purchased by a zemindar, or by the Court of Wards on his behalf during minority, from savings of an impartible ancestral Raj is to be regarded as his self-acquired property, unless an intention appears on his part to deal with it as a part of the Raj; and the mere fact that the same servant collected rents from both properties and that the collection papers were kept together are no proof that there was such intention.*

This was an appeal against a decree of the Calcutta High Court, which reversed a decree of the Sub-Judge of Midnapore. The suit was brought by the Appellant, one of the two widows of Raja Purna Chunder of Jamboni, who had died intestate without leaving any male issue, to recover his estate from Iswar Chunder, his half-brother. The suit was brought on the assumption that the family was governed by the Dayabhaga law. The Defendant-Respondent resisted the claim asserting that the Mitakshara law governed the family, under which the widow was only entitled to maintenance and in any case the other widow the 2nd Defendant, who was found to be the senior widow, was the preferential heir. The Sub-Judge found in favour of Appellant. The High Court reversed that decision and dismissed the suit. The arguments were entirely on facts and on examination of the oral evidence. The Appellant also claimed the savings made by the late Raja from the income of his estate during his lifetime, claiming that there was no evidence that such properties were incorporated in the zemindari.

Mr. Mayne for the Appellant.

Mr. Asquith, K. C., and Mr. Branson for the Respondent.



SRIMATI RANI PARBATI KUMARI DEBI v. JAGADISH CHUNDER DHABAL.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—The questions raised by this appeal relate to the succession of Raja Purna Chunder, who died on 23rd August 1886. He left no issue but was survived by two widows and a half-brother. One of the two widows, Rani Radha Kumari Debi, granted a release, and although appearing as a Defendant in this suit, raised no claim adverse to the interest of the half-brother, and does not appear in this appeal. The half-brother has died since this suit was instituted and is now represented by his son the minor Respondent. The present controversy is between the Appellant, who is the other widow, on the one hand, and the son of the brother on the other hand and relates to two subject-matters of very different values.\* Those are (1) the ancestral estates of the deceased Purna Chunder which are situate in the jungle-mehals of Midnapore and are claimed by the Appellant on the ground that the succession is governed by the Dayabhaga law which would give it to her; and (2) four mouzahs, bought by the Court of Wards with the savings of Purna Chunder's estate while it was under their management, which the Appellant claims, even assuming the Mitakshara-law to govern the succession. The Respondent's answer to the claim to the ancestral estates is that the Mitakshara and not the Dayabhaga law rules, and under the Mitakshara law he is the undoubted heir; but he says further that, even if the Dayabhaga law governed, the right to compete with him would lie not in the Appellant but in the other widow who has renounced her rights in his favour.

On the question of the four mouzahs he maintains that the conduct of Purna Chunder in dealing with this property showed his intention that it should go with the ancestral properties. By much the most important and complicated question thus raised is as to which system of law governs this succession, the Mitakshara or the Dayabhaga.

The suit was brought by the Appellant, whose plaint was filed on 14th April 1893, the lands in dispute having by this time been taken possession of by the half-brother. The Defendants were Iswar Chunder (the half-brother) and Radha Kumari, the other widow. The Appellant prayed for a declaration that she was entitled, either jointly with the other widow or exclusively, to the whole estate, moveable or immoveable, of the deceased Purna Chunder, or for a similar declaration as regards his self-acquired property or to maintenance. The Appellant alleged that upon the death of her husband who (as she averred) like his ancestors had lived under and was governed by the Bengal School of the Hindu law, she and the other widow, as his co-heiresses, became entitled to the Jamboni Raj, which was the ancestral estate, and also to his self-acquired properties. It was further averred that the second Defendant (the other widow) had granted to the first Defendant a release and declaration, which transaction was characterised as fraudulent and collusive. The plaint (and by consequence all the proceedings) were greatly inflated and complicated by a number of questions, now extinct, which it would be superfluous to rehearse.

Written statements were filed on be-

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half of both Defendants. The first Defendant Iswar Chunder claimed the Raj as heir under the Mitakshara law and also the long-standing custom and usage of the family. He explained that his ancestors were originally inhabitants of Dharanuggur in the North-West Provinces, where the Mitakshara Shastra was in force; that they came from there and took possession of the lands now in question; that since then and to the present time their family ceremonies have been performed according to the Mitakshara; and that the right of inheritance is determined according to it.

As to the second Defendant (*i.e.*, the other widow) Iswar Chunder alleged that the release granted by her was executed in good faith and because she knew and thereby acknowledged that the Mitakshara law governed the succession that any rights she had were vested in the first Defendant, and could not be held to be acquired by the Plaintiff. As regards the four mouzahs the first Defendant (Iswar) alleged that the right to them had been acquired by the Court of Wards (when the Raja Purna was under that Court in minority) out of the profits of the Raj Jamboni and must be "taken as a . . . part of the joint original impartible estate."

A written statement was also filed for the second Defendant, the other widow, in which she made no claim adverse to the first Defendant and took his side in denying the Appellant's claim. Her fourth and sixth statements set out a further obstacle in the Appellant's way strongly insisted on in argument by the Respondent, the representative of the first Defendant but which only arises

for consideration if the Dayabhaga law applies:—

"4. This Defendant further submits, that if the Court holds that the family of this Defendant's husband was governed by the Dayabhaga Shastra, this Defendant, by reason of her being the *pat-mohishi* and of the zemindari being impartible, is alone entitled to get the said zemindari, etc., and the Plaintiff cannot acquire any right therein, and the said right cannot at all be taken to have been extinguished in connection with or in favour of the Plaintiff, and no right can accrue to the Plaintiff."

"6. This Defendant is the elder wife, *i.e.*, the first married *pat-mohishi* of her husband and she is older than the Plaintiff. The statement made by the Plaintiff in para. 12 of the plaint that she is older than this Defendant, is not true."

Her fifth statement also must be noted, having regard to eventualities:

"5. If the Court holds that the moveable and immoveable properties mentioned in Sch. C., were the self-acquired properties of my late husband, and that the Plaintiff and this Defendant both were our husband's heirs with regard to the same, this Defendant submits that this Defendant is entitled to get an eight annas share of the said properties and the said right cannot be taken to have been extinguished or relinquished in favour of the Plaintiff by the deed of release mentioned above executed by this Defendant. Accordingly, the Plaintiff's claim with regard to the 16 annas of the same, is wholly improper."

Various issues were settled and tried; but of these the fourth (as to the law governing the succession), the ninth (as to the effect of the Defendant widow's release), and the eleventh, whether the four mouzahs were self-acquired estate the only questions argued under the present appeal.

After much procedure, the examination of many witnesses and the production of several documents, the first Subordinate Judge of Midnapore on 26th February 1895 gave judgment. He held that the Dayabhaga law governed the succession

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and ordered that the Plaintiff (Appellant) do recover possession of all the properties in suit. This order was qualified by a declaration (not satisfactory to the Appellant and not very clearly explainable) that instead of being full owner the Plaintiff should recover possession as manager. Against this decree appeals were taken both by the present Respondents (for Iswar was now dead) and the present Appellant; and on 17th May 1897 the High Court at Fort William set aside the decision and dismissed the suit as regards possession of moveables and immoveables, and ordered an allowance of maintenance. The main ground of judgment was that the Mitakshara law governed the succession; and this superseded the question as to the rights of the Appellant in relation to the other widow, even assuming the Dayabhaga to prevail. The question of the four mouzabs is not discussed in the judgment.

In comparing the judgment of the Subordinate Judge, which was in favour of the Appellant, on the main question between the Mitakshara and the Dayabhaga with the judgment of the High Court, which was for the Respondents, their Lordships take note of two facts. The first and most important is that the Subordinate Judge fell into the grave error of holding that the origin of this family was unknown and its original place of residence unascertainable; that there was no evidence worthy of reliance to show whether they were originally governed by the Mitakshara or by the Dayabhaga; and, "that being so, the Defendant is not entitled to the benefit of the presumption laid down in *Sooren-*

*dro Nath Roy v. Mussumut Hiroo Monee Burmonee* (1) and in the other cases cited by the defence." So far are the facts on this matter (which the High Court has justly treated as of primary importance) from being uncertain, that it was not disputed at their Lordships' Bar that this family came originally from the North-West, where the Mitakshara undoubtedly prevailed, and that the only question was whether it was not to be inferred from the facts that they had divested themselves of their original customs and adopted the rule of the Dayabhaga? The other criticism to be made on the judgment of the Subordinate Judge is that, holding himself to be thus exempt from any presumption in favour of the Respondents, he has not merely based himself upon testimony which has been handled with great caution by the party whom it purports to support, but he has accepted as credible and rejected as incredible large numbers of witnesses with a freedom and on grounds which would have commanded more confidence if the learned Judge had had the advantage of seeing the witnesses. As a matter of fact the great majority of the witnesses were examined before his predecessor and very few before himself. Accordingly the High Court have felt justified in forming their own conclusions as to the effect and quality of the evidence; and after careful examination their Lordships see no ground for disputing the soundness of their appreciations. This necessarily goes far towards deciding the case, once the broader conditions of the controversy are fully realised.

The question of succession now in

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dispute depends upon the custom of the family; and in families observing the Mitakahara Shastra the brother and not the widow of a childless man takes an ancestral estate. The tenacity of such customs, even under the strain of migration, has been repeatedly recognised by the law in questions such as the present. Accordingly the question being primarily one of personal as distinguished from geographical custom, it is of the first importance to inquire of the origin of the family. Now, amid a mass of contradiction on almost everything else, it is undisputed that these people came from the North-West. Tradition names Dharanaggur as their original home; but the precise place is of no moment, for it is not suggested that in any place in the North-West does the Dayabhaga prevail. The presumption therefore is that the family continued to observe the Mitakshara and it remains to see whether the contrary has been proved.

The occasions which afford the most direct evidence are successions. Now, with the doubtful exception of the succession of Gobindmomi about a century ago, the Appellant has no such case to point to, while as regards Gobindmomi it is not satisfactorily proved that her competitor had any genuine right such as would have brought him under the Mitakshara rules of succession. On the other hand, in at least two more recent instances, widows have been passed over in favour of brothers, where none but conjectural explanations can be offered, consistent with the Dayabhaga rule.

When, turning from successions, regard is had to the evidence relating to ceremonies at marriages, births and *shraddhs*,

it cannot be disputed that there is a strong body of affirmative evidence in support of the continuance and against the relinquishment of the Mitakshara in this family. The High Court, in a careful analysis, have stated their reasons for preferring the Respondents' evidences to that adduced for the Appellant, and the able arguments at their Lordships' Bar have satisfied them of the soundness of this conclusion. Nor do their Lordships see that the most abundant caution need restrain them from accepting as authentic the several documents which have been relied on by the High Court and the import of which is unmistakable.

The learned counsel for the Appellant placed before their Lordships an elaborate argumentative demonstration of the history and geographical application of the name Orissa. The bearing of this upon the present question is only that the estate in dispute being (according to the argument) in a district where the Dayabhaga prevailed, the family would be more likely to fall in with the customs of their neighbours and adopt the Dayabhaga. Their Lordships, satisfied on the evidence bearing directly on the family in question, do not require to pronounce on a matter relating to a district on which they have not complete materials and their opinion on which might needlessly affect other interests.

On the question of the four *mouzahs* their Lordships regret that they have not the assistance of the High Court's judgment; but they find themselves unable to reject the Appellant's claim. The property in dispute was bought for Purna Chunder by the Court of Wards, out of savings

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of the zemindari and must be considered as Purna Chunder's savings. All that the Respondents can point to as indicating Purna's intention to deal with them as part of the Raj is that the rents were collected by the same servant, and the collection papers kept with the papers of the Raj. Their Lordships do not find in these meagre facts adequate ground for holding that the Raja intended to incorporate the four mouzahs with the ancestral estate for the purposes of his succession. The four mouzahs must therefore follow the rule of the Mitakshara law as to self-acquired property.

The argument addressed to their Lordships about the four mouzahs was confined to the question whether they were self-acquired, and it might perhaps be inferred that the success of the Appellant on that issue involved her right to possession of the mouzahs. But, in face of the claim made by the Respondent Rani Radha Kumari Debi in the 5th article of her written statement, their Lordships deem it well, before reporting to His Majesty, to give the parties an opportunity, if they so desire, of being heard on the disposal of the four mouzahs, on the footing that they are held by their Lordships to be self-acquired property, and on the High Court's order for maintenance, which was made on a footing now displaced.

[*The following addendum to their Lordships' judgment was delivered by Lord Robertson on the 19th March 1902.*]

THEIR LORDSHIPS have further considered this appeal with reference to the points raised in the last paragraph of

their judgment of the 22nd February and the observations of counsel thereon on the 1st March, and they will humbly advise His Majesty that, subject to the recommendation below, the decree of the High Court of the 17th May 1897 ought to be affirmed and this appeal dismissed. And they will further humbly recommend His Majesty to make a declaration that the four mouzahs in question are self-acquired property and to remit the suit to the High Court with directions to try or cause to be tried any issues which may be raised by the parties to the suit or any one or more of them for the purpose of having determined any question consequent on the declaration, more especially as to the right to the four mouzahs or to maintenance out of the impartible estate

The Appellant will pay the first Respondent (who alone appeared in England) three-fourth parts of his costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Miller, Smith and Bell* for the Respondent

C. W. A.

#### [APPEAL FROM ORIGINAL JURISDICTION.]

No. 27 of 1901.

MACLEAN, C. J.	}	J. BOISOGOMOFF,
BANERJEE, J.		Plaintiff, Appellant,
HILL, J.		<i>v.</i>
1902. 4, March.		NAHAPIET JUTE COMPANY, LIMITED,
		Defendants,
		Respondents.

*Damages—Inferiority of quality, proof of  
—Examination of samples from portions of*

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*bulk—Method of ascertaining damages—Amount of damages where inferiority in jute.*

*In a suit for damages by a purchaser of goods on the ground of their being below the guaranteed standard of quality, it is sufficient if the Plaintiff proves the inferiority by an examination of samples taken from different portions of the bulk. He is not bound to examine the entire bulk.*

*In a case of this class in respect of jute where the damages recoverable for inferiority of quality is established and recognised in the trade as being 2 annas per maund for a deficiency of 5 per cent. of Hessian Warp, it is not necessary for the Plaintiff to show how he has dealt with the goods delivered to him and whether he has suffered any and what loss by reason of the goods being inferior in quality.*

This was a suit for the recovery of damages for breach of warranty in respect of certain bales of jute sold and delivered by the Defendant Company to the Plaintiff. The Plaintiff alleged that in September and October 1900 he purchased from the Defendant Company three lots of jute containing in the aggregate 7,000 *kutchas* bales, that according to the contracts the jute so purchased was to be of the standard quality of the mark known as T. N., which is said to contain 40 per cent. of Hessian Warp, and that of the 7,000 bales delivered in November 1900, 6,000 bales delivered *ex flats* "Gorai" and "Khargosh" were found to be not of the contract quality. They thereupon complained to the Defendant Company and asked them to examine the same. The Defendant Company then proposed an

arbitration by the Bengal Chamber of Commerce.

To this the Plaintiff replied as follows :—

"In terms of the contract no mention is made of the Bengal Chamber of Commerce, we will therefore hold a private survey. Kindly therefore mention the name of your surveyor and we shall mention ours and finish this matter tomorrow."

Thereupon the Defendant Company wrote as follows :—

"As the contracts in question do not provide for any form of survey, we consider we made you a very fair offer when we proposed to refer the question as to whether the jute is equal to the standard of the mark to the arbitration of the Bengal Chamber of Commerce.

"As you have declined our offer, we now withdraw it, and we refuse to consent to any private survey of the jute in question as we are satisfied that your complaints are entirely groundless. You offer no reason for refusing to refer the matter to the Chamber of Commerce, and we can only infer that you have none, and that the real reason for your complaint is that the market has dropped since the contracts were entered into."

To which the Plaintiff replied as follows :—

"Your statement that you infer that we have no ground for complaint and that the real reason is that the market has declined is insulting and untrue and perfectly uncalled for.

In our letter of the 22nd, we stated our ground for complaint that the quality was not to the standard of the mark. Our reason for objecting to refer it to

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the arbitration of the Bengal Chamber of Commerce is that their surveys are mostly if not all on contracts with mill guarantees of percentage of Hessian Warp and Weft, and that many of the surveyors on their list do not know the standard of your marks. We therefore consider it desirable that surveyors should be appointed who know the standard of the mark. Your declining to examine or survey any jute landed by us is we hold unreasonable, as until the jute is landed how could we possibly examine it? The question, however, of how, when and where a survey should take place, is one for the surveyors, and not for the parties to the survey to decide. As you positively now refuse to agree to a survey of any kind we give you notice, that we have asked Mr. Crichton of Sinclair Murray & Co., and Mr. Duncan of the Budge-Budge to examine the jute and grant survey reports of both the parcels under dispute and should they state that, as we contend, the jute is inferior and state that we are entitled to an allowance and should you fail to pay same on demand we will without further notice instruct our solicitor to recover the amount by aid of the Court. As soon as the surveyors appoint the time at which they will examine the jute, we will inform you that you may, should you wish, have a representative present at the survey."

Thereupon Mr. Duncan, a buyer of jute for the Budge-Budge Mills, and Mr. Crichton, a member of the firm of Messrs. Sinclair Murray & Co., jute brokers, were requested by the Plaintiff to examine and report on the jute, and on notice of the fact being given to the

Defendant Company, Mr. Wallace, the manager of the Howrah Jute Mills, and Mr. Brown a partner of Messrs. Landale and Morgan, jute brokers, were deputed by the latter to "watch" the survey on their behalf "without prejudice to our rights." In the presence of these two gentlemen, Messrs. Duncan and Crichton took out 12 bales from the bulk, some from the flat "Khargosh" and some from the flat "Sita" into which the bales had been transferred from the flat "Gorai." They opened these bales and examined a portion of each, not the entire bale.

Upon such examination Messrs. Duncan and Crichton were of opinion that the Hessian Warp in the bales would not be more than 25 per cent. and Mr. Duncan, in order to be more sure, sent another ten bales of the jute, taken half from one flat and half from another to the Budge Budge Mills for examination. The mill selection was made at the Mills under the supervision of one Mr. Pullin, the jute godown superintendent, and according to him the quality of Hessian Warp did not amount to more than 25 per cent. A report was thereupon made by Messrs. Crichton and Duncan in which they estimated the loss sustained by the Plaintiff, at the sum of Rs. 7,875 being an allowance of two annas per maund for every 5 per cent. deficiency in Hessian Warp. There was evidence that this was the allowance usually made by surveyors.

The defence taken by the Defendant Company in their written statement was mainly a denial that the jute was not of the standard quality and that they were not bound by the opinion of Messrs.

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Duncan and Crichton, which was in fact erroneous.

The suit came on before Stanley, J., who, on the 20th June 1901, delivered the following judgment:—

STANLEY, J.—(After stating the facts) This is shortly the case of the Plaintiff. Neither the Plaintiff nor any one in his employment has been examined and not a tittle of evidence has been given on the part of the Plaintiff to prove what was the quality of the bulk of the consignments, that is, the 5,978 bales which form the balance of the 6,000 bales. I am told that I should judge of the bulk by the sample on the principle, ~~I presume~~, *ex uno disce omnes*.

Assuming that the evidence satisfied me that the bales which were examined were inferior to the standard quality of the mark, should I be justified in arriving at the conclusion that the remaining bales were all likewise inferior when the Plaintiff who, so far as appears, has had the opportunity of examining, if he has not actually examined the remaining bales, has adduced no evidence to prove the quality of them? I know of no case in which, under similar circumstances, a Court has condemned the bulk of a large consignment of goods as of inferior quality on proof of the inferiority of a sample. In the case of breach of warranty of quality, *prima facie* the measure of damages is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty. This is the principle upon which damages would be measured in the present case if there was a breach of the warranty.

What data have been furnished to me by the Plaintiff for estimating the value of the bales 5,978 in number which were not examined by the surveyors? None whatever. I am asked to accept the testimony of the surveyors in regard to the bales which were examined as satisfactory evidence of the quality of the jute which was not examined and to say that I am satisfied that the jute in the unopened bales corresponded in quality with the jute in the bales which were opened. This seems to me to be a somewhat arbitrary mode of estimating damages. No doubt there may be cases in which the Court would be justified in drawing an inference as to the quality of the bulk from the quality of a sample, as for example in a case in which the Plaintiff had no opportunity of examining and testing the bulk. Here however such is not shown to be the case. The Plaintiff does a large export trade. If the jute in question was exported, then for the purpose of export it was necessary for him according to the evidence to re-bale the jute, opening all the bales and re-assorting the jute. If this had been done, there would not have been much difficulty, I would say, in ascertaining approximately at least the amount of Hessian Warp in the consignment. As Sir Allen Arthur in his evidence said, there would be no difficulty in such case in saying what percentage of Hessians there was in each assortment of the consignments and the Plaintiff could have arrived at some estimate of his loss if he had suffered any.

If the jute was not exported but was used by the Plaintiff in manufacture, he would, one would expect, be in a position



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to adduce some evidence to satisfy the Court as to its quality. If it was sold, then the Plaintiff should, I would think, have been able to tell the Court the classification under which it was sold and what percentage of Hessian Warp was guaranteed. If the Plaintiff had sold the jute and only guaranteed that it contained 25 per cent. of Hessian Warp, I am disposed to think that I should have heard of this. As matters stand, not a shred of evidence in regard to the unopened bales has been adduced by the Plaintiff. The only evidence which I have bearing upon the quality of the jute in these bales, independently of the evidence which was given in regard to the examined bales, is that of Mr. Nahapiet, the manager at Naraingunge of the Jute Department of the Defendant Company. He has been in the jute trade for fifteen years and he superintends the assortment of and the pressing and baling of the Company's jute. Before the bales, he said, are pressed, he makes an examination of the jute from *khata* to *khata* (batch of coolies engaged in sorting) and on passing the qualities as correct the jute is taken to the press-house and baled. Until the jute has been examined and passed by him the jute is not pressed. In answer to a question in cross-examination Mr. Nahapiet admitted that it was possible, but very unlikely, that he would make a mistake and pass a bale which did not contain the guaranteed percentage of the Hessian Warp. If the consignments by the flats "Khargosh" and "Gorai" had been tested properly, he says that the bales would have given between 47 to 55 per cent. Hessian. The assortment, he says,

was carefully done to keep up the reputation of the mark. This is very striking evidence. No doubt the Plaintiff's counsel are justified in pointing out that Mr. Nahapiet is interested in this litigation; he is the person who is responsible for any faulty assortment of jute and if there was faulty assortment in this case, he would be responsible for the loss. I have no reason, however, to think that this consideration has unduly weighed with Mr. Nahapiet in giving his evidence. He appeared to me to give his testimony without regard to any personal consideration of this kind and to be speaking what he believed to be the truth. It may be that he has somewhat overstated the percentage of Hessian Warp in the bales but I am quite satisfied that he did not wilfully overstate it. If his evidence is trustworthy, it is impossible to believe that the Plaintiff has any real grievance. I believe that Mr. Nahapiet's evidence is reliable, and taking it in conjunction with the evidence of Mr. Wallace I have arrived at the conclusion that as regards the bulk of the consignment the jute was not inferior to the standard quality of the mark.

(His Lordship then dealt with the evidence and continued as follows):— It appears to me that there was an initial error committed by both Mr. Crichton and Mr. Duncan in the test which they made. When they found that the hanks of jute which they examined, were as they thought inferior to the quality of the mark, it was surely their duty to examine all the jute in the opened bales. *Non constat* but that the part in each bale which was left unexamined contained sufficient Hessian

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Warp to make up for any deficiency of this Warp in the portions which they examined. They had no right to assume that the residue of the jute in the opened bales was of similar quality to the portions which they examined, particularly when their examination was to be a test not merely of the opened bales but of the entire consignments.

It seems to me clear, as Mr. Wallace has pointed out, that these gentlemen, when they found portions of a bale inferior, ought to have examined the entire of the bale.

They or at least Mr. Crichton appear to have been too ready to arrive at a conclusion. Mr. Duncan, no doubt, was more cautious, seeing that he determined to have a mill selection made. To make himself more sure, as he says, but according to Mr. Crichton, in order to see the jute "in his own light," he made up his mind to have a mill selection taken. Mr. Duncan is a buyer of jute for the Budge-Budge Mills and has been 4 years in Calcutta; before he came to Calcutta he was for 25 years engaged in the jute business in Dundee but he had no experience, he says, in surveying jute in Dundee.

Whatever may be the views and ideas of Mr. Duncan as regards the requisites necessary to bring jute within the classification of Hessian Warp, it is not unnatural to suppose that these views and ideas will be shared by the employers in the jute department of the Budge-Budge Mills, and therefore I am not disposed to attach so much importance to the mill selection which was so made, as I otherwise should. If bales of jute had been sent for selection to another

mill than the mill with which Mr. Duncan is connected, the test would have been, in my opinion, more satisfactory. I am disposed to think, from the evidence, that Mr. Duncan is perhaps a little hypercritical and exacting in the matter of jute classification and that he looks for a colour in Hessian Warp which is not according to the true test requisite for its classification as Hessian. He admits that Hessian is difficult to define, he defines it as being good coloured, strong and with straight fibre, not broken fibre; the colour, he says, should be white, and gloss indicated strength.

Mr. Crichton said that Hessian was light in colour and strong, and that Sacking Warp is inferior in colour but strong. Colour seems to be an important criterion of superiority but where and what the dividing colour between Hessian Warp and Sacking Warp is we have not been told.

Mr. Nahapiet said that Hessian Warp must be long, glossy and golden coloured, with strong fibres. Mr. Wallace said that the jute which he examined was light in colour and not as alleged by Mr. Crichton, grey in colour. Mr. Crichton said that the jute was deficient in strength and colour, that it was grey and heavy rooted.

Mr. Wallace struck me as being a person who had experience in and sound knowledge of jute. I was favourably impressed by his evidence and the manner in which he gave it. In a matter of this kind there is room for exaggeration, and I cannot but think that if there were defects in the jute in question, these defects have been exaggerated by the witnesses for the Plaintiff. I do not

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say wilfully exaggerated but there exists in the case of expert witnesses a tendency to support the view which is favourable to the party who employs them, so that it is difficult to get from them an independent opinion.

A high authority once said "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence." I do not say that in the present case, I have acted on the principle so stated. I may observe also that I do not attach any importance to the suggestions made by the Defendants' counsel that Mr. Crichton's firm would be willing and are desirous to take over the Plaintiff's agency and therefore that Mr. Crichton is not an important witness.

I decide this case solely upon the evidence which has been laid before me as to the quality of the jute. The Plaintiff has failed to satisfy me that the jute was inferior to the standard quality of the mark, the burden of proving which, lay upon him.

The Plaintiff appealed.

Mr. Dunne and Mr. Sinha for the Appellant.

The Advocate-General (The Hon'ble J. T. Woodroffe) and Mr. Garth for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is a suit to recover damages for an alleged breach of warranty as to the quality of 6,000 *kutchu* bales of jute purchased by the Plaintiff from the Defendants. There is no dispute as to the contracts which are

set out in the plaint: the only dispute is as to the quality of the goods. The jute was to be of the standard quality of a certain mark,  $\frac{T.S.N.}{2}$ , and this, admittedly, means that each bale was to contain 40 per cent. of what is known as Hessian Warp. The sole question is whether the bales delivered did contain that percentage of Hessian Warp, and this is a question of fact. The jute was delivered by the Defendants, and immediately after delivery, the Plaintiff complained that the jute was not up to the standard quality of the mark, and asked the Defendants to send down a representative to inspect it. Some correspondence then ensued: the Plaintiff suggesting a survey and the Defendants proposing an arbitration by the Bengal Chamber of Commerce. The Plaintiff declined the latter offer as he was entitled to do, and I regret that the Defendants' agents should have thought it necessary to make the imputation they did against the Plaintiff in the letter of the 27th November 1900. The price paid for the whole of the jute, including 1,000 bales, as to which there is no dispute, was about 1,50,000 rupees. The Plaintiff then appointed two surveyors to examine the jute, and the Defendants sent down two gentlemen to "watch" the proceedings on their behalf. I will deal in a moment with what took place on this survey and subsequently.

Before examining the evidence I desire to deal with two points which are prominently dealt with in the judgment of Mr. Justice Stanley. If by his observation the learned Judge intended to convey that, before recovering damages in a case of this class, the Plaintiff was bound to

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examine each of the 6,000 bales of jute, and, as the result of such examination, was bound to show that in each bale the jute fell short of the requisite standard, I most respectfully differ from him. If such were the usage, it would, I fear, impose a serious clog upon commercial transactions. But it is clear from the evidence that this is not so. Mr. Duncan, one of the Plaintiff's witnesses, says:—"I examined 12 bales out of the bulk which was in the flats there. It is usual to examine certain lots only in making a survey. To take a part of the bulk, to examine a part and make a report on that part, we are supposed to take 10 or 12 bales, a sufficient quantity to form a judgment as to what the bulk is" and further on he says: "In order to find the average of a whole consignment it is not usual to examine the whole consignment. We arrive at an average for the consignment, we take a portion for selection. The average of the consignment is taken to be that of the portion selected. We took the quantity which we considered would give us a representative quantity of the bulk," and Mr. Wallace, the Defendants' witness on being asked "Q.—Do you consider that a list of 12 bales is sufficient for a cargo of 10,000?" says, "Picked out here and there in the bulk I should think it was. Selected as these were I should think it was so."

The other point is that the Plaintiff ought to have shewn how he had dealt with the jute which was delivered, and whether he had suffered any and what loss by reason of the jute not being up to the warranted standard. There would have been much force in this contention

had it not been that, according to the evidence the measure of damages, or, perhaps, I should say the method of ascertaining the damages, in a case of this class, appears to be established and recognised in the trade. It would appear that the buyer is entitled in respect of the inferiority alleged in this case to an allowance of 6 annas per maund, the rule being to allow 2 annas per maund for a deficiency of 5 per cent. of Hessian Warp. Both Mr. Duncan and Mr. Crichton say so, and Sir Allan Arthur who is experienced in these matters, and who was called for the Defendants, appears to be of the same opinion. Mr. Crichton speaks of it as a custom in the trade. Moreover, we have heard no argument from the Respondents' counsel that, if the Plaintiff is entitled to damages, the damages as regards the quality of the jute have been assessed upon a wrong basis.

Mr. Justice Stanley dismissed the suit holding that the Plaintiff had failed to satisfy him that the jute was not up to the warranted standard, hence the present appeal, and it now becomes necessary to consider the evidence on this point, which is the real issue in the case.

Mr. Crichton and Mr. Duncan surveyed 12 bales out of the consignment on board one of the flats, and the survey lasted quite an hour. I agree with the Court below that, as the evidence of these gentlemen is that of experts, we must regard it with every care, though apparently, from the evidence of Nahapiet Seth Nahapiet, one of the Defendants' witnesses, "It is not the least difficult to distinguish between the two classes of jute, that is between Hessian and Sacking

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Warps." And I also agree with Mr. Justice Stanley that no real importance, detracting from the value of Mr. Crichton's evidence, ought to be attached to the circumstances that his firm was desirous of taking over the Plaintiff's agency.

Now Mr. Crichton's evidence is precise that the bales which he examined were not up to the standard quality, and that they contained only 20 or 25 per cent. of Hessian Warp. He tells us how the bales were opened, what he and Mr. Duncan did, and how the jute was examined and he points out the difference between Hessian Warp, Sacking Warp and cuttings. Nor do I think that in material points he has been shaken by cross-examination.

It was urged for the Respondents that the survey was defective because only a portion of the jute out of the bales which were opened was examined and that the surveyors could not have arrived at a just conclusion as to the percentage of Hessian in each bale without examining the whole, but Mr. Crichton says they can always judge of a bale by opening half the hanks, and that they can do so accurately; and this view is confirmed by Mr. Wallace, one of the Defendants' witnesses who says:—"from one-third to about half of each bale was opened. Probably more in one or two. I could form an opinion as to whether that jute was up to standard quality or not." So that it would appear to be common ground between the witnesses on each side that enough of each bale was opened to enable the surveyors to form an opinion as to whether the jute was up to standard quality or not.

Mr. Duncan, who also surveyed these 12 bales, says that they examined the quality carefully, and that he did not consider that it was up to the standard quality of the mark, but in order to make sure of his opinion, he determined to have a mill selection taken. His opinion, on the survey, was, that the jute in the bales which were examined was, substantially, below the standard quality of the mark by some 15 per cent.

With the view to this mill selection, which is, apparently, a much more searching examination than that effected by a survey, ten bales were selected from the bulk of the consignment, five from one flat and five from another, and these were sent to the Budge-Budge Jute Mills, with a note to Mr. Batchelor, who was the manager. Mr. Duncan is an assistant in the firm of Andrew Yule and Company, who were the managing agents of the Budge-Budge Jute Mills.

It has been contended for the Respondents that it has not been clearly established that the ten bales which were subjected to the mill selection, formed part of the consignment to the Plaintiff; but I think that, upon the evidence it is clearly made out that the ten bales did form part of that consignment, and the learned Judge's observations on this part of the case proceed upon that footing. Mr. Pullin, who is employed in the Budge-Budge Mills and who tells us how mill selections of jute are effected and who examined the jute in this case on the 4th December, and superintended the selections, tells us the result of the selection, a result which shows that the bales examined were very far below the standard quality of the mark. No valid reason is

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shewn for impeaching Mr. Pullin's evidence on this point, nor do I think that the fact that the selection was made at the Budge-Budge Mills is sufficient ground for saying that the selection was not a fair or an honest one. It is true that no representative of the Defendant Company was present at the selection, but this may be attributed to the circumstance that they had previously declined to be parties to the survey.

As against this evidence we have that of Mr. Wallace, who is a gentleman of experience in the jute trade, and who, it will be remembered, was sent down with Mr. Brown, not to survey, but to watch the survey to be made by Messrs. Crichton and Duncan. He says, decidedly, that there was 40 per cent. of Hessian Warp in the bales which were opened and this would bring the bales up to the standard quality of the mark.

I gather from his evidence that he did not by any means make so careful an examination as Messrs. Crichton and Duncan. He does not appear to have handled the jute but to have stood about and looked on whilst Messrs. Crichton and Duncan were examining it. He, in fact, says, it is not necessary to handle it, though the witness Nahapiet Seth Nahapiet said, "of course, we always handle it to see that it is all right," a statement from which he subsequently resiled.

We have it, then, that out of the bulk, 22 bales were examined, 12 by way of survey and 10 by way of mill selection, with a result showing as deposed to by Messrs. Crichton and Duncan that the jute was far below the standard quality of the mark, the deficiency in the Hessian Warp being at least 15 per cent.

As against this, we have only the evidence of Mr. Wallace, whose examination of the 12 bales on the flat was of the somewhat superficial nature I have described. He says the jute was up to the standard quality. No doubt there is the evidence of Nahapiet Seth, the Manager of the Mill Jute Department of the Defendant Company. He tells us how the business of the Company is carried on at Naraingunge. The Company appear to have sent out about 35,000 bales with the mark  $\frac{T. S. N.}{2}$  in the season of 1900, and he says, speaking generally that bales of this mark had more than 40 per cent. of Hessian when they were taken out of the godown and put into the flat. It appears from his evidence that they received complaints from the Budge-Budge Company about certain jute they had sold to that Company and that the jute complained of was exactly the same class of jute as that sold to the Plaintiff, and that they had made an allowance in respect of that complaint. I do not think that this gentleman's evidence as to the quality of the jute generally can prevail as against the evidence given as to the quality of the jute in the specific consignment to the Plaintiff, or can or ought to prevail as against the direct evidence in this case as to the result of the examination of the 22 bales, and especially as regards the ten bales which were subjected to the mill selection. I have no desire to make any imputation upon the Company in this matter. I have no doubt that every care was taken in this case by them to see that the jute at their depot at Naraingunge was up to the standard quality but it is not always

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to support the presumption that this was a common gaming house and kept for that purpose and that being so, we think that the conviction in the present case must stand and the rule discharged and we direct accordingly.

In the next case (Rule No. 1042) connected with the conviction of Amrit Singh, the owner of the house, it appears that he has been convicted in a separate trial—that trial being held immediately after the trial of the persons whose case we have just disposed of and in that trial he has been convicted of keeping a common gaming house.

The defence was that it was the accused's own private house and not a common gaming house within the meaning of the Act.

The question for determination is whether there is sufficient evidence in this case to show that the house was a common gaming house. The evidence that has been adduced tends to show that a large body of persons, some 29 in number, of different ages and social standing, some Hindus, some Mahomedans who, in the usual course, would not be fit companions or associates of the accused, were found assembled in his house at a late hour of the night and at the same time and place, pice and cowries which, the Magistrate says, in shape indicated that they were used for gambling purposes, were discovered. No doubt, as we have already had occasion to point out, coins and cowries are not necessarily implements of gambling but they become "instruments of gaming" if they are found to be used for that purpose, and in this case also we think that there is sufficient to show, from the cir-

cumstances under which the articles were found, that they were being used at the time for the purpose of gaming. That being so, the presumption under sec. 6 of the Act arises and instead of being rebutted by the evidence adduced by the accused we think it is strengthened by the facts and circumstances under which the different people were found in the house. It seems to us to be quite clear that a house cannot be considered as exclusively private in its character which is used for the purposes of gaming by a large party of people of different social position and standing who would not ordinarily be the private friends or guests of the owner. We have no doubt that the house in this case comes within the meaning of the Act, and we think that the conviction is right and that this rule also must be discharged.

H. P. C.

*Rule discharged.***CIVIL APPELLATE JURISDICTION.**

APPEAL FROM ORIGINAL SIDE

No. 23 of 1900.

MACLEAN, C. J.  
PRINSEP, J.  
HILL, J.  
1901.  
6, March.

In the goods of  
MULKA MUKHADARAH  
OSMAH NAWAB PADSHA  
MEHAL SAHEBA  
(known as KHAS  
MEHAL), deceased,  
PRINCE KURATULAIN  
MIRZA and NAWAB  
DILBUND BEGUM  
v.  
THE ADMINISTRATOR-  
GENERAL OF BENGAL

*Will of a Mahomedan—Rules applicable to the execution thereof—Undue influence—Indian Succession Act (X of 1865), sec. 48—Will of a purdanashin lady—Onus probandi,*

## KHAS MEHAL v. THE ADMINISTRATOR-GENERAL OF BENGAL.

*When dealing with the case of a Will or a deed executed by a purdanashin lady, a particular and peculiar onus rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing, and was thoroughly and fully acquainted with the terms of the document she was executing.*

*The presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a purdanashin lady as in the case of other persons.*

*As to what constitutes undue influence in this country, a useful guide is afforded by sec. 48 of the Indian Succession Act. It is true that that section does not apply to the Wills of Mahomedans, but for all that it is a useful guide as to what does or does not constitute undue influence.*

The facts of the case are fully stated in the judgment.

*The Advocate-General (Hon'ble Mr. J. T. Woodroffe) and Mr. B. C. Mitter for the Appellants.*

*Sir Griffith Evans and Mr. Sinha for the Respondent.*

THE JUDGMENTS OF THE COURT were as follows :—

MACLEAN, C. J.—This is an appeal from a decision of Mr. Justice Sale, dated the 2nd of July last, under which he granted probate to the Administrator-General of Bengal of the Will of the widow of the late King of Oudh, dated the 30th of June 1893. The lady was generally known as Khas Mehal. She died on the 31st of March 1894, and on the 14th of May 1894, an application

was made by the Administrator-General of Bengal, who was appointed executor of the Will for probate.

The grant of probate was resisted by Prince Kuratulain Mirza, and Nawab Dilbund Begum, who are the son and daughter, respectively, of the testator's late son, Prince Hamid Ali Mirza Wali Ahmed Bahadur, and who have been found in these proceedings to be amongst the testatrix's heirs. Probate was resisted on the ground that the testatrix had not sufficient mental capacity at the date of the execution of the Will to understand what she was doing, and the objectors further say that, if she did execute the document, she was induced to do so by the undue influence of one Nawab Peara Saheb, who was a somewhat distant relative of the testatrix, and who, no doubt, had been living, as one of her household in her house and looking after her business affairs for many years. Under the Will, which is challenged, though, no doubt, the testatrix confirmed a *safinamah* in his favour, and gave him the control of a sum of Rs. 10,000 for religious ceremonies and sending her remains to *karbela*, and other purposes, and also gave him the control of the income of a further sum of Rs. 10,000, for the purpose of having the *Koran* read over her remains, and other objects, Nawab Peara Saheb took no interest.

In dealing with the question of undue influence this is not an unimportant feature. Although, apparently, the execution of the Will was originally challenged by the objectors, it was admitted, when the case was in the Court below, that the testatrix had actually executed it; and



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the only questions, therefore, which remain for our consideration are, whether she was of sufficient mental capacity at the date of the execution of the Will to understand, and whether or not she did thoroughly understand what she was doing, and whether she was induced by the undue influence of Peara Sahab, to execute it. The case of the objectors is set out in the 16th paragraph of their affidavit filed on the 31st of May 1894. I will read it:—

"I further say that as time went on she became feebler in body and mind and for about a year before her death her state of body and mind was such that she was not only incapable of attending to any business affairs of hers but could not bear being spoken to by anybody and would only utter from time to time a few incoherent sentences, besides making signs asking for food and drink and the like; and I assert that at the time when she was alleged to have made a Will she was from the state of her body and mind incapable of executing a Will or any other legal document or of understanding the provisions of any legal document whatsoever and that if it is shown that she in fact did execute any document in the nature of a Will I further assert that she was then suffering from the illness of which she subsequently died and that she was not a free agent in executing the said alleged Will and that the same was procured from her by the said Peara Sahab and his agents by the exercise of the undue influence and ascendancy which he (the said Peara Sahab) had acquired over her as aforesaid."

In dealing with this case, I have no

desire to impugn the proposition laid down in many cases, that, when dealing with the case of a Will, or a deed, executed by a *purdanashin* lady, a particular and peculiar onus rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing, and was thoroughly and fully acquainted with the terms of the document she was executing, and that the presumptions as to the knowledge of the executant of the contents of the document she is executing, do not equally apply in the case of a *purdanashin* lady as in the case of other persons. I have no desire to impugn any of those propositions. But, all said and done, the real question in this case, as in all cases of this description, is, was the testatrix of sufficient mental capacity to understand what she was doing, and did she understand what she was doing, and does the Will give effect to her true intentions and wishes?

Now, upon this part of the case, the evidence of Mr. Rutter, as also that of Mr. Jehandar Mirza, appears to me to be conclusive. It is perfectly true that the instructions for the Will were conveyed to Mr. Rutter, who, I may say, in passing, is a gentleman of great experience and undoubted respectability, no imputation whatever having been made against him in this matter, by Peara Sahab, and also by one Aga Hossein who is now dead, and were not conveyed direct by the testatrix herself to Mr. Rutter; but there is nothing so very exceptional, or suspicious in this, seeing the method in which *purdanashin* ladies, from the exigencies of their position, are compelled to transact their business

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affairs in this country. In pursuance of those instructions, Mr. Rutter prepared a draft Will, which was sent to the lady for her approval and returned to him approved with a letter, which is undoubtedly signed by the lady herself, appointing the 13th of June for its execution.

Much has been said by the Appellant as to the mental and intellectual capacity of the testatrix, but there cannot, I think, be any reasonable doubt that she was a woman of somewhat exceptional capacity and accomplishments, and, quite apart from the evidence of Mr. Rutter and Mr. Jehandar Mirza upon this point, the evidence of Mirza Mahomed Jelal, at p. 63 of the paper-book, in connection with Exhibit B which is a letter of the 15th of February 1894, many months after the date of the Will, as also the evidence of the objector himself Prince Kuratulain, at p. 78 of the paper-book, is absolutely inconsistent with the description of her physical and mental condition which is set out in para. 16 of the affidavit to which I have referred.

Much is made of paragraph 3 of the Will as to the objectors not being her heirs, and we are invited to infer from that, that this was put in at the instigation of Peara Saheb, and that he had some deep, but somewhat undefined motive, for its insertion. There is really no evidence to show that Peara Saheb inspired this paragraph; or that he could have had any reasonable motive for so doing, but there is evidence to show that the old lady, for I ought to have mentioned that she was an old lady of nearly 80 years of age, was angry with the objector Prince Kuratulain Mirza and

specially so by reason of the memorial of the 20th February 1893, the practical object of which was to take away from her the management of her own property and affairs. It is much more probable that it was owing to some feeling of resentment entertained by her against the objectors on this account that paragraph 3 was inserted than that it was instigated by Peara Saheb.

But be that as it may, it is clear that Mr. Rutter did attend upon the old lady on the 30th June 1893, and if his evidence is to be believed, and I see no reason for doubting it, that a translation of the Will was read over and explained to her, that she said she was satisfied with it, and that she executed the Will in his presence. As I have said, the execution is not now denied, and Mr. Rutter says, that on this day, she was in full possession of her senses, that she was always an intelligent woman and understood business matters thoroughly. No question of persolation can arise because, as I understand, the actual execution of the Will by the testatrix is not now challenged. I have no doubt whatever upon the evidence of Mr. Rutter, that the testatrix thoroughly understood what she was doing, and that the Will gives effect to her intentions and wishes.

Of the other witnesses the identifier, Hajee Ali Mirza, is unfortunately dead, as are Aga Hossein, and Meah Mantaz, and also Mr. Rutter's clerk, Tej Chunder Chatterjee.

Then the witness Syed Jehandar Mirza, who appears to us to be a witness entirely worthy of belief and an independent witness, identified the testatrix before the Sub-Registrar at her house in Sonai

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**Bazar.** He was admitted to her presence; he says that the signature and seal on the Will are hers, and that the signature was placed there in his presence. He says she was perfectly well at the time so far as he could judge; that he told her that it was her Will, and she said that she understood that it was her Will, and knew its contents; and he tells us that she was more than an ordinarily intelligent woman; she was a woman of culture. This evidence coupled with that of Mr. Rutter, is, to my mind, conclusive that the lady knew that the document she was executing was her Will, that she understood its contents and that it gave effect to her wishes.

I now pass to the question of undue influence alleged to have been exercised by Peara Saheb in connection with the instructions for and execution of the Will. As to what constitutes undue influence in this country, a useful guide is afforded to us by sec. 48 of the Indian Succession Act. It is true that does not apply to the Wills of Mahomedans, but for all that it is a useful guide as to what does or does not constitute undue influence.

No doubt the evidence shows and I have very little doubt that it was the fact that Peara Saheb was the object of the lady's affection, that she had great confidence in him, that he had for years assisted her in managing her affairs, and that she relied upon his advice and the assistance which he gave her. But there is absolutely no evidence to show, in relation to this particular Will that, either by any fraud or coercion on the part of Peara Saheb, the lady was induced to execute it, or that there was any action

or importunity on his part such as would have the effect of destroying her free agency in the matter. In this connection, I may remark, that his personal interest under the Will is a remote one, and that he would take no personal benefit whatever, if he properly discharged the obligations which were imposed upon him. To my mind the case of undue influence absolutely fails.

Upon the question of costs, I see no reason to differ from the conclusion arrived at by the Court below.

The appeal must be dismissed with costs.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM APPELLATE DECREE**

No. 1205 of 1898.

BANERJEE, J.	} MOHESH CHUNDER DAS, Plaintiff, Appellant, " v. JAHIRUDDI MOLLAH and others, Defendants, Respondents.
BRETT, J.	
1901.	
18, January.	

*Civil Procedure Code (Act XIV of 1882),  
secs 562, 566, 578, 588, cl. (28), and 591—  
Appeal—Remand order—Jurisdiction.*

*The lower Appellate Court erroneously remanded a case under sec. 562 instead of under sec. 566 which it ought to have done, and on appeal to the High Court against the decree of the lower Appellate Court passed on appeal against the decree of the first Court made after such remand, the Appellant took objections to the legality of the order of remand:*

**Held—***That such objections may now be*

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*raised although no appeal had been preferred against the order of remand previously.*

MAHARAJAH MOHESHR SINGH v. THE BENGAL GOVERNMENT (1) and SAVITRI v. RAMJI (2) referred to.

*That the word "jurisdiction" may either mean what is ordinarily understood by the term "jurisdiction" when used with reference to the local or pecuniary jurisdiction of a Court or its jurisdiction with reference to the subject-matter of a suit; or it may mean the legal authority of a Court to do certain things. The term "jurisdiction" in sec. 578, C. P. C., is used in the former sense.*

*That sec. 578 of the Civil Procedure Code is applicable in curing the defect of an erroneous order of remand if it does not affect the merits of the case.*

RAMESHR SINGH v. SHEODIN SINGH (3) and SUBBA SASTRI v. BALA CHANDRA SASTRI (4) dissented from.

BRIJ MOHAN THAKUR v. RAI UMA NATH (7) and MOHESH CHANDRA v. MADHUB CHANDRA (5) distinguished.

AMIR HASSAN v. SHEO BAKSH (6) and MALLIKARJUNA v. PATHANENI (8) referred to.

NASSUROODDEEN v. LALL MAHOMED (9), SAVITRI v. RAMJI (2) and MATRA MONDAL v. HARI MOHAN (10) referred to and approved.

(1) 7 Moo. I. A. 283 (1859).

(2) 1 L. R. 14 Bom. 232 (1889).

(3) 1 L. R. 12 All. 510 (1889).

(4) 1 L. R. 18 Mad. 421 (1894).

(5) 2 B. L. R. short notes of cases, p. 13 (1868).

(6) 1 L. R. 11 Cal. 6 (1884).

(7) 1 L. R. 20 Cal. 8 (1892).

(8) 1 L. R. 19 Mad. 479 (1896).

(9) 13 W. R. 234 (1870).

(10) 1 L. R. 17 Cal. 155 (1889).

This was an appeal preferred on the 20th of June 1898, against the decree of Babu Behari Lal Mullik, Additional Subordinate Judge of Zillah Faridpur, dated the 30th of March 1898, modifying the decree of Babu Mohim Chunder Chuckerbutty, Additional Munsif of Faridpur, dated the 31st July 1897.

The facts of the case appear from the judgment.

Dr. Asutosh Mukerjee and Babu Biraj Mohan Mazumdar for the Appellant.

Babu Sarada Churn Mitter and Babu Daswathi Sunyal for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit brought by the Plaintiff-Appellant to recover possession of certain immoveable property.

The first Court gave the Plaintiff a decree. On appeal by the Defendant No 1 the lower Appellate Court held that the first Court's judgment was based upon an admission of the Defendant which could be explained if a certain question of fact, namely, what was the position of the river Padma at a certain date, was correctly determined, and as that question, the lower Appellate Court found, had not been properly determined, it remanded the case to the first Court. But instead of remanding it under sec. 566 of the Civil Procedure Code as it ought to have done, it made its remand order under sec. 562 of the Code, after setting aside the decree of the first Court, and it directed that Court to decide the suit itself. No appeal was preferred against his erroneous remand order, though an appeal could have been

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preferred under cl. 28 of sec. 588 of the Code. After remand the case was re-tried by the first Court and a decree was made in favour of the Plaintiff but not a decree in full as had been originally granted to him. The Plaintiff was satisfied with that partial decree, but the Defendant again preferred an appeal; and upon that appeal the lower Appellate Court modified the decree of the first Court and gave the Plaintiff something less than what the first Court on the second occasion had given him. Against the last-mentioned decree of the lower Appellate Court the Plaintiff has preferred this second appeal; and it is contended on his behalf, *first*, that as the remand was in contravention of the provisions of secs. 562 and 566 of the Code of Civil Procedure, it and all subsequent proceedings should be treated as a nullity and the case sent back to the lower Appellate Court in order that it may try, according to law, the original appeal that had been preferred against the first decree of the first Court; and, *secondly*, it is contended that even if the order of remand be not treated as an absolute nullity and void for want of jurisdiction, and if sec. 578 of the Code of Civil Procedure be applicable to the case, still the remand order and all subsequent proceedings ought to be set aside on the ground of the error in making that order having affected the merits of the case.

A preliminary question\* may arise for consideration, the question, namely, whether it is open to the Appellant to raise the abovementioned objections now, he not having preferred any appeal against the remand order under cl. 28

of sec. 588 of the Code of Civil Procedure. Having regard to the provisions of sec. 591 of the Code, and the cases of *Maharajah Moheshur Singh v. The Bengal Government* (1) and *Savitri v. Ramji* (2), we are of opinion that the preliminary question ought to be answered in favour of the Appellant. That being so, let us now see how far the two contentions urged on his behalf are well sustained.

In support of the first contention it is argued that as the jurisdiction of the lower Appellate Court is founded upon the provisions of the Code of Civil Procedure, and as sec. 562 is limited in its application to cases where a suit has been disposed of by the first Court on a preliminary point and the decision of that Court on such preliminary point is reversed, and sec. 564 expressly provides that the Appellate Court shall not remand any case for a second decision except as provided in sec. 562, we must hold that the erroneous remand of a case under sec. 562 is an act of the lower Appellate Court in excess of its jurisdiction, or, in other words, is an error affecting the jurisdiction of the lower Appellate Court, and therefore not cured by sec. 578.

In support of the contention stated above the learned vakil for the Appellant relies upon the cases of *Rameshwar Singh v. Sheodin Singh* (3), *Subba Sastri v. Bala Chandra Sastri* (4) and *Mohesh Chandra Das v. Madhab Chandra Sirdas* (5), mainly, and incidentally upon certain

(1) 7 Moo. I. A. 238 (1857).

(2) I. L. R. 14 Bom. 232 (1889).

(3) I. L. R. 12 All. 510 (1889).

(4) I. L. R. 18 Mad. 421 (1894).

(5) 2 B. L. R. short-notes of cases, p. 13 (1888).

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other cases which are not necessary to be noticed just now.

We shall first consider the argument based upon the language of the Civil Procedure Code, and then deal with the authorities cited in support of it. \*

The gist of the contention is that the error of the lower Appellate Court in remanding the case under sec. 562 of the Code of Civil Procedure, when that section was not applicable to the case, and when a remand for a second decision was expressly prohibited by sec. 564, was an error affecting the jurisdiction of that Court within the meaning of sec. 578; and that the erroneous order being made by the Court in excess of its jurisdiction it and all proceedings held thereunder should be treated as a nullity. The determination of this point depends upon the meaning to be attached to the term "jurisdiction." That word is used in two different senses. It may either mean what is ordinarily understood by the term "jurisdiction" when used with reference to the local jurisdiction of a Court, or pecuniary jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit; or it may mean the legal authority of a Court to do certain things. It is only in this latter sense that an erroneous order of remand by an Appellate Court can be treated as an order made without jurisdiction. But the Court which made the remand order in this case clearly had jurisdiction to deal with the appeal, if the term "jurisdiction" is understood in the former sense. There is no question that it was the Court to which the appeal would lie. And the question therefore is reduced to this, namely, whether the

term "jurisdiction" used in sec. 578 of the Code of Civil Procedure is used in the former sense or in the latter. We are of opinion that regard being had to the scope and object of the section, the term "jurisdiction" must be held to have been used there in the former and not in the latter sense. For if it be held to be used in the latter sense, that is, in the sense of the power of the Court to make any particular order in a case over which it has jurisdiction, local and pecuniary, as well as jurisdiction with reference to the subject-matter, it may sometimes be difficult to draw the line between an error which is merely an error of procedure and one that is an error of jurisdiction understood in that sense. There is another way of viewing it, from which it would appear that the term "jurisdiction" could only have been intended to be used in sec. 578 in the sense of pecuniary or local jurisdiction, or jurisdiction relating to the subject-matter. When a Court, which is wanting either in local jurisdiction, or in pecuniary jurisdiction, or in jurisdiction with reference to the subject-matter, is made to hear a suit or appeal, the error primarily is the error of the party who invokes the Court's jurisdiction, though that error may also be shared by the Court; and there is always good reason for saying that the order of the Court should be treated as a nullity, and the party who finds that the order he has obtained is infructuous cannot reasonably complain, because it was he who brought the suit or appeal in a wrong Court. Where, however, the defect of jurisdiction is not in the nature of a defect or a want of pecuniary jurisdiction, or local jurisdic-

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tion, or jurisdiction with reference to the subject-matter, but is a defect of jurisdiction consisting in a Court making an order in excess of its power, the error is primarily one of the Court and may not be at all shared by the party in whose favour the order is made; and to hold in such a case that the order of the Court and all proceedings had thereunder should be treated as a nullity would be to visit the party for an act for which he may not at all be responsible. The anomaly may be intensified in certain cases. Take, for instance, a case in which a remand order is made and a decree in favour of the party in whose favour that order is made is eventually passed after remand. That decree may stand unimpugned for years until it is sought to be used on his behalf when his adversary may say that it was made wholly without jurisdiction and should be treated as a nullity. If the contention of the Appellant is correct, carried to its legitimate consequences, it would lead to this result. We do not think such a result was contemplated by the Legislature; at any rate, it could not have been their intention in a remedial provision like that in sec. 578 of the Code of Civil Procedure which is enacted to cure technical defects, to use the word "jurisdiction" in a sense which may lead to such anomalous consequences. We are therefore of opinion that so far as this question depends upon the construction of sec. 578, it cannot reasonably be answered in favour of the Appellant's contention.

We will now deal with the authorities upon which reliance has been placed. The decision in the case of *Ramesh Singh v. Sheodin Singh* (3) rests mainly

(3) I. L. R. 12 All. 510 (1882).

upon the ground that a distinction ought to be drawn between a Court's omitting to do something which it is required by law to do, and its doing something which it is possibly prohibited to do, and that when a Court does any thing of the latter description its act ought to be treated as done without jurisdiction. There is no doubt a distinction between the two classes of acts, but we are not prepared to hold that acts of the latter class are acts which affect the jurisdiction of the Court within the meaning of sec. 578 of the Code of Civil Procedure. We may observe that the view taken in this case is to a certain extent inconsistent with that taken by the Privy Council in the case of *Amir Hassan Khan v. Sheo Baksh Singh* (6). For the erroneous order or decision that was complained of in that case was the decision of a suit upon a wrong view of the effect of a certain previous decision, which was set up as operating by way of *res judicata*; if the contention of the Defendant in the case was well founded, the Court by sec. 13 of the Code of Civil Procedure was positively prohibited to try the suit; and its trying it in contravention of that positive prohibition was, upon the view taken by the Allahabad High Court, an act done in excess of the Court's jurisdiction. The Privy Council, however, did not take that view, as it held that interference with the decisions of the lower Court under sec. 622 was not warranted in that case.

We were referred incidentally to the case of *Dr. Mohan Thakur v. Rai Uma Nath Chaudhuri* (7) as supporting the

(6) I. L. R. 11 Cal. 6 (1884).

(7) I. L. R. 20 Cal. 8 (1892).

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Appellant's contention and the view of the law taken by the Allahabad High Court in the case of *Rameshur Singh v. Sheodin Singh* (3). It is true the case of *Brij Mohan Thakur v. Rai Uma Nath Chaudhuri* (7) is authority for the proposition that when a Court does not do that which it is required by law to do, and does that which the law affords no warrant for its doing, it declines to exercise a jurisdiction vested in it and acts without jurisdiction within the meaning of sec. 622, C. P. C. But that again is a remedial provision with different object, and having regard to that object, which is to vest the Court of revision with discretionary power to rectify certain erroneous orders in non-appealable cases, the term "jurisdiction" may well be taken to have been used in it in a more comprehensive sense than in sec. 578. With all respect for the learned Judges who decided the case of *Rameshur Singh v. Sheodin Singh* (3) we must say that we cannot assent to the view which they have expressed.

\* As for the case of *Subba Sastri v. Bala Chandra Sastri* (4), we may observe that in a later case, that is, the case of *Mallikarjuna v. Pathaneni* (8), sec. 578 of the Code of Civil Procedure was held to be applicable in curing the defect of an erroneous order of remand if it did not affect the merits of the case. And we may add that the learned Chief Justice of the Madras High Court, who was one of the Judges who decided the earlier Madras case, was also a party to the later decision.

(3) I. L. R. 12 All. 510 (1889).

(4) I. L. R. 18 Mad. 421 (1894).

(7) I. L. R. 20 Cal. 8 (1892).

(8) I. L. R. 19 Mad. 479 (1896).

The case of *Mohesh Chandra Das v. Madhub Chandra Sardar* (5) is quite distinguishable from the present case; for there it was not only found that the order was bad as a complete remand, but it was further found that there was no ground even for that partial remand that the Code allows, namely, a remand by the Appellate Court, retaining the case in its file, for taking further evidence on any point; and if that was so, the order was bad on the simple ground that it affected the merits of the case by allowing one of the parties to do that which he had no right to do, namely, to adduce fresh evidence.

On the other hand, we may refer to the cases of *Nassurooddeen Chowdhry v. Lall Mahomed Pramanick* (9), *Savitri v. Ramji* (2), and also to the case of *Matra Mondal v. Hari Mohun Mullick* (10) as supporting the view we take.

Upon reason then as well as upon authority, we think that the first contention urged on behalf of the Appellant must fail.

It remains now to consider the second question. It has been argued that the erroneous remand order of the lower Appellate Court in this case, even if it did not affect the jurisdiction of that Court must be held to have affected the merits of the case, because by that order the favourable judgment which the Appellant before us had obtained in the first Court, and which the lower Appellate Court was bound to set aside before it could make the modified decree that has

(2) I. L. R. 14 Bom. 232 (1889).

(5) 2 B. L. R. short-notes of cases,  
\* p. 13 (1868).

(9) 18 W. R. 234 (1876).

(10) I. L. R. 17 Cal. 155 (1890).



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now been made, had been wrongly set aside, and the Plaintiff-Appellant has not had the benefit of that judgment when the lower Appellate Court last disposed of the case. No doubt this matter requires consideration; but as the Bombay High Court in the case of *Savitri v. Ramji* (2), just referred to, observed, each case must be considered with reference to its own circumstances in dealing with the question now under consideration, and referring to the circumstances of this case we do not find any good ground for saying that the erroneous remand order has affected the merits of the case.

If the right course had been followed, the first Court should have been directed to take further evidence upon the question as to the position of the river Padma at the date referred to in the remand order, and then the first Court ought to have submitted its finding to the lower Appellate Court, which together with the additional evidence taken on remand would have had to be considered along with the first judgment of the first Court. As events took their course, however, what happened was, instead of the finding of the first Court after remand being laid before the lower Appellate Court, the judgment of that Court was before it; but the Plaintiff was still in the position of a Respondent before the lower Appellate Court as he was originally and as he ought to have been if the right course had been followed. Moreover, there is nothing in the judgment of the lower Appellate Court on the last occasion which would show that it was influenced in any way by the

last judgment of the first Court being treated as a judgment rather than as a finding; nor is it pointed out that the absence of the first judgment of the first Court from its consideration has in any way affected the last decision of the lower Appellate Court. That being so, the second contention of the Appellant must also fail.

We may add that cases may arise, and a perusal of the concluding portion of the first judgment of the lower Appellate Court which was placed before us, shows that the present was a case of that nature, in which, although a complete remand under sec. 562 may not be warranted by the Code, still nothing short of a retrial of all the issues, rendered necessary by the previous imperfect trial of them, would satisfy the requirements of justice. In such a case the provisions of the Code have to be strained to a certain extent in order to enable the Appellate Court to decide the appeal properly. But that of course is a matter for the Legislature to consider.

In the result the appeal fails, and must be dismissed with costs.

*Appeal dismissed.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 64 of 1899.

BAIDYA NATH BAHARA,

RAMPINI, J. Defendant, Appellant,  
PRATT, J. v.

1900. DHON KRISHNA SIRKAR and  
27, June. others, Plaintiffs,  
Respondents.

*Bengal Tenancy Act (VIII of 1885), sec.  
153—Appeal—Second appeal—Rent suit—  
Rate of rent—Pleadings.*

RAIDYA NATH BAHARA v. DHON KRISHNA SIKKAR

*In a suit for rent for less than Rs. 100, the Defendant pleaded that he was the tenant, not of the Plaintiffs but of some other persons at a rate lower than that claimed in the suit, no issue was raised as to the rate of rent and the lower Court merely decided that the Defendant was Plaintiffs' tenant and decreed the suit :*

*Held—That the question of the rate of rent not having been raised and decided no second appeal lay.*

This was an appeal preferred on the 6th of January 1899, against the decree of Babu Akhoy Kumar Bose, Officiating Subordinate Judge of Zillah Beerbhum, dated the 4th of October 1898, reversing the decree of Babu Nritya Gopal Gossami, Additional Munsif of Bolepur, dated the 21st of December 1897.

The suit, out of which the present appeal arose, was brought by the Plaintiffs for recovery of rent in respect of 12 bighas of land which, it was alleged, the Defendant held at a rental of Rs. 31 a year in terms of settlement. The Plaintiffs alleged that they were tenants in respect of the land of several proprietors and that they had in their turn sublet it to the Defendant. The defence was that the land was let to the Defendant by the proprietors themselves at a rent of Rs. 25 and that the Plaintiffs had no right and title to it. The first Court found on the evidence that the Plaintiffs failed to prove that all the proprietors had let the land to them and that they had a perfect title to it and on that ground dismissed the suit. The lower Appellate Court found that the Defendant was estopped from denying Plaintiffs' title, for the Plaintiffs let the land to the Defendant and put him

in possession of the same; the lower Appellate Court therefore decreed the appeal and the suit of the Plaintiffs. Thereupon the Defendant preferred this second appeal.

*Babu Sib Chandra Palit for the Appellant.*

*Babu Karuna Sindhu Mukerjee for the Respondents.*

THE JUDGMENT OF THE COURT was as follows :—

A preliminary objection has been taken to the hearing of this appeal, namely, that no second appeal lies, as the value of the suit is less than Rs. 100 and no question as to the amount of rent annually payable has been decided.

We think that this objection must prevail.

The Plaintiffs sued for arrears of rent at Rs. 31 per annum. The defence of the Defendant was that he was not the Plaintiffs' tenant, but that he held the land under some third person at a rent of Rs. 25 per annum.

The lower Appellate Court has found that the Plaintiffs are the landlords, that the Defendant is their tenant, and that the rent is Rs. 31 per annum.

Now it appears to us that no question of the amount of rent payable has been decided. The Defendant did not dispute that if he was the Plaintiffs' tenant he was liable to pay at the rate of Rs. 31. He stated that the rent of the land payable by him to some one else was Rs. 25. But that was a perfectly unnecessary plea to raise in the suit; and no decision has been given on this point by the lower Appellate Court. All that the lower Appellate Court has decided

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is that the Defendant is the Plaintiffs' tenant at a rent of Rs. 31. As a matter of fact, there is no dispute as to the amount of rent payable. The dispute was as to whether the relation of landlord and tenant existed between the parties. That was the only issue in the case, that was the only issue which arose and the only issue decided.

There can therefore be no second appeal in this case, simply because the Defendant chose to plead, in a very unnecessary manner, that the rent of the land payable to some one else, not a party to the suit and a person found not to be the landlord, is Rs. 25.

The appeal is dismissed with costs.

*Appeal dismissed.*

S. C. S.

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NO. 1012 OF 1900.

AMEER ALI, J.      KAMALA PRASAD,  
PRATT, J.      Petitioner,  
1901.      v.  
31, January.      THE EMPRESS.

*Accomplice—Evidence Act (I of 1872), secs. 114, ill. (b), 133—Admissibility of the evidence of accomplice—Corroboration, when and in what way necessary—Principles underlying the law of corroboration—Primary and secondary accomplices, distinction between—Amount of corroboration necessary in each case—Conviction based upon testimony of secondary accomplice when not in expectation of reward or punishment.*

*Although a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars, and such evidence should*

*be accepted with a great deal of caution and scrutiny.*

*The amount of criminality is a matter for consideration, and when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of a person who is an actual perpetrator with the principal offender.*

*In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion, whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence aliunde as to the facts deposed to by that accomplice.*

This was a rule issued on the 13th November 1900, against an order of the Deputy Magistrate of Gaya, dated the 6th of September 1900, confirmed on appeal by the Sessions Judge of Gaya on the 11th of September 1900.

The facts of the case were shortly these:—On the night of Monday, the 26th March 1900, there was a burglary of a serious character in the house of one Brindabun. A box or trunk was taken out of the house. It was afterwards broken open and a considerable amount of money in cash and gold and silver ornaments and clothes were abstracted therefrom. Information was given to the thana on the 27th with a list of

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the articles missing. The Police took up the enquiry, and the steel trunk was found broken in a corner of the garden towards the north of the house. Suspicion, naturally, fell upon the servants of the house, but the Petitioner Kamala Prasad was not suspected. His position in the house was one of some trust, he being a sort of *moshahab* to the complainant who used to take his meals with him. On the 29th March, the house of one Dosain was searched and two silver bangles were found in his house and identified as part of the articles stolen. The enquiry into the case proceeded for some time with the object of discovering more articles and connecting the different people whose names Dosain gave as having been perpetrators of the burglary. The case was sent up on the 18th of April, and on the 19th Dosain was convicted under sec. 411, I. P. Code, and sentenced to imprisonment and a small fine of Rs. 5. On the 20th April, warrant was issued against Kamala Prasad. Dosain's statements were taken on two previous occasions, and after he had served out his period of imprisonment his evidence was taken afresh regarding the facts to which he had deposed. His evidence in substance amounted to this, that on the night in question, he went out of the house of Brindabun, where he used to sleep and, hearing some trampling on dry leaves, went towards the spot and found the Petitioner engaged either in opening a box or standing near the box which had been apparently broken open. Two of his companions had gone a little distance on hearing Dosain's footsteps. He enquired what they were there for, and the accused in order to obtain his

silence, gave him the two bangles which he produced or which were found in his house on the 29th of March. On trial, Kamala Prasad was convicted by the Deputy Magistrate of Gaya under sec. 381, I. P. Code, and sentenced to undergo 2 years' rigorous imprisonment and to pay a fine of Rs. 100, or, in default of payment, to undergo six months' further imprisonment. On appeal, the Sessions Judge of Gaya confirmed the conviction and upheld the sentence.

The Petitioner then applied for and obtained the present rule to show cause why the conviction and sentence should not be set aside on the ground that the evidence of the accomplice Dosain, upon which the judgments were based, had not been sufficiently corroborated in law and also on the ground that there was no sufficient evidence to support the conviction. It was argued on behalf of the Petitioner that the matters which had been used for the purpose of holding that the evidence of the accomplice had been corroborated did not in law amount to corroboration.

*Mr. P. L. Roy*, with him *Ilabu Dasarathi Sanyal*, for the Petitioner.

*Mr. Leith* for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

In this case, the Petitioner Kamala Prasad was convicted by the Deputy Magistrate of Gaya under sec. 381, Indian Penal Code, and sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 100 or, in default of payment, to undergo six months' further imprisonment. He preferred an appeal to the Sessions Judge who has confirmed

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the conviction and upheld the sentence. A rule was applied for and obtained from this Court calling upon the District Magistrate to show cause why the conviction and sentence should not be set aside on the ground that the evidence of the accomplice upon which the judgment is based has not been sufficiently corroborated in law, and also on the ground that there is no sufficient evidence to support the conviction. Mr. Roy for the accused has placed the entire evidence before us and has contended that the witness Dosain was an accomplice and that his statements regarding the identity of the accused and the latter's participation in the offence of theft which, there can be no doubt, took place on the night in question in the house of Brindabun Prasad have not been corroborated regarding material particulars by outside evidence, and that, if the statements of Dosain be eliminated there is no other evidence to connect the accused with the offence. It appears that, on the night of Monday, the 20th March last, there was a burglary of a serious character in the house of Brindabun. A box or trunk seems to have been taken out of the house. It was broken open afterwards and a considerable amount of money in cash and gold and silver ornaments and clothes were abstracted therefrom. Information was given to the thana on the 27th with a list of the articles missing. The steel trunk was found broken in a corner of the garden towards the north of the house. Naturally suspicion fell upon the servants of the house, but as the learned counsel for the accused points out, Kamala Prasad was not suspected. His position in the house was one of

some trust. It is said he was a sort of *moshahab* to the complainant and used to take his meals with him. On the 29th of March Dosain's house was searched, and two silver bangles were found in his house and identified as part of the articles stolen. Mr. Roy says that the accused himself produced those articles, but it makes no difference whether he himself produced them or they were found in the search. The inquiry into the case proceeded for some time apparently with the object of discovering more articles and connecting the different people whose names Dosain gave as having been perpetrators of the burglary.

The case was sent upon the 18th of April, and on the 19th Dosain was convicted under sec. 411, I. P. C., and sentenced to imprisonment and a small fine of Rs. 5. On the 20th April a warrant was issued against the present accused. Dosain's statements were taken on two previous occasions and, after he had served out his period of imprisonment, his evidence was taken afresh regarding the facts to which he deposes and upon which stress has been laid by the Courts below. His evidence in substance amounts to this: that, on the night in question, he went out of the house of Brindabun where he used to sleep and, hearing some trampling on dry leaves, went towards the spot and found the present accused engaged either in opening a box or standing near the box which had been apparently broken open. Two of his companions had gone a little distance on hearing Dosain's footsteps. He inquired what they were there for and the accused in order to obtain his silence gave him the two

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bangles which he produced or which were found in his house on the 29th of March. If Dosain's evidence is believed, there can be no doubt that the present accused was concerned in the burglary and has been rightly convicted by the Courts below. The question of law which has been raised before us is, as we pointed out before, that he is an accomplice and that his evidence requires corroboration and that the necessary corroboration has not been furnished. It is contended that the matters which have been used for the purpose of holding that his evidence has been corroborated do not in law afford that corroboration. It is necessary, therefore, to consider what the position of Dosain was, but before doing so, we think it right to state the law bearing upon the admissibility of an accomplice's evidence and the legality of a conviction founded thereupon. Illustration (b) to sec. 114 of the Evidence Act says that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Sec. 133 declares that an accomplice shall be a competent witness against an accused person, and that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice. The principle underlying the rule against the acceptance of an accomplice's evidence without corroboration proceeds upon certain reasons. These reasons have been set forth in a number of cases to which it is not necessary for us to refer here. Primarily an accomplice's evidence requires to be accepted with a great deal of caution and scrutiny, because it is naturally

supposed that, when a person is concerned in a crime and has been discovered as being so concerned, he is likely to swear falsely in order to shift the guilt from himself. It is also supposed that an accomplice, in other words a participator in the crime is a person of bad character, and that his evidence, although given under the sanction of an oath, is open to suspicion and, thirdly, evidence given in expectation of any hope of pardon is sure to be biased in favour of the prosecution. It is for these reasons, although the law declares that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, that the Courts have held that, ordinarily speaking, the evidence of an accomplice should be corroborated in material particulars and the practice which has been laid down has become, one may say, a part of the law itself. At the same time it is quite clear from the cases that the amount of criminality is a matter for consideration. When a person is only an accomplice by implication, or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence

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purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice. That seems to us to be the general principle and keeping that in view it appears to us that in this case, Dosain Goala is only an accomplice in a secondary sense. He does not say, nor has it been shown, that he was actually concerned in the burglary, that he took any part in the abstraction of the steel trunk, in breaking it open or taking out any of the articles or money. His statement amounts to this that he saw that night certain persons, whom he names, and one of whom is the accused, committing the robbery. He knew that there was a burglary and knowing of the theft he accepted certain articles which were the proceeds of that theft and, for that, he has suffered imprisonment and has now no hope of reward or expectation of punishment. It is difficult for us to see how the principles to which we have referred apply to him. No doubt, having been a receiver of stolen property with a guilty knowledge and having suffered imprisonment, his character is now such that his evidence requires to be scrutinized and carefully considered in connection with the other circumstances of the case. The Courts below seem to have examined the facts with a great deal of care and they have come to the conclusion that there was no reason to disbelieve the direct testimony of Dosain. They do not ignore the fact that he was a receiver of stolen property or that he had been in jail, yet the first Court which had the witness before it and the Appellate Court which dealt with the

evidence both have come to the conclusion that his evidence may be accepted. It is difficult for us to say that they are wrong in accepting his testimony nor are we in a position to say, giving every consideration to Mr. Roy's argument, that there are circumstances wanting to support the testimony given. On the whole, therefore, after a careful consideration of the case, we are of opinion that the conviction ought not to be interfered with and we accordingly discharge the rule. The accused being on bail must surrender to undergo the remaining portion of his sentence.

H. P. C. *Rule discharged.*

[CIVIL APPELLATE JURISDICTION.]  
[Full Bench.]

APPEAL FROM ORIGINAL DECREE

No. 14 of 1898.

MACLEAN, C. J.

PRINSEP, J.

BANERJEE, J.

AMEER ALI, J.

RAMPINI, J.

1901.

14, February.

RAM TARACK HAZRA,  
Defendant, Appellant,  
v.  
DILWAR ALI and anr.,  
Plaintiffs, Respondents.

*Public Demands Recovery Act (VII, B. C., of 1880), sale under—(Act VII of 1868, B. C.), sec. 2—Appeal to Commissioner—Regular suit to set aside sale whether maintainable.*

Held by the Full Bench (RAMPINI, J., dissenting)—*Sec. 2 of Act VII (B. C.) of 1868 does not bar a civil suit for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act VII (B. C.) of 1880 on the ground that the sale was vitiated by a material irregularity leading to substantial injury; the irregularity complained of being that one property was advertised for sale and a different*

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*property sold, and an appeal to the Commissioner under sec. 2, Act VII (B. C.) of 1868 is not the only remedy open to the party whose property has been sold.*

TROYLUCKHO NATH MOZUMDAR v. PAHAR KHAN (1) and SADHU SARAN SINGH v. PANCH DEO LAL (2) *overruled.*

This was an appeal against the decree of the Subordinate Judge of Burdwan, dated the 13th November 1897.

The suit, out of which this appeal arose, was brought to set aside a sale held in execution of a certificate issued against the Plaintiffs for arrears of road-cess under the provisions of Act VII of 1880, B. C.

They alleged that the name of the mehal on account of which the cess was due was wrongly entered—Katalgachi being written for Kalapahar—that in the sale proclamation Katalgachi was wrongly entered for Kalapahar, that the sale proclamation was published in Katalgachi and not in Kalapahar, and that in consequence of such irregularities their property, mehal Kalapahar, which they valued at Rs. 25,000 was sold for Rs. 165, the demand for road-cess being only Rs. 131. It appeared that both in the certificate and in the sale proclamation the towji number and the name of the pargana of mehal Kalapahar were correctly given, the pargana and towji number of mehal Katalgachi being quite different.

This case was referred to a Full Bench with the following opinion by Banerjee and Brett, JJ., to whom the case had been referred under sec. 575, C. C. P., in consequence of a difference of opinion between Rampini and Pratt, JJ., who had originally tried the case.

(1) I. L. R. 23 Cal. 641 (1896).

(2) I. L. R. 14 Cal. 1 (1886).

The Judgments of Rampini and Pratt, JJ., were as follows:—

RAMINI, J.—The Plaintiffs have brought this suit to set aside a sale held in execution of a certificate issued against them for road-cess under the provisions of Act VII of 1880, B. C., and they allege that there were inaccuracies in the certificate, that the name of the property sold was incorrectly given in the sale proclamation, that the sale proclamation was not published on the property and that the property consequently sold for an inadequate price. They further aver that there was fraud on the part of the Defendants Nos 3 and 4, who in collusion with the serving peon fraudulently brought about the sale.

The Subordinate Judge found that there was no fraud on the part of the Defendants Nos. 3 and 4, but he held that the sale proclamation was incorrect, and had not been duly published. He therefore on the authority of *Ram Logan Ojha v. Bhawani Ojha* (3) has decreed the suit and set aside the sale.

The Defendant No. 2, the auction-purchaser, appeals. On his behalf it has been contended—(1) that the suit is not maintainable, as the certificate is not impugned as invalid or void and the suit is not one to set it aside; (2) that the irregularities that have been shown to have occurred in the proclamation of sale with regard to its publication are mere irregularities and do not warrant the sale being set aside.

I will first set forth the facts of the case and then deal with its legal aspects.

The certificate was issued for road-cess, and there is no allegation on the part of the Plaintiffs that the amount mentioned in the certificate is incorrect or was not due from them. Then, there was no averment by the Plaintiffs in their plaint that this certificate was not duly served on them under the provisions of this Act. When the case went to trial they attempted to set up such a plea, but the Subordinate Judge has not dealt with this question in his judgment, because the Plaintiffs never raised any such plea in their pleadings. Moreover, the Defendant adduced ample evidence which appears to me to be quite satisfactory to prove the service

(3) I. L. R. 14 Cal. 9 (1887).



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of the certificate on the Plaintiffs. All that the Plaintiffs say against the certificate is that the amount entered in it as due from them was due for public work-cess as well as road-cess, and that the name of the mehal on account of which the demand was due was wrongly entered—Katalgachi being written for Kalapahar. The omission to state that the amount was due for public work-cess as well as road-cess seems immaterial. As for the name of the mehal being wrongly given, it is pointed out on behalf of the Appellant that the form given in Act VII of 1880 does not require the name of the mehal to be mentioned at all, and that as all the other particulars of the property are quite correct, the Plaintiffs can have been under no misapprehension as to the mehal for which the demand was due from them. This appears to me to be a sufficient answer to the Plaintiffs' objection to the certificate. But whether it is or not would seem to be immaterial, as the present suit is not brought to set aside the certificate, which, as has been said before, is not impugned as either invalid or void.

What the Plaintiffs rest their case on is certain irregularities connected with the sale proclamation. In the copy filed with the record, it appears that mehal "Katalgachi" has been incorrectly entered for mehal "Kalapahar." But the other particulars of the estate are correctly entered. It is described as Towji No. 1381, situated in Pergana Haveli, which is quite correct. In the plaint it is further alleged that the property was described as in Division Satgachia. But this is not the case. It is not so described in the sale proclamation. The Respondents' pleader has also objected before us that the Government revenue of the property is not stated in the sale proclamation. But this was not complained of in the plaint or in the Court below; so it is too late to object to this omission now. See *Macnaghten v. Mahabir Pershad Singh* (5).

It has been found by the Subordinate Judge that the sale proclamation was published in Katalgachi, and not in Kalapahar, and I see no reason to differ from the view taken by him of the evidence adduced by the parties on this point.

\* These then are the facts of the case. The sale certificate is a good certificate. The amount for which it was issued was really due from the Plaintiffs. It was duly served on the Plaintiffs under sec. 10 of the Act. But in the sale proclamation the name of the mehal advertised to be sold was entered as "Katalgachi" instead of "Kalapahar," and the proclamation was published at the former place instead of at the latter, the two places being about ten miles distant.

It may be mentioned here that the "lotbundi" and certificate of sale obtained by the Appellant are quite correct. There is no mistake in either of them. The property purchased by the Appellant was Kalapahar. Further, it may be mentioned that at every sale held under sec. 289, Civil Procedure Code, there are two other proclamations issued, one affixed at the Court-house and the other at the Collectorate. In this case, as the Collector held the sale, there was probably only one other copy of the proclamation issued. But neither in the plaint nor at the trial nor before us has any complaint been made as to non-service or inaccuracy of this copy of the proclamation. Before us the Respondents' pleader has argued that the copy hung up at the Collectorate must be identical with the copy filed with the record. This may be so, but it has not been shown to be the case.

Now the Subordinate Judge has found, and the Respondents' pleader has contended before us on the strength of the case of *Ram Logan Ojah v. Bhawani Ojah* (3) that the sale must be set aside, as one thing was advertised for sale, and another thing was sold. I am unable to see that this was the case. The sale proclamation was correct in every particular except the name of the mehal. The other particulars given, particularly the towzi number, were sufficient for its identification. This was all that was necessary to specify, so as to identify it, as has been held in the case of *Amirunessa Khatoon v. Secretary of State* (6). This information therefore was quite sufficient for intending bidders. As for the Plaintiffs, they can have been under no misapprehension as to what was going to be sold. They knew very well that

(5) I. L. R. 14 Cal. 9 (1887).

(6) I. L. R. 10 Cal. 66 (1885).

(5) I. L. R. 9 Cal. 656 (1882).

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Katalgachi was not the name of the property for which the demand due from them was due. They knew it was not their property. As a matter of fact Katalgachi is situated in Pergana Laldi. Its towzi number is 492, and its owners are perfectly different persons. The Plaintiffs knew all the time that their property of Kalapahar was the estate in default and that that answered to the description of "Pergana Haveli, No. 1381 of the towzi."

The same mistake had been made in the certificate, but they never protested against it or endeavoured to have the mistake set right. Probably they intentionally lay by, hoping that the whole proceedings might be held invalid on this ground. It is open to question whether in these circumstances they can now complain of the mistake in the sale proclamation or whether they are not estopped from doing so. (See *Arunachellam Chetti v. Arunachellam Chetti* (7).

But be this as it may, I cannot regard this case as being on all fours with that referred to above, on which the Subordinate Judge and the Respondents' pleader have relied, and in these circumstances I think the sale cannot be set aside on account of these irregularities, however serious they may be, and in support of this view I would cite the case of *Sadhu Saran Singh v. Panch Deo Lal* (2), in which it was said—"the only remedy of a judgment-debtor whose property has been sold in execution of a certificate issued under Bengal Act VII of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale is by way of an appeal under sec. 2, Bengal Act VII of 1868." This was expressly followed in *Troyluckho Nath Mozumdar v. Pahar Khan* (1). I am aware of no ruling in any way setting aside the rule of law laid down in these two cases, and none has been brought to our notice during the argument in this case. These decisions are decisions of Division Benches of this Court, and under the rules of this Court they must be followed, until set aside by a Full Bench.

I would here interpolate the remark that the

Plaintiffs did appeal to the Commissioner against the sale, but without success, their applications being dismissed as barred by limitation. There is nothing to show why they did not appeal to the Commissioner in time.

The Respondents' pleader has called our attention to the following cases on which he relies viz., *Lala Mobaruk Lal v. Secretary of State* (8) *Gujraj Sahay v. Secretary of State* (9), *Girjanath v. Ram Narain* (10), *Pryag Lal v. Jainarain* (11) *Bajjnath Sahai v. Ramgut Singh* (12), *Mohibet Huq v. Shew Sahay Singh* (13), *Saroda Charan Bandopadhyaya v. Kista Mohan Bhattacharjee* (14)

The case of *Lala Mobaruk v. Secretary of State* (8) lays down that a sale under Act XI of 1859 before the expiry of 30 days is no sale. The same was held under Act VII of 1880 (B. O. in *Sadhu Saran v. Panch Deo Lal* (2). But both were on this point set aside by the Privy Council decision in *Tasadduk Rasul Khan v. Ahmad Husain* (15), in which it has been ruled that non-compliance with the provisions of sec. 290, Civil Procedure Code, is a mere irregularity, which does not *ipso facto* make a sale void. In the case of *Gujraj Sahai v. Secretary of State* (9), affirmed on appeal by the Privy Council and in the decision of which I was a party, there was found to be no certificate, and there were no arrears of cess due: the arrears had been paid before issue of the certificate. These were the grounds of our decision in this case. There were no other grounds.

In the case of *Girjanath v. Ram Narain* (10), the certificate was held invalid, as there was no sum due at the time of its issue.

The case of *Pryag Lal v. Jainarain* (11) relates to a review by a Commissioner of the order of his predecessor setting aside a sale. This review was held to be *ultra vires* and of no effect.

The case of *Bajjnath Sahai v. Ramgut Singh* (12) is also a case in which the sale was set aside on

(8) I. L. R. 11 Cal. 200 (1885).

(9) I. L. R. 17 Cal. 414 (1890); 20 Cal. 100 (1892); L. R. 20 I. A. 70 (1892).

(10) I. L. R. 20 Cal. 264 (1891).

(11) I. L. R. 22 Cal. 419 (1895).

(12) I. L. R. 23 Cal. 775 (1896).

(13) I. L. R. 25 Cal. 65 (1897).

(14) 1 C. W. N. 516 (1897).

(15) I. L. R. 21 Cal. 66 (1893).

(1) I. L. R. 23 Cal. 641 (1890).

(2) I. L. R. 14 Cal. 1 (1886).

(7) I. L. R. 16 I. A. 171 (1888).

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the ground that the notice under sec. 10 had not been served, and there was consequently no valid certificate.

In the report of the case the ground of the decision of the Judges of this Court was said to be "mainly the absence of proof of the certificate of unpaid demand according to the requirements of sec. 7." I do not see that their judgment in any way proceeded on the ground of irregularities in publishing or conducting the sale. Their Lordships of the Privy Council affirmed the decision of this Court, because "there was no actual sale," because there was no final, conclusive and definite order confirming the sale, "and because, if no certificate be given, the whole basis of the proceeding is gone." I do not see that any other considerations influenced them.

The case of *Mahibul Hui v. Shew Shahai Singh* (13) was one in which no notice had been served under sec. 10 of Bengal Act VII of 1880, the want of which notice would of course make the certificate bad. But the only point argued and decided in that case was "whether such a suit would lie without a previous appeal to the Commissioner from the order of the Collector."

The case of *Saroda Charan Bandopadhyaya v. Kista Mohan Bhattacharjee* (14) was a case in which it was held that when the notice required in sec. 10 of Act VII of 1880 (B. C.) is not served, the whole of the proceedings resulting in the sale are invalid.

Since the present case has been argued the report of *Chunder Kumar Mukerji v. Secretary of State* (4) has appeared. This was also a case in which the sale was held or admitted to be bad on the ground that no notice under sec. 10 of the Act had been served on the persons whose property had been sold.

None of these cases then afford any justification for the setting aside of the sale in the present case.

I may notice here another argument of the Respondents' pleader, viz., that the Secretary of State who was a party Defendant admitted that the sale proclamation had not been duly

served and did not defend the suit. But this does not bind the auction-purchaser who is the Appellant in this Court. And the admission that the sale was void would seem to me to proceed on a misapprehension of the law.

The following cases have been cited on behalf of the Appellant, viz.,—*Kishory Mohun Roy v. Mahomed Mojafer Hossein* (16), *Nana Kumar Roy v. Golam Chunder Dey* (17) and *Bagal Chunder Mookerji v. Rameshur Mundul* (18).

In *Kishory Mohun Roy v. Mahomed Mojafer Hossein* (18), it was ruled that a sale is not to be considered a nullity merely by reason of the absence of any attachment. In *Nana Kumar Roy v. Golam Chunder Dey* (17), it is said that a sale of the revenue-paying land is not *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office, as required by sec. 289, Civil Procedure Code. In *Bagal Chunder Mookerji v. Rameshur Mundul* (18), the omission to issue a fresh sale proclamation under sec. 291 was held to be only an irregularity which does not vitiate a sale.

To these cases I may add *Nooral Hossein v. Ram Coomar Sahce* (19) which establishes that the mention of a wrong pergunna in the notice of sale is not a material irregularity in publishing or conducting a sale. I think all these cases establish the principle that where there was a demand due, when the notice under sec. 10 of Act VII of 1880 has been duly served, and there was a good and valid certificate, a sale under the Act cannot be set aside on any ground but fraud (and there has been no fraud established in this case), or on some other ground invalidating and rendering void the certificate.

The irregularities complained of by the Plaintiffs, however serious they may be, are nothing but irregularities, which do not make the sale a nullity, and the proper remedy for which is an appeal to the Commissioner as admitted by Banerjee, J., in his judgment in *Chunder Kumar Mukerji v. Secretary of State* (4).

To hold that a sale under Act VII of 1880

(4) 4 C. W. N. 586: s. c. I. L. R. 27 Cal. 698 (1900).

(16) I. L. R. 18 Cal. 188 (1890).

(17) I. L. R. 18 Cal. 422 (1891).

(18) I. L. R. 18 Cal. 406 (1891).

(19) 25 W. R. 226 (1876).

(4) 4 C. W. N. 586: s. c. I. L. R. 27 Cal. 698 (1900).

(13) I. L. R. 25 Cal. 85 (1897).

(14) 1 C. W. N. 516 (1897).

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(B. C.), can be set aside on the ground of mere irregularities would seem to me to be going far beyond the law as hitherto administered by this Court, and to be giving to judgment-debtors in suits under this Act facilities for setting aside the sales of their property not given to judgment-debtors by any other Act. As a rule the certificate of sale cures all defects in publishing and conducting the sales. This is so in the case of sales under the Civil Procedure Code.—See *Balkrishna v. Masuma Bibi* (20). This is so in the case of sales under Act XI of 1859 and Act VII of 1880.—*Bishambhar Haldar v. Bonomali Haldar* (21). No sales held under these Acts can be set aside on the grounds on which we are asked to set aside the sale of the Respondents' property in this case. According to the Full Bench ruling just cited sales under Act VII of 1880 are, however, an exception to the general rule, for it has been held that the sale certificate does not cure such defects in their case. But are we to go a step further, and to hold that sales under Act VII of 1880 may be set aside in a regular suit on grounds on which no other kind of sale can be so set aside, when judgment-debtors under Act VII of 1880 have a remedy provided for them in the Act, if they choose to avail themselves of it? To go to this length would seem to me to be detrimental to the interests of such judgment-debtors themselves. For if such be the law, no one will bid an adequate price for their property, when put up to sale.

For these reasons I would decree this appeal.

But as my brother Pratt does not agree with me, and we differ on a point of law, viz., the maintainability of the suit on the grounds on which it is brought, the case must be laid before the Honourable the Chief Justice for reference to a Third Judge.

The Respondents wish to press certain cross-objections not against the Appellant, but against their Co-respondents, the Defendants Nos. 3 and 4. We were unable to see how they could do so, unless they themselves appealed against the decree which they have not done.

PRATT, J.—This was a suit brought by the Plaintiffs as proprietors of an 8 annas 3 gundas 1 krant share of Mouzah Bagh Kalapahar, Towzi No. 1381 of the Burdwan Collectorate, to set aside the sale of that property under a certificate for arrears of cesses, on the grounds (1) that the certificate of arrears was faulty; (2) that the sale proclamation related to Mouzah Katalgachi which is not the property of the judgment-debtors and that no proclamation was published at Bagh Kalapahar and that in consequence a property worth Rs. 25,000 was sold at the very inadequate price of Rs. 165.

There was a further allegation that the sale had been fraudulently brought about by two of Plaintiffs' co sharers, viz., Defendants Nos. 3 and 4 in collusion with the auction-purchaser Defendant No. 1, and that Defendants Nos. 3 and 4 are in actual possession of the property. The Subordinate Judge, however, held, and I think quite correctly, that this plea was not substantiated, and that in fact the Defendant No. 1 purchased on behalf of Defendant No. 2 who is in possession of the property. The Subordinate Judge found that the sale proclamation was served at Katalgachi and not at Bagh Kalapahar which was the mahal sold, and that the sale is absolutely null and void.

It should be mentioned that the Secretary\* of State, who was made a party to the suit, filed a written statement admitting that the notice of sale was not duly published as it was not stuck up in any part of the property sold, and intimating that he advisedly refrained from defending the suit as the sale was bad in law and he was unable to support it.

The Defendant No. 2 appeals, and on his behalf the following contentions have been raised—

(1) That the sale proclamation was in fact published at Bagh Kalapahar.

(2) That the Plaintiffs have not asked to have the certificate set aside, and cannot therefore now impugn it as bad.

(3) That the suit to set aside the sale is not maintainable as arrears of cess were due and the allegation of fraud has been negatived.

(4) That in any case the irregularities complained of furnish no sufficient ground for setting aside the sale.

(0) L. R. 9 I. A. 182 (1882).

(21) 8 C. W. N. 238: s. c. I. L. R. 26 Cal. 414 (1899)

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The learned pleader for the Respondents had in the course of his argument endeavoured to show that the notices required by sec. 10 of Act VIII (B. C.) of 1880 were not served, and hence he contended on the authority of several decisions that the subsequent sale was bad. With reference to this contention it would be sufficient to say that no such allegation was made in the plaint and consequently it was not dealt with in the judgment of the lower Court. However I am satisfied on the evidence that the required notices were served upon the Plaintiffs.

Now turning to the facts of the case I find from Ex. 14, which is the certificate of arrears of public demand that the demand was on account of arrears of road-cess of Pergana Haveli, Mouzah Katalgachi, Towji No. 1381.

The towzi number is that of Bagh Kalapahar which is situated in Pergana Haveli, whereas Katalgachi appertains to a different towzi number and pergana, so that on the face of it the certificate is ambiguous in an important particular. There is thus some force in the contention that it was incapable of execution, so long as it remained unamended.

If this had been the sole ground for setting aside the sale, I might have hesitated to pronounce it sufficient. But I think that when taken in connection with the subsequent proceedings the Subordinate Judge was justified in giving the Plaintiffs a decree.

The sale proclamation Ex. 10 describes the property to be sold as Pergana Haveli, Towzi No. 1381, mehal Katalgachi. There is no mention of Bagh Kalapahar, and in the order issued by the Certificate Deputy Collector to the Nazir (Ex. 11) the schedule of property which he is directed to cause to be proclaimed for sale is thus described "mehal Katalgachi appertaining to Towzi No. 1381, Division Satgachia, Pergana Haveli." Here we have the introduction of the name Satgachia which is actually the Police Thana for Katalgachi, while that for Bagh Kalapahar is named Jamalpur. Next we come to Ex. 9 which is the peon's return of service and records that the sale proclamation was published at Katalgachi by beat of drum in the presence of witnesses, three of whom are named, and that a copy of that sale-proclama-

tion was affixed to the Collectorate verandah.

The peon having left the service of Government his return was proved by the former Nazir. Two of the witnesses named in that return have testified to its correctness and their evidence has been corroborated by other witnesses from Katalgachi. Some attempt was made by the Defendant to prove that the service was effected at Bagh Kalapahar. Of the four witnesses examined on this point, two do not reside at Kalapahar while the other two give very vague evidence and one of them has had litigation with the Plaintiffs. This evidence is quite unworthy of credit, and it fails to explain how the peon in his return refers to Katalgachi and correctly names witnesses of that place and why he should have gone to Kalapahar which is 10 miles away and is not at all mentioned in the proclamation given into his hands. To the peon the towzi number would convey no information and he would naturally go to the place named in his instructions.

In the result a 10<sup>4</sup>/<sub>10</sub> annas 13 gundas 3 karas share of Bagh Kalapahar was put up to sale by the Nazir, and knocked down for Rs. 165 to a pleader's mohurir, there being only one other bidder. The Plaintiffs value the property at Rs. 25,000, and on a consideration of the evidence, I am satisfied that at the lowest estimate it must be worth Rs. 10,000 to 12,000. It appears that Plaintiffs' share had been mortgaged for about Rs. 1,500 and that the amount under the mortgage decree was deposited in Court after the sale. It seems to me clear that Plaintiffs have suffered very great loss in consequence of the very irregular proceedings taken in connection with the sale of their property. Adopting the language of the learned Judges in the case of *Ram Logan Ojha v. Bhawanee Ojha* (3), "one thing was advertized for sale and another was sold, so that in fact there was no sale proclamation at all. But even if that did not make the sale a nullity, and if it were necessary to enquire whether any damage had arisen by reason of the irregularity in the sale, there would be no doubt in the matter." In the present instance neither the judgment-debtor who reside at Kalapahar nor any likely bidders of

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that place were apprized of the intended sale ; for no sale proclamation whatever has issued or been published in or even near Bagh Kalapahar. And persons present at the sale would naturally be deterred from bidding, when it was patent that there was a grave discrepancy between the property advertized and that offered for sale and when the sale proclamation had not been published where it should have been. In fact, I fail to understand how the Nazir with the actual facts staring him in the face could have considered himself authorized to sell Bagh Kalapahar. To the Collector the defects in procedure seemed so patent and material that he refused to defend the suit or support the action of his subordinates. Now I come to the legal aspects of the case.

The contention of the Appellant is that on the facts found such a suit as this is not maintainable, that the only remedy which was available to the Plaintiffs was an appeal to the Commissioner, a remedy which they sought but were refused on the ground that their application was out of time, though they had no notice of the sale and could not have anticipated that the certificate officer would for a small demand of Rs. 131 put up a valuable estate for sale in defiance of the prohibition contained in sec. 245 of the Civil Procedure Code, that the value of the property attached for sale shall, as nearly as may be, correspond with the amount of the decree.

Now under the Act for the Recovery of Public Demands which is at present in force, viz., Act I (B. C.) of 1895 as amended by Act I (B. C.) of 1897, not only does an appeal lie to the Collector or the Commissioner as the case may be (sec. 32), but a sale may be set aside under sec. 311 of the Code of Civil Procedure (sec. 20). Sales which are held under Act XI of 1859 may, by sec. 33 of that Act, be set aside on appeal to the Commissioner, or thereafter, by regular suit. But we have to deal with Act VII (B. C.) of 1880. It has been held in several cases that the provisions of sec. 311, Civil Procedure Code, do not apply to sales under Act VII (B. C.) of 1880. See for example *Sadhu Saran Singh v. Panch Deo Lal* (2) and *Ram Lagan Ojha v. Bhawani*

(2) I. L. R. 14 Cal. 1 (1886)

*Ojha* (3). Further in the case of *Mohdun Huj v. Shew Sahay Singh* (18) which was a suit to set aside a sale for arrears of road and public works-cess on the ground that no notice has been served under sec. 10, Act VII (B. C.) of 1880, and that no sale proclamation had been published on the land, it was held that the suit would lie although no previous appeal had been preferred to the Commissioner, the reason being that sec. 98 of the Cess Act makes cesses recoverable under Act VII (B. C.) of 1880, and not as "arrears of revenue and other demands realizable in the same manner as arrears of revenue are realizable" to which alone sec. 33, Act XI of 1859, is applicable.

The same reasoning would also seem to bar the application of sec. 2 of Act VII (B. C.) of 1868, inasmuch as the preamble of that Act indicates that its scope is to amend the law "for the recovery of arrears of land revenue and of public demands recoverable as arrears of land revenue."

No doubt this was not the view taken in the case of *Sadhu Saran Singh v. Panch Deo Lal* (2), but the learned Judges who decided that case, while inclined to hold that sec. 33, Act XI of 1859, was inapplicable to sales for arrears of cess, do not appear to have had their attention drawn to the preamble to the Act of 1868 in which almost the same words are used as those in sec. 33 of Act XI of 1859 on which the argument was founded.

Even if it be conceded that the law allowed an appeal to the Commissioner, I fail to see how either in law or reason the Plaintiffs are necessarily debarred from any further remedy by suit. Had the sale been held under Act XI of 1859 a regular suit would lie. As the Plaintiffs were precluded from applying under sec. 311, Civil Procedure Code, the bar to a regular suit which is expressly created by sec. 33 is removed. As regards authority, no doubt most of the cases cited at the hearing referred to suits instituted on the ground either that no valid certificate of arrears was drawn up, or that the notices required by sec. 10 were not served. Still if it be once conceded that a suit will lie

(2) I. L. R. 14 Cal. 1 (1886).

(3) I. L. R. 14 Cal. 9 (1887).

(18) I. L. R. 25 Cal. 85 (1897).

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under such circumstances, the question naturally arises where should the line be drawn, and why in the absence of a statutory bar should the Plaintiffs be denied a right of suit in order to obtain redress for a grievous wrong resulting from the culpable negligence of executive officers to carry out the provisions of the law, and initiated by a total disregard of the safeguard provided by sec. 245, Civil Procedure Code.

Moreover there is clear authority for the proposition that a suit like the present one is maintainable. In the case relied on by the lower Court [*Ram Logan Ojha v. Bhuvani Ojha* (3)] the sale was set aside on the ground that there was no sale proclamation for the land actually sold. In *Mohibul Haq v. Shaw Sahai Singh* (13), previously cited, one of the grounds on which the sale was set aside was that no sale proclamation had been published on the land and that the property had consequently been sold at a very low price. The High Court dismissed the appeal after deciding that an appeal to the Commissioner was not a condition precedent to the institution of such a suit.

In the case of *Baigunth Sahai v. Ramyut Singh* (12), their Lordships of the Privy Council, while resting their decision on the ground that there was no certificate for arrears and therefore no foundation for the sale, nevertheless do not impugn the finding of the High Court that the sale was likewise liable to be set aside on the ground of irregularities in conducting the sale (*vide* page 778). Much reliance was placed by the learned pleader for the Appellant on the case of *Troyluckho Nath Mozundar v. Pahar Khan* (1), where the learned Judges in reliance upon the rule laid down in *Sadhu Saran Singh v. Panch Doo Lal* (2) held that "the only remedy of a judgment-debtor whose property has been sold in execution of a certificate issued under Bengal Act VII of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale is by way of an appeal under sec. 2 of Bengal Act VII of 1868."

The words "substantial injury by reason of a material irregularity in publishing or conducting the sale" do not occur in sec. 2 of Act VII (B. C.) of 1868 which empowers the Commissioner to annul sales "made under this Act or Act XI of 1859, which shall appear to him not to have been conducted according to the provisions of the said Acts."

I have already intimated why in my opinion this section does not apply to sales held under Act VII (B. C.) of 1880. I may add that it was enacted in lieu of the repealed sec. 25 of Act XI of 1859 from which it differs only as regards the period for appeal and in some slight verbal expressions. The time for appeal to the Commissioner is limited to 60 days from the day of sale. In the present case the Plaintiffs were debarred from that remedy by the very action of which they complain whereby they were kept in ignorance that their property was about to be sold (*vide* paragraph 12 of the plaint and page 20, line 1 of the paper-book). I cannot persuade myself that it is in consonance with law and justice that the Plaintiff should be confined to a remedy which by the very force of those circumstances of which they justly complain was in their case wholly illusory.

It is noteworthy that the learned Judges who laid down the rule relied upon by the Appellant also conceded that a judgment-debtor has a right of suit for the contravention of sec. 290 of the Civil Procedure Code, which, I think, is after all no more serious than the infringement of sec. 274 relating to the publication of sale proclamation. I would further rely upon the following observations of the learned Chief Justice in the recent case of *Chunder Kumar Mukerji v. The Secretary of State for India and another* (4), which I find from the paper-book was a case relating to a sale under a certificate for arrears of road and public works cesses:—"It was contended that there is no jurisdiction in the Civil Court to entertain a regular suit to set aside the sale, having regard to the provisions of sec. 2 of Act VII (B. C.) of 1868. But that section only enables the Commissioner of Revenue 'to receive an appeal': it does not make it compulsory upon the judgment-debtor

(1) I. L. R. 23 Cal. 641 (1896).

(2) I. L. R. 14 Cal. 1 (1886).

(3) I. L. R. 14 Cal. 9 (1887).

(12) I. L. R. 23 Cal. 775 (1896).

(13) I. L. R. 25 Cal. 85 (1897).

(4) 4 C. W. N. 588 : A. C. I. L. R. 27 Cal. 698 (1900).

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who complains of the sale to appeal to that tribunal, nor does it deprive him of his right to institute a regular suit to set aside the sale. If the case of *Troyluckho Nath Mozumdar v. Pahar Khan* (1) decides the contrary, I respectfully differ from its conclusion which appears to me to be inconsistent with the cases to which I am about to refer." Then after citing certain cases the learned Chief Justice proceeds—"The case of *Baijnath Sahai v. Ramgout Singh* (12), indicates how important it is in cases of this class that the requisites preliminary to a sale should be strictly complied with. In neither of the Privy Council cases to which I have referred was it suggested that a regular suit would not lie to set aside the sale, or that the judgment-debtor's only remedy was an appeal under sec. 2 of Act VII (B. C.) of 1888."

I therefore conclude that there is both reason and authority for holding that the present suit is maintainable, and I would accordingly dismiss the appeal with costs, the Appellant being allowed to take back his purchase-money.

The cross-appeal, which is directed against some of the Co-respondents and not against the Appellant, cannot, I consider, be sustained.

The Order of Reference made by Banerjee and Brett, JJ, was as follows:—

BANERJEE and BRETT, JJ.—In this appeal, which has been referred to us under sec. 575 of the Code of Civil Procedure, one of the questions that arise for determination is whether a civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act (VII of 1880, B. C.) on the ground that the sale was vitiated by a material irregularity leading to substantial injury, the irregularity complained of being that one property was advertised for sale and a different property sold; or whether the only remedy of the party whose property was sold lies in the appeal to the Commissioner under sec. 2 of Act VII of 1888 (B. C.).

The cases of *Sadhu Saran Singh v. Panch Deo Lal* (2) and *Troyluckho Nath Mozumdar v. Pahar Khan* (1) are authority in favour of the view that the first branch of the question should be answered in the negative, and the second in the affirmative; while, on the other hand, the case of *Ram Logan Ojha v. Bhawani Ojha* (3) is in favour of the opposite view; and the judgment of the learned Chief Justice in the case of *Chunder Kumar Mukerji v. The Secretary of State for India* (4) also supports the same view. In my judgment in this last-mentioned case there is a passage which has been referred to by one of the learned Judges who heard this case in the first instance as being in favour of the opposite view; but that passage, taken with the context, would show that there was no definite expression of opinion on my part on the question stated above, nor was it necessary to express any such opinion in that case, all that was said being to this effect, that even if the Respondents' contention was accepted that would not affect the jurisdiction of the Civil Court to entertain the suit then under consideration.

But quite apart from the last-mentioned case, there is, as will appear from what we have said above, a clear conflict of authority in this Court upon the question stated at the outset. That being so, the question must be referred to a Full Bench. We may add that the inclination of our opinion is in favour of the view taken by Mr. Justice Wilson in the case of *Ram Logan Ojha v. Bhawani Ojha* (3).

There is nothing in Act VII of 1880 (B. C.) to take away the jurisdiction of the Civil Court to entertain a suit like this; and the only legal provision which takes away the jurisdiction of the Civil Court to enter

(1) I. L. R. 23 Cal. 641 (1896).  
(12) I. L. R. 23 Cal. 776 (1896).

(1) I. L. R. 23 Cal. 641 (1896).  
(2) I. L. R. 14 Cal. 1 (1887).  
(3) I. L. R. 14 Cal. 9 (1887).  
(4) 4 C. W. N. 586; a. c. I. L. R. 27 Cal. 698 (1900).



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tain a suit for setting aside a sale on the ground of material irregularity leading to substantial injury, namely, sec. 312 of the Code of Civil Procedure, is not applicable to a sale in enforcement of a certificate issued under the Public Demands Recovery Act.

*Dr. Asutosh Mookerji, Moulvie Serajul Islam, Babus Govinda Chandra Roy and Tarit Mohun Das* for the Appellant.

*Babus Lall Mohun Das, Karuna Sindhu Mookerjee and Manindra Nath Bose* for the Respondents.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—The question submitted for our determination on this reference is, whether a civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act VII (B. C.) of 1880, on the ground that the sale was vitiated by a material irregularity leading to substantial injury, the irregularity complained of being that one property was advertised for sale and a different property sold; or whether the only remedy of the party whose property was sold lies in the appeal to the Commissioner under sec. 2 of Act VII (B. C.) of 1868.

It has been contended before us that it is open to the Appellant upon this reference to show, having regard to the language of the suit and the question submitted, that a suit will not lie for reasons other than the possible application of sec. 2 of Act VII of 1868, for instance, that secs. 244 and 312 of the Code of Civil Procedure are bar to the suit. I do not think that is so. It might have been so if the first question

had stood alone, but the alternative evidences what the real question is, and I read the reference as one merely upon the question of whether the view expressed by the learned Judges in the case of *Troyluckho Nath Mozumdar v. Pahar Khan* (1) which followed a previous decision of a Division Bench of this Court, in the case of *Sudhu Saran Singh v. Panch Deo Lal* (2) which held “that the only remedy of a judgment-debtor whose property has been sold in execution of a certificate issued under Act VII (B. C.) of 1880 and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale is by way of an appeal under sec. 2 of Act VII (B. C.) of 1868,” is or is not correct having regard to the case of *Ram Logan v. Bhawani Ojha* (3) which is in favour of the opposite view. That is the only question upon which I propose to express my opinion. The question of whether sec. 244 or 312 of the Code is a bar to the suit has never been raised; there is nothing to show that that point has ever been the subject of conflicting decisions of Division Benches of this Court, and so a fit subject for a Full Bench reference. It would lead to much confusion and be contrary to Rule 1 of Ch. V of the Appellate Side Rules, if we were to go into such points as are now suggested upon the present reference.

We ought to confine ourselves to the precise and specific point of law submitted for our disposal. Nothing I am now saying, will prevent the Appellant

(1) L. L. R. 23 Cal. 641 (1896).

(2) L. L. R. 14 Cal. 1 (1886).

(3) L. L. R. 14 Cal. 9 (1887).

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from raising any other points before the Division Bench to which this case may be sent back for final disposal, or prevent that Bench from deciding them.

Upon the question submitted to us being such as I have indicated, I am clearly of opinion that the decisions in the two first cases I have referred to are bad in law, for, whether sec. 2 of Act VII (B. C.) of 1868 does or does not allow an appeal, there is nothing in that section which prevents the party whose property has been sold under the circumstances stated in the referring order, from bringing a suit in the Civil Court to set aside such sale. There may, of course, be other defences to such a suit, but I hold, unhesitatingly, that sec. 2 of Act VII (B. C.) of 1880 is no bar in itself to a person who considers he is aggrieved by the sale bringing a civil suit in a Civil Court to have that sale set aside.

I have virtually expressed the same view previously, though perhaps it was not necessary for the decision of that particular case, in the case of *Chunder Kumar Mukerji v. The Secretary of State* (4), and I have heard nothing to-day which leads me to resile from that opinion. In point of fact the learned vakil who appeared for the Appellant has not attempted to support the point.

In my opinion the answer to the question referred to us is that an appeal to the Commissioner under sec. 2 of Act VII (B. C.) of 1868 is not the only remedy open to the party whose property has been sold in enforcement of a certificate issued under the Public Demands

Recovery Act (VII, B. C., of 1880) and that that section is no bar to his bringing a civil suit in a Civil Court to set aside the sale.

The costs of this reference will abide the result of the appeal, the hearing fee being assessed at five gold mohurs.

PRINSEP, J.—I am of the same opinion. As I understand the object of the learned Judges in making this reference, it was to obtain an expression of opinion whether in a suit such as this, sec. 2 of Act VII (B. C.) of 1868 was a bar to its institution and as expressing the affirmative of that question they refer to the case of *Ram Logan Ojha v. Bhawani Ojha* (3). That, as I understand it, was the only point before us, and I agree with the answer which it is proposed to give.

BANERJEE, J.—I agree with the learned Chief Justice in holding that sec. 2 of Act (VII, B. C., of 1868) does not bar a civil suit for setting aside a sale in enforcement of a certificate issued under the Public Demands Recovery Act (VII, B. C., of 1880), on the ground that the sale was vitiated by a material irregularity leading to substantial injury, and that the case of *Troyluckho Nath Morumdar v. Pahar Khan* (1) in so far as it affirms that view and lays down that the only remedy of the party whose property has been sold lies in an appeal to the Commissioner under sec. 2 of the Bengal Councils Act of 1868, was wrongly decided. But as I was one of the Judges who made this reference, I feel bound to add that this answers only one part of the question, namely, the latter

(1) 1 C. W. N. 586 : S. C. I. L. R. 27 Cal. 608 (1900).

(1) I. L. R. 23 Cal. 641 (1896).

(3) I. L. R. 14 Cal. 9 (1887).

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alternative, and that the other alternative question, namely, whether a civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act (VII, B. C., of 1880) on the ground that the sale was vitiated by a material irregularity leading to substantial injury, the irregularity complained of being that one property was advertised for sale and a different property sold, remains unanswered.

At the argument the learned vakil for the Defendant-Appellant raised the question whether a civil suit such as the one contemplated in the first alternative of the question referred to us was not barred by sec. 244 of the Code of Civil Procedure, but it was held by a majority of this Bench that it was not open to him, upon this reference, to raise that question. From that view I beg respectfully to dissent. I am of opinion that the reference, or at any rate, the first part of the question stated in the order of reference did raise that question; and the reason, why the second alternative of the question referred to the Full Bench was worded in the manner in which it has been, is because the point is so put in one of the conflicting decisions which have led to this reference. The conflict in the decisions of this Court which has led to this reference is that between the case of *Ram Logan Ojha v. Bhawani Ojha* (3), on the one hand, holding that a civil suit would lie in a case like the one described in the question, and the cases of *Sadhu Saran Singh v. Panch Deo Lal* (2), and *Troyluckho*

*Nath Mozumdar v. Pahar Khan* (1), on the other, holding that a civil suit would not lie and that the only remedy of the party whose property has been sold is an appeal to the Commissioner. There is thus a conflict in the result; and therefore I and Mr. Justice Brett, who made the reference, thought that by reason of the conflict between these cases the question ought to be referred to a Full Bench. The conflict was in the conclusions arrived at in those cases, though not in the reasoning. But as the question which was sought to be raised in this reference has been held by a majority of the Full Bench not to be open to the Appellant to raise, I will not express any opinion upon it now; and I simply express my concurrence in the answer which the learned Chief Justice has given to the reference so far as that answer goes, reserving my opinion upon that question.

AMEER ALI, J.—I agree with the answer the learned Chief Justice proposes to give to this reference. It appears to me that necessity for the reference arose from the fact that in *Troyluckho Nath Mozumdar v. Pahar Khan* (1), which proceeded upon the earlier case of *Sadhu Saran Singh v. Panch Deo Lal* (2), it was held that a civil suit was barred inasmuch as the Plaintiff had a remedy in the shape of an appeal to the Commissioner under sec. 2 of Act VII (B. C.) of 1868. This view, however, was at variance with that taken in the case of *Ram Logan Ojha v. Bhawani Ojha* (3). There was no conflict on any other point

(2) I. L. R. 14 Cal. 1 (1886).

(3) I. L. R. 14 Cal. 9 (1887).

(1) I. L. R. 23 Cal. 641 (1896).

(2) I. L. R. 14 Cal. 1 (1886).

(3) I. L. R. 14 Cal. 9 (1887).

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in those decisions. It was not held either in *Troyluckho Nath Mozumdar v. Pahar Khan* (1) or in *Sadhu Saran Singh v. Panch Deo Lal* (2) that the suit was barred under any other provisions of the law. I therefore think as I said before, that the necessity for the reference arose upon the ground which formed the *ratio decidendi* of the case of *Troyluckho Nath Mozumdar v. Pahar Khan* (1). And accordingly in my opinion the answer proposed to be given deals with the exact question raised.

RAMPINI, J.—I concur with my brother Banerjee in thinking that by the referring order in this case two questions have been referred for the decision of the Full Bench, namely, *first*, whether a civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act (VII, B. C., of 1880) on the ground that the sale was vitiated by a material irregularity leading to substantial injury; and, *secondly*, whether the only remedy of the party whose property has been sold lies in an appeal to the Commissioner under sec. 2 of Act VII (B. C.) of 1868. Consequently, I do not think that we are fully answering the questions propounded to us when we only deal with the second of those questions. But I understand that when the case goes back to the referring Bench, the first question will be open for discussion; so that perhaps it is not very important whether we deal with it here or not.

I regret I am unable to agree with the opinion of the other Judges constituting this Bench as to the answer to

be given to the second question proposed in the referring order. It seems to me that the only remedy of the party whose property has been sold does lie in an appeal to the Commissioner under sec. 2 of Act VII (B. C.) of 1868. I think I am bound to hold this on the authority of the cases cited in the referring order, namely, the case of *Sadhu Saran Singh v. Panch Deo Lal* (2), and the case of *Troyluckho Nath Mozumdar v. Pahar Khan* (1). The reasons given in these cases for this view are that in sec. 2 of Act VII (B. C.) of 1880 it is provided that the two Acts XI of 1859 and VII (B. C.) of 1868, together with Act VII (B. C.) of 1880 itself are to be read as one Act. By the provisions of sec. 2 of Act VII (B. C.) of 1868 an appeal lies to the Commissioner by a person who is aggrieved and who wishes to complain of any irregularity in publishing or conducting the sale, and by the final words of the section the order of the Commissioner in such an appeal is final. Nothing has been said before us to-day which satisfies me that these reasons are incorrect. Indeed no attempt has been made to controvert this reasoning. I must therefore adhere to the conclusion arrived at in those cases.

Of course I must not be understood as implying that no suit will lie in a Civil Court to set aside a sale on grounds other than that of irregularity in publishing or conducting a sale, such as fraud, absence of a good and valid certificate, non-service of notice under sec. 10 of Act VII (B. C.) of 1880 in such

(1) I. L. R. 23 Cal. 641 (1896).

(2) I. L. R. 14 Cal. 1 (1886).

(1) I. L. R. 23 Cal. 641 (1896).

(2) I. L. R. 14 Cal. 1 (1886).

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a way as to make it binding on the judgment-debtor, or other grounds of the like nature.

S. C. S.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1979 of 1898.

A. CASPERSZ and subsequently A. M. DUNNE, substituted in his place as

RAMPINI, J.

PRATT, J.

1900.

20, June.

Receiver to the estate of the late Prosunno Kumar Tagore, Plaintiff, Appellant,

KUMAR SINGH, Defendant, Respondent.

*Cess Act (IX of 1880, B. C.), sec. 4—Cultivating raiyat—Tenure-holder.*

*A tenant holding land and paying as rent therefor a sum of money exceeding one hundred rupees per annum is, for the purposes of assessment under the Cess Act, a tenure-holder and not a cultivating raiyat.*

This was an appeal preferred on the 26th of September 1898, against the decree of Babu Nuffer Chunder Bhutta, Subordinate Judge, 1st Court of Zillah Bhagulpore, dated the 9th of June 1898, modifying the decree of Babu Jogendra Nath Deb, Munsif of Monghyr, dated the 21st of February 1898.

The facts of the case appear from the judgment of the Court.

Babus Nilmadhub Bose and Mohendra Nath Roy for the Appellant.

Babus Karuna Sindhu Mukerjee and Lakshmi. Narain Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from a decision of the Subordinate Judge of Bhagulpore, dated the 9th June 1898.

The suit is one brought by the Plaintiff to recover a certain amount of road-cess and public work-cess from the Defendant. The facts of the case are these:—The Defendant was formerly, i. e., before 1303, a *raiya*, holding a *raiya* or cultivating lease of 1,848½ bighas.

The Collector, however, assessed him with road-cess as a tenure-holder. The term of the previous lease expired in 1302. The Defendant then took another lease (so far as we can see admittedly for the same land, with the exception of 48 bighas) for a period of 5 years, viz, from 1303 to 1307. This lease was also granted to him as a cultivating *raiya*. It was for 1,000 bighas at a rent of Rs. 1,000.

The Plaintiff now sues the Defendant for the road-cess of 1302, 1303, 1304 at the rate assessed by the Collector. The Defendant denies that he is liable to pay at this rate.

The first Court gave the Plaintiff a decree, holding that the Defendant was a tenure-holder and not a cultivating *raiya*.

The Subordinate Judge affirmed the decree of the Court of first instance, so far as the year 1302 was concerned, but he held that, after the execution of the new lease in favour of the Defendant, the Defendant was not bound by the Collector's assessment, but was liable to pay road-cess, etc., at the rates leviable upon a cultivating *raiya*.

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The Plaintiff appeals against the Subordinate Judge's judgment, so far as the years 1303 and 1304 are concerned, and we think that the Subordinate Judge has certainly fallen into error so far as the status of the Defendant is concerned. It may be that, within the meaning of the Bengal Tenancy Act, the Defendant is to be regarded as a *raiya*t and not as a tenure-holder, but, for the purposes of the Road-cess Act, the law with regard to what is a cultivating *raiya*t and what is a tenure-holder would seem to be different. Under sec. 4 of Act IX of 1880, B. C., a "cultivating *raiya*t" is defined as a person cultivating land and paying rent therefor not exceeding Rs. 100 per annum; and "tenure" includes every interest in land, whether rent paying or not, save and except an estate as above defined, and save and except an interest of a cultivating *raiya*t. Looking at this definition, it is perfectly clear that under the terms of the law the Defendant, so far as the collection of road-cess is concerned, is a tenure-holder and not a cultivating *raiya*t. We are surprised that the Subordinate Judge should have set aside the judgment of the Munsif on this point in the face of this definition, and set it aside without attempting in any way to show how the Munsif is wrong; and we can only say that, so far as we can see, the Subordinate Judge has come to the conclusion that the Defendant is a cultivating *raiya*t by wilfully shutting his eyes to the provisions of the road-cess law. We must therefore set aside his decision; for we find that according to the road-cess law the Defendant is not a cultivating *raiya*t; but a tenure-holder and is liable to be assessed as such.

The case must therefore go back to the lower Appellate Court for the disposal of the second issue, which is to be found at page 5 of the paper-book, *viz*, what amount, if any, is the Plaintiff entitled to recover from the Defendant for the years 1303, 1304? Having found this it must dispose of the case accordingly. We, therefore, remand the case to be dealt with in accordance with the above directions. The costs will abide the result.

C. C. G.

#### PRIVY COUNCIL.

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

LORD HOBHOUSE.	HARENDRA LAL ROY
LORD DAVEY.	CHOWDHRY,
LORD LINDLEY.	Plaintiff, Appellant,
SIR R. COUCH.	MAHARANI DAS and
1901.	others, Defendants,
22, February.	Respondents.

*Consent decree, construction of—Solehnama—Mortgage suit—Breach of contract.*

*In a suit on a mortgage for Rs. 49,855 and odd, a consent decree was made whereby the Defendants consented to judgment for the entire amount but subject to the proviso that, if on a certain date the Defendants should pay to the Plaintiff the sum of Rs. 35,000, the decree should be considered as satisfied. The decree further provided that if for the payment of the aforesaid sum it should be necessary for the Defendants to sell any portion of the mortgaged properties, they should give the particulars of the properties to be sold to the Plaintiff who should then appraise the same within 30 days and after credit.*

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*ing the proper price against the Defendants' debt, should execute a deed of release or deed of consent. The Plaintiff, however, refused to appraise any properties when asked to do so, and by reason of such refusal the Defendants were unable to pay up the amount within the date fixed. The Plaintiff thereupon applied for execution for the whole amount of the decree:*

*Held—That by reason of the breach of contract by the Plaintiff, he was only entitled to a decree for Rs. 35,000. That that sum must be regarded as having been tendered and refused on the date fixed for payment thereof and would not therefore carry any interest.*

This was an appeal from an order of the High Court of Calcutta (Beverley and Ameer Ali, JJ.), dated the 4th January 1894. The appeal arose out of an application for execution of a consent decree obtained by the Plaintiff on the 13th August 1888 under the following circumstances: The Plaintiff held a mortgage in respect of several properties from two persons, Ram Churn Saha and Madan Mohun Saha, both of them since deceased, and represented in the suit by the Respondents. A suit was brought on the mortgage for the recovery of Rs. 49,000 and odd, with interest and costs, which was compromised, and the terms of the *solehnama* entered into between the parties were embodied in the decree. A decree was entered for the full amount claimed with interest and costs of the suit and the following were the other important provisions of the decree:—

"3. A decree will be made to the effect that the entire amount found on account made to be due to the Plaintiff up to this day for principal

and interest due during the pendency of the suit and the cost of the suit, shall be realised by the sale of the mortgaged properties, which shall be liable for the whole amount, and by the sale of the properties of the Defendants and other properties left by the mortgagors, whether standing in their own names or *benami* for them, moveable and immoveable, as well as by the sale of the Defendants' dwelling-house, and that such sum shall bear interest at the rate of 10 annas per cent. per month from the date of the decree to the date of realisation.

"4. If the Defendants should, within the 30th Srabun 1296 from the date of the decree, pay to the Plaintiff amicably or deposit to his credit in Court the sum of Rs. 35,000, the decree shall be considered as satisfied. The Plaintiff shall not be able to execute this decree again. The balance of the money shall be considered as remitted, and the decree satisfied. Out of the aforesaid Rs. 35,000, the Defendants shall pay to the Plaintiff the sum of Rs. 700 within Assin next, and the remaining Rs. 34,300 within the 30th Srabun 1296. If they fail to pay the sum of Rs. 700 within the month of Assin next, then the aforesaid sum of Rs. 700 shall bear interest at the rate of Rs. 5 per cent. per month from the month of Kartic next.

"5. If the Defendants do not pay the aforesaid Rs. 35,000 within the 30th of Srabun 1 as provided by para. 4 or if part should be paid and part remain unpaid, then the whole amount of the decree as stated in para. 3 and the amount of interest which may be due from the date of the decree, after deducting the amount paid, shall be realised by the sale of the mortgaged and other properties, moveable and immoveable, whether standing in their own names or *benami* for them, and by the sale of the Defendants' dwelling-house. To that the Defendants shall not be able to make any objections, and if they do, it shall be of no effect.

"6. The execution of the decree shall be stayed till the 30th Srabun 1296, which, according to the provisions of para. 4, is the time granted by the Plaintiff for the payment of the aforesaid sum of Rs. 35,000. But if within this time the mortgaged properties or any one of them should be proclaimed for sale for any kind of

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arrears of rent, and the Defendants should not prevent the sale by payment of the decretal amount, then the Plaintiff shall be competent to realise the whole money due under the decree, by taking out execution without waiting for the expiration of the fixed time under the provisions of para. 5, and the Defendants shall not be entitled to any remission under the terms embodied in para. 4, and they shall not be able to make any objection with respect to it, and if they do, it shall be rejected. If the Plaintiff should save any property under mortgage by paying the money due for arrears of rent, then such money with costs and interest shall be a further charge on the properties, and such money shall be realised by the sale of moveable and immoveable properties of the Defendants, their ancestors and their heirs, and by the sale of their dwelling-house.

"7. If for the payment of the aforesaid sum of Rs. 35,000, it should be necessary for the Defendants to transfer the mortgaged properties or any plots or portions of them or grant *pattahs* on receipt of *salami*, then the Defendants shall, on settling who are to receive (the properties), give the Plaintiff the *sthit* papers in relation to whatever properties they may from time to time determine to sell or lease, before the 30th Assar 1296. Within 30 days from that day the Plaintiff shall, at the Defendants' expense, make an appraisal of the *sthit* in the *mofussil*, and after crediting the proper price or the proper *salami* against the Defendants' debt, shall, at the Defendants' expense, duly execute a deed of release or a deed of consent. The Defendants shall not be able to alienate the mortgaged properties or any portion of them, or confer any right therein by *pattah* to any one, without a written deed of release or consent from the Plaintiff, and if they do any act contrary to this, such act shall be of no effect."

The sum of Rs. 700 was paid as provided in the decree, but the Rs. 34,300, which was required to be paid before the 30th Srabun 1296, i.e., 14th August 1889, was not paid as conditioned in the consent decree; and an application was made for the execution of the higher amount

named in the decree, viz., Rs. 52,000 and odd. The Subordinate Judge granted execution in respect of the amount claimed. The Defendants thereupon appealed to the High Court, contending that they were unable to carry out the terms of the contract on account of certain misconduct which they alleged against the decree-holder. They alleged that they could not make the last payment on account of the refusal of the decree-holder to give consent to certain sales of the mortgaged properties which he was bound to give under para. 7 of the *solehnama* decree, and that therefore the decree-holder was only entitled to get Rs. 34,300 and not the full amount of the decree. The High Court on the 1st September 1891 remanded the case with directions to inquire whether the mortgagee had, by unreasonable refusal or neglect on his part to take any steps to carry out the terms of the clause authorising the judgment-debtors to sell the properties piecemeal, prevented them from paying the money within the time fixed. The learned Judges (Pigot and Banerjee, JJ.) were of opinion that, "if on inquiry, it should appear that the mortgagee did render it practically impossible for the mortgagors to carry out the intended arrangement, the mortgagee must be limited to the reduced amount agreed on. Unreasonable refusal or neglect by the mortgagee and a reasonable ground for belief that property could have been sold in time for enough to meet the reduced claim but for such conduct, would be enough to entitle the mortgagors to have the mortgagee held to his agreement to take the lesser sum."

Upon remand the Subordinate Judge



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found that the mortgagor had unwarrantably and unjustifiably thrown obstacles in the way of the judgment-debtors selling various properties which they had from time to time arranged to sell and thus prevented their making the payment of the smaller sum agreed upon to be paid on or before the 30th Srabun 1296. He also found on the evidence that the judgment-debtors had bargained for the sale of their landed property of the value of Rs. 23,000, and for the sale of their business at Sahebgunge for Rs. 2,000; that they had arranged for a loan of Rs. 5,000 and were about to sell their ornaments for Rs. 5,000 so as to make up the Rs. 35,000; under those circumstances he allowed execution for the lesser sum only and refused interest thereon.

The decree-holder thereupon appealed to the High Court contending, that the facts found by the lower Court were erroneous; that there was no obligation on the part of the decree-holder to take any steps for the purpose of giving his consent to the sales unless he was assured that the entire amount, viz., Rs. 34,300, which remained due after payment of the Rs. 700, would be paid in full; that, assuming, that he was bound to give his consent as alleged by the judgment-debtors, the effect of his not giving consent would only entitle the judgment-debtors to have the sums for which they were going to sell the properties credited against the decretal debt, viz., Rs. 23,000, and lastly, that the lower Court was wrong in refusing him interest upon the lesser sum of Rs. 34,300.

The High Court dismissed the appeal,

agreeing with the lower Court on all the points.

The decree-holder now appealed to the Privy Council against the orders of the High Court, the one dated the 1st September 1891 remanding the case to the lower Court, and the order of the 4th January 1894 dismissing the appeal from the order made by the Subordinate Judge upon remand.

*Mr. Branson* for the Appellant.

*Mr. C. W. Arathoon* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

**LORD DAVEY**—This is an appeal by a money-lender in Bengal, who held a mortgage from Ram Churn Saha Poddar, and Madan Mohun Saha Poddar, brothers, for a sum which it is unnecessary to mention. Suffice it to say, that in the early part of the year 1888 the Appellant instituted a suit in the Court of the Subordinate Judge of Backergunge against the Respondents to recover the sum of Rs. 49,855-14. The mortgage covered 90 different lots of land, some of them, apparently, from the description in the schedule, being of small value, and others of larger value, but apparently not lying contiguous to each other. After the suit was commenced a compromise was come to, and that compromise is to be found in the consent decree at page 18 of the record. The effect of that decree was this, that the Defendants consented to judgment for the entire amount asked by the plaintiff, but subject to this proviso, that if, on a day which is the same as the 14th of August 1889, the Defendants should pay to the Plain-

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tiff the sum of Rs. 35,000, the decree should be considered as satisfied, and the balance of the money should be considered as remitted. Out of the sum of Rs. 35,000 the Defendants were to pay to the Plaintiff the sum of Rs. 700 before the 15th of October 1888, and the remaining Rs. 34,300 before the 14th of August 1889. The decree provided that if they failed to pay the sum of Rs. 700 within the month of Assin—that is October—next, then the aforesaid sum of Rs. 700 should bear interest at the rate of 5 per cent. per month from the month of Kartic next. It then contained a clause, which is No. 7 in the decree, and according to the translation given in the record is as follows—the learned Judges of the High Court had it re-translated, but in substance, and for any material purpose, it does not appear to their Lordships that the version given in the judgment of the High Court differs from that in the record (p. 34):—“If for the payment of the aforesaid sum of Rs. 35,000 it should be necessary for the Defendants to transfer the mortgaged properties, or any plots or portions of them, or grant *pattahs* on receipt of *salami*”—that is, a premium or bonus for the lease—“then the Defendants shall, on settling who are to receive (the properties), give the Plaintiff the *shit* papers in relation to whatever properties they may from time to time determine to sell or lease, before the 30th Assar 1296”—that is the 13th July 1889.—“Within 30 days from that day the Plaintiff shall, at the Defendants’ expense, make appraisement of the *shit* in the *mofussil*, and after crediting the proper price, or the proper *salami*, against the Defendants’

debt, shall at the Defendants’ expense duly execute a deed of release or deed of consent. The Defendants shall not be able to alienate the mortgaged properties, or any portion of them, or confer any right therein by *pattah* to any one without a written deed of release or consent from the Plaintiff, and if they do any act contrary to this such act shall be of no effect.” The meaning of that clause appears to their Lordships to be reasonably plain. No doubt the Respondents, who appear to be a widow lady and her sons, would find a difficulty in raising the money for the purpose of paying the mortgage debt to the decree-holder except by sale, as opportunity offered, of the mortgaged properties themselves. The clause provides means for doing so. But of course the Plaintiff would quite rightly secure himself against any improvident alienation, or any alienation, of the property comprised in his mortgage at an inadequate price, and for that purpose the arrangement is that whenever from time to time the Defendants, the mortgagors, should determine to sell or release they should send to the Plaintiff the particulars, in order to enable him to judge of the propriety of the sale, or the adequacy of the price of any sale, or the bonus, if a lease. Then there is an absolute obligation upon him. It is not left to his option. There is an absolute obligation upon him within 30 days from the day he receives the papers and particulars, to make an appraisement, and if the price is approved, and credited to him against the debt, he is then to execute a deed of release, or deed of consent. On the face of this clause there is not the slightest pretence for saying

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that the decree-holder was at liberty to postpone the appraisalment of the properties which the Respondents proposed to sell from time to time until sales were proposed of a sufficient amount to pay the whole of the debt. On the contrary, it is expressly contemplated that the Respondents may from "time to time" determine to sell or release; and from the nature of the property, consisting, as has been said, of 90 small lots, it is apparent that they would be more likely to sell in separate parcels than in bulk, so as to raise the whole amount at once. Nor is there any ground for saying, as Mr. Branson suggested, that the Plaintiff, the decree-holder, is not bound to execute a deed of release, or a deed of consent, until the whole debt is paid off. The deed of release, or deed of consent, which is referred to in this clause, is obviously a deed of release, or a deed of consent to the mortgagor selling, in favour of the purchaser. The High Court's observation is, their Lordships think, entitled to great weight, that if the construction which the decree-holder, the Appellant, put upon this clause, that he was not bound to do anything until the whole of his money was forthcoming, was a right construction, they might just as well have had no clause at all; because, of course, if the whole of his money was forthcoming, and they were ready to pay him off the whole of his money, it was perfectly immaterial to him what prices they obtained.

What took place on this decree was this. The Rs. 700 were paid in the time stipulated; about that, there is no controversy; leaving, therefore, Rs. 34,300 to be paid before the 14th of August 1889. The present Respond-

ents did arrange for a sale of various lots, and without reading the whole of the correspondence, it is sufficient to take the first letter, which is dated the 7th of Bysack 1296, equivalent to the 19th April 1889, as a specimen. This is from the Respondent, Bindubasini Dasi, the widow. She writes this to the present Appellant:—"I have already written two letters to you, but owing to my misfortune you have not, up to this time, given any reply to them. I have been trying to pay up your money by the sale of properties. The matter has not yet been settled with the purchasers, but the sale of the properties Nos. 55, 52, 68 of the mortgage bond at thirty times the profit,"—that is, probably 30 years' purchase—"has been arranged for with Gobind Chunder Saha and others, and the property No. 79 at thirty times the profit with Judhistir Saha, and the earnest moneys have been taken from both. I send the *skit* papers of those properties to you per book post;" and then she points out, which is an obvious observation, that "people fear many things before they purchase, and if one transaction is completed with one person, others will be encouraged to enter into (similar) transactions." Or, the sentence might have been put in a negative form: if it is found that these transactions will not go off, and you will not give your consent to my selling these properties as I have agreed to do, then other persons will be shy of entering into contracts for the remainder of the property. Then she asks him in accordance with this contract to "send a man as soon as you can to make an appraisalment of \* \* \* those four properties." What was the answer to

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that? His answer was dated the 29th of Bysack which would be equivalent to some day in April or May 1889, about ten days afterwards: "It will be very troublesome to make an appraisement if you arrange for the sale of properties in this way. You have in this way procured only Rs. 3,138-8 annas; but you have not said what is to be done about the remaining money. Procure the whole of the money, then an appraisement shall be made of all the properties together, and a deed of release will be executed." That was a plain breach of the contract which the Appellant had entered into. He had, as has been already pointed out, entered into a contract that 30 days after receiving the particulars of sales made from time to time, he would send a man to appraise; but in this letter he refuses to send a man to make the appraisement until the whole of the money is procured, and an appraisement can be made of all the properties together, when a deed of release will be executed. That, therefore, was a complete breach of his contract, and the consequence was that those sales could not be carried out. Then there are subsequent letters to the same effect, and he gives the same answer, that she cannot get a release "until the whole amount is procured according to the terms of the settlement;" and he says it wastes time trying to sell piecemeal. Ultimately she sends a registered letter on the 29th of Assar 1296, that is, the 12th July 1889. She had previously sent her servants to personally expostulate with the Appellant, and she now writes him a letter begging him to send a man to appraise the properties which she had undertaken to sell. He

replies, "Nothing can be done unless the whole of the money is procured, and it is of no use to worry me repeatedly. Still, as you say you have secured purchasers for some of the properties mortgaged to me, and of some other properties, for Rs. 23,000, I send my officer Jagat Chunder Chuckerbutty to make an appraisement. Have the consideration money of those among the mortgaged properties for the sale of which you have arranged deposited by the purchasers with some trustworthy pleaders, and mukhtar of Madaripore, and after getting the appraisement made within three days you will pay up the remaining money within the time fixed by the *solehnama*." In other words he says, "Out of grace and favour to you I will send my officer to make an appraisement, but I make the condition that the consideration money of the mortgaged properties," for the sale of which the Respondent had arranged, "shall be first deposited by the purchasers, and also that the appraisement shall be made within three days, and you will thereupon pay up the remaining money." The man apparently was sent. There is some difference in the evidence as to what took place, but the learned Subordinate Judge has expressed his opinion as to the result of the evidence, and the High Court concur in the view which he takes of the evidence upon that point. It amounts to this: that the man did go, but refused to appraise, and the reason why he refused to appraise was because in accordance, no doubt, with the instructions he had received he required the whole amount of the purchase money to be deposited by the

## HARENDRA LAL ROY CHOWDHRY v. MAHARANI DASÍ.

purchasers before he would make the appraisement, which was, of course, a perfectly unreasonable condition, and one which he had no right to make : and he also required the appraisement to be made in three days, which the learned Subordinate Judge says made it practically impossible to carry it out.

Under the circumstances it is not surprising that the Respondents were not able to find the money on the stipulated day, and thereupon the present Appellant presented a petition for realisation of his entire decree by sale of the mortgaged properties. That was resisted by a statement put in on behalf of the Respondents, showing in substance, but not in the detail in which their Lordships have stated them, the facts which have been referred to. The learned Subordinate Judge in the first instance gave the Appellant execution for the whole amount of his decree on the ground that there was nothing in the compromise decree, the *solehnama*, which requires the Appellant to give his consent to the sale of any of the property. There was an appeal, and the learned Judges in the Court of Appeal expressed their opinion of the construction of the *solehnama*, and remanded it back to the learned Judge to inquire whether in substance the Appellant had placed unreasonable obstructions in the way of the Respondents realising the mortgage money by sale of the mortgaged properties. The learned Subordinate Judge took evidence on the point, and gave his judgment on the 31st of August 1892. After very carefully examining the evidence he says :—"Considering all these facts and circumstances of the case I find that the

decree-holder did render it practically impossible for the judgment-debtors to sell some of the mortgaged properties within Srabun 1296 for enough to meet the reduced claim, and therefore, according to the terms of the *solehnama* as interpreted by the High Court, he is not entitled to get more than Rs. 34,300 for his mortgage decree." It should be mentioned that there was evidence which satisfied the Subordinate Judge, and the High Court also, that if the Appellant had done that which he had contracted to do, and made an appraisement, and given a deed of release of the properties which were proposed to be sold by the mortgagors within the time stipulated for, the Respondents had made arrangements through which, by the sale of other property, including their jewellery, they would have been in a position to pay Rs. 35,000 before the date when it ought to have been paid according to the *solehnama*.

There was an appeal from this judgment of the Subordinate Judge. The Appeal Court again went very fully into the case, and they came to the conclusion that the Subordinate Judge was right in the view which he had taken of the facts of the case, and that the Appellant had not performed the contract which he had undertaken to perform, and had rendered it impossible for the Respondent to find the money within the time fixed. They thereupon confirmed the decree of the Subordinate Judge. In other words the substance of their decree is this : that as the Appellant in breach of his contract had prevented the Respondents from paying the sum of Rs. 35,000, as they could have done, and would other-

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wise have done within the time stipulated for by the *solehnama*, he must be put into the same position as if that sum had been tendered to him within that time, and he had refused the tender. Their Lordships think that that is the principle of the decree, and that in the circumstances of the case it is a sound principle. It follows that the Appellant cannot get any interest on his Rs. 34,300. The learned Subordinate Judge has taken that view, and the High Court also have taken the same view on that question as was taken by the Subordinate Judge.

In the result their Lordships will humbly advise His Majesty that the decree of the High Court should be affirmed, and the appeal dismissed; and the Appellant will pay the costs of it.

Solicitors:—*Messrs. Gush, Phillips & Co.* for the Appellant.

Solicitors:—*Messrs. Watkins and Lempriere* for the Respondents.

*Appeal dismissed with costs.*

C. W. A.

# [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 603 OF 1900.

ISWAR CHUNDER

CHOWDHRY and another,

2nd Party,

AMEER ALI, J.

PRATT, J.

1901.

5, February.

KALI MOHAN ROY  
CHOWDHRY and others,  
3rd Party, Petitioners,  
v.

AMBICA CHURN MAJUM-  
DAR and others, 1st  
Party, Opposite Party.

*Criminal Procedure Code (Act I of 1898),  
secs. 145, 537—Proceeding in respect of several  
plots of lands—Separate proceedings, if ne-  
cessary—Prejudice.*

*Where a Magistrate drew up one proceeding in respect of several plots of lands claimed to be in the possession of different persons and the parties were not prejudiced by the Magistrate not taking separate proceedings but dealing with the matter in one and the same proceeding; and where the course taken by the Magistrate did not preclude any of the parties from adducing evidence in the case concerning the different plots of land:*

Held—*That the procedure taken by the Magistrate did not vitiate the enquiry and the order made therein.*

This was a rule issued on the 1st of August 1900, against the preliminary order of the District Magistrate of Faridpur, dated the 6th of March 1900, as well as the order of the Deputy Magistrate, dated the 26th of May 1900.

The facts material to this report appear from the judgment.

*The Advocate-General (Mr. J. T. Woodroffe) and Babu Sarat Chunder Khan* for the Petitioners.

*Mr. Hill, Babus Jogesh Chunder Roy and Dasarathi Sanyal* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

In this case a rule was issued on the District Magistrate and on the 1st party to shew cause why the proceedings of the District Magistrate mentioned in the petition should not be set aside on the ground that they were made without jurisdiction, first, inasmuch as the report of the Sub-Inspector and the petition of Gobind Baidya did not disclose grounds for apprehending a breach of the peace;

## ISWAR CHUNDER CHOWDHRY v. AMBICA CHURN MAJUMDAR.

*secondly*, inasmuch as the same proceedings involved the claims of the 1st party as against the 2nd and 3rd parties in respect of lands, some of which were claimed only by the 2nd party, and some of which were claimed only by the 3rd party; and, *thirdly*, inasmuch as the proceedings related in part to land in respect of which no dispute existed. Cause has been shown on behalf of the 1st party by Mr. Hill, and we are satisfied that there were sufficient materials before the Deputy Magistrate to institute the proceedings under sec. 145, C. Cr. P. Apparently, by some clerical mistake or inadvertence, the words "7th of February" crept in for "the 1st February." We find that, upon the petitions of the 24th January and the 1st February, there are distinct statements regarding a breach of the peace. As a matter of fact, Gobind Baldya stated that there had actually been an affray some days previously which would perfectly justify the District Magistrate in instituting the proceeding under sec. 145.

As regards the second ground, the learned Advocate-General contended that his clients were prejudiced because there was only one proceeding. We have given that contention our best consideration. Assuming that the plots B and C which were claimed by the 2nd and the 3rd parties separately were sufficiently localized, we find that the 2nd and 3rd parties went fully into evidence in the case, and notwithstanding that they gave evidence of their possession in respect of these two plots of land, the Magistrate came to the conclusion that the party in whose favour he has made the order was in possession of the

entire plot forming the subject-matter of dispute.

We see no reason for supposing that the Petitioners have been prejudiced by the Magistrates not splitting up the matter into two proceedings but dealing with it in one and the same proceeding. It is not suggested that the procedure he adopted precluded any of them from adducing evidence in the case.

The third ground appears to us to have no substance either. We accordingly discharge the rule.

*Rule discharged.*

H. P. C.

## PRIVY COUNCIL.

[ON APPEAL FROM THE MADRAS HIGH COURT.]

LORD HOBHOUSE.	VASUDEVA PADHI
LORD MACNAGHTEN.	KHADANGA GARU, De-
LORD DAVEY.	fendant, Appellant,
LORD ROBERTSON.	v.
LORD LINDLEY.	MAGUNI DEVAN
SIR FORD NORTH.	BAKSHI MAHAPATRU-
• 1901.	LU GARU, Plaintiff,
23, March.	Respondent.

*Limitation Act XV of 1877, secs. 7, 18 and 28, and Sch. II, Arts. 142, 144—Joint family—Separate estate—Possession, discontinuance of—Property, extinguishment of right to.*

*Under sec. 7 of the Limitation Act a person under disability cannot bring his suit after 3 years after the disability ceases.*

*Under sec. 28 of the Limitation Act the right of a person to property is extinguished at the determination of the period limited for bringing a suit for possession of it.*

**VASUDEVA PADHI KHADANGA GARU v. MAGUNI DEVAN BAKSHI MAHAPATRULU GARU.**

This was a suit for partition, and the question involved in the case was whether the two villages in suit were joint or separate property. These villages were granted by the zemindar to Bayana Padhi, the father of the Defendant-Appellant, who died in 1858. At that time the Appellant was 7 or 8 years of age. The Respondent, the Plaintiff in this suit, was the son of one Gurunatha Padhi, the brother of Bayana Padhi, who also died in 1858. The two brothers, Bayana and Gurunatha, were members of a Hindu family joint in property.

There was nothing to show the circumstances under which the grant was made or of the manner in which the property was enjoyed or whether it was treated as joint or separate property from the date of the grant until the death of the survivor of the two brothers in 1858. But on the death of the two brothers, the widows concurred in appointing a manager and it was not denied that during the Appellant's minority it was treated as joint family property; and after he attained his majority in 1870 it continued to be so treated by the Appellant and the Respondent for several years. Subsequently a quarrel took place between the two cousins and the Appellant thereupon asserted his right to the villages as the separate property to which he was entitled as his heir and ousted the Respondent. The Respondent thereupon instituted this suit on the 11th November 1891 for the declaration of his right to and partition of the property.

*Mr. Brinson* for the Appellant.

*Mr. Mayne* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DAVEY.—This is an appeal against a judgment of the High Court of Madras, dated the 25th of March 1896, reversing a decree of the District Judge of Ganjam of the 17th of October 1894.

The Appellant, who is Defendant in the action, is the only son of Bayana Padhi, who died shortly before the year 1858. The Appellant was then 7 or 8 years of age. The Respondent, the Plaintiff in the action, is the first cousin of the Appellant, and is the son of Gurunatha Padhi, who died in the year 1858. The Respondent was about two years older than the Appellant. The two brothers, Bayana Padhi and Gurunatha Padhi, were members of a Hindu family, joint in property.

The question in the case is whether the two villages in suit are joint or separate property. It is admitted that these villages were granted to Bayana Padhi by the zemindar of the Chikati Taluq. The deed is not forthcoming, and the only information their Lordships have as to the grant is contained in two orders from the Collector of Ganjam to the zemindar. The 1st order is dated the 10th August 1847, and is in these words:—"I have approved of the permanent cowle you have granted to one Bayana Padhi Khadanga of Jayantipuram under sec. 15 of Regulation XXX of 1802 in respect of the forest land called Rajendrapuram attached to your taluk, fixing a Kattubadi of Rs. 45 a year, and defining the boundaries (Chekubandi). But you are informed that there should be no disputes by the Jalandhra people



VASUDEVA PADHI KHADANGA GARU v. MAGUNI DEVAN BAKSHI MAHAPATRULU GARU.

regarding the boundaries thereof." The other order of the Collector was dated 22nd July 1848. It states that the Collector has "under sec. 15 of Regulation 30 of 1802 approved of the gift of 840 Bbaranams of forest land which was granted to Bayana Padhi Khadanga by the late zemindar of the taluk, Sri Brundavna Chandra Rajendra Dev Garu, after fixing the Kattubadi and the boundaries thereof. You shall inform the said Khadanga that he might improve the said land and make it fruitful, and collect from him every year, commencing from the current year, the Kattubadi fixed at Rs. 50 a year." There is no evidence of the circumstances under which this grant was made, or of the manner in which the property was enjoyed or whether it was treated as joint or separate property from the date of the grant until the death of the survivor of the two brothers in the year 1858. On that event the widows of the two brothers concurred in appointing a manager of the property, and it is not disputed that during the Appellant's minority it was treated or enjoyed as joint-family property; and after he attained his majority in or about the year 1870 it continued to be so treated by the Appellant and the Respondent for several years. The Subordinate Judge fixed the date up to which that state of things lasted as the year 1880; and their Lordships assume that date for the purpose of their judgment. A quarrel took place between the two cousins, and the Appellant thereupon asserted his right to the villages as the separate property of his father to which he was entitled as his heir, and ousted the Res-

pondent. Hence this suit, which was instituted by the Respondent on 11th November 1891. The Subordinate Judge held it to be the separate property of the Appellant; but his decree was reversed by the High Court, who held it to be joint-family property, and decreed a partition. Their Lordships find the question whether the property was the separate property of Bayana, or had been acquired and held by him in his own name for the benefit of the joint family, to be one of some difficulty, owing to the absence of any direct evidence as to the circumstances under which the grant was made, or the manner in which the property was treated during Bayana's lifetime; and they accordingly desired that the case should be argued a second time. On the second argument Counsel for the Respondent raised the question of limitation, and their Lordships have come to the conclusion that the Respondent ought to succeed on that ground. The 7th section of the Act of Limitation is in these terms: "If a person entitled to institute a suit, or make an application, be at the time from which the period of limitation is to be reckoned a minor, or insane, or an idiot, he may institute the suit, or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed." Then there is provision as to double and successive disabilities, and a provision for the case of the continuing of the disability up to the death of the person under disability; and the end of the section is in these terms:—"Nothing

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in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend for more than three years from the cessation of the disability, or the death of the person affected thereby, the period within which any suit must be instituted, or application made." The effect of that section, therefore, is this,—that a person under disability may institute a suit within the same period after the disability has ceased as he would otherwise have been allowed under the schedule, but subject to a proviso that the time shall not in any case be extended for more than three years from the cessation of the disability. Illustration (b) exactly illustrates the present case. Their Lordships, for the purpose of their judgment, will make the assumption which is most favourable to the Appellant and they will assume in his favour that up to the year 1858, the date of the death of the surviving brother, it was treated as, and was, separate property of Bayana, to which the Appellant was entitled to succeed as his heir. But on that assumption the Appellant was dispossessed, or discontinued his possession of his separate property, in favour of the joint estate at least on the death of his uncle in the year 1858; and the case comes within No. 142 in the 2nd schedule; but if that be not so, the possession of the joint family was at any rate adverse to his separate estate from the same date; and it thus comes within No. 144. It is immaterial for the present purpose which article it comes under. That being so, the Appellant could not have brought an action after the expiration of three years after he attained his majority (say) 1873. Then

comes in sec. 28, by which his right to the property is extinguished at the determination of the period limited for bringing a suit for possession of it. The point does not require to be expressly pleaded, as it is only evidence of the Respondent's title; but that question does not arise in this case, as it undoubtedly was a matter of controversy in the Court below, and in fact forms the subject of the third issue: Whether the Plaintiff has acquired any title by possession. The Subordinate Judge finds against the Plaintiff on that issue, but it does not appear on what grounds.

The same point is also raised in the sixth reason for appeal to the High Court, though it was unnecessary for that Court, in the view they took of the case, to express any opinion upon it. The only answer which could be made to the argument would be one founded on sec. 18, namely, that the existence of the original grant was fraudulently concealed from the Appellant. This answer is, perhaps, sufficiently pleaded by para. 3 of the defence, although there is no mention in that paragraph of fraud; but their Lordships do not think that any such case is proved with such precision as is necessary in a charge of fraud. There is, undoubtedly, some evidence that the original grant found its way into the Respondent's possession; and it is not produced by him. On the other hand, the Defendant gave evidence on his own behalf, but merely put in a copy of another document, and did not even say that he was ignorant of the original grant, or when he first discovered it, or say anything about it.

Their Lordships do not think that this

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is sufficient to support a charge of fraud. They are, therefore, of opinion that the appeal ought to be dismissed, on the ground that the Defendant's right of possession (if it ever existed) has been extinguished by limitation; and they will humbly advise His Majesty accordingly.

The Appellant must pay the costs of the appeal.

Solicitors: Messrs. Lawford & Co. for the Appellant.

Solicitor: Mr. R. T. Tasker for the Respondent.

*Appeal dismissed with costs.*

C. W. A.

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 17 OF 1898.

HARINGTON, J.	}	SPEDSURY DASSEE
1901.		v.
21, January.		JONARDAN SARKAR.

*Hindu Law—Bengal School—Mitakshara—Maintenance—Widowed daughter-in-law, maintenance of—Moral obligation—Heir of father-in-law—Legal obligation—Moral right, forfeiture of—Severance from father-in-law's family.*

*It is the duty of the father-in-law to maintain his widowed daughter-in-law.*

*This obligation is legally enforceable where the father-in-law has by survivorship obtained property in which his son had a vested interest as in a Mitakshara family.*

*Where the father, on the death of his son, does not become entitled to any interest or property which the son had, the obligation to maintain the son's widow is only moral and cannot be enforced in a Court of law.*

*KHETROMONI v. KASHINATH (1) followed.*

*The moral obligation in the father to maintain his widowed daughter-in-law becomes a legal obligation in the inheritor of his property.*

*JANKI v. NANDRAM (2) and KAMINI DASSEE v. CHANDRA PODE MONDLE (3) followed.*

*The right to be maintained where it exists is not necessarily forfeited by a widow who resides away from her father-in-law's house as long as she remains chaste.*

*RAJA PIRTHEE SING v. RANI RAJ KOWER (4), KASTURBAI v. SHIVAJIRAM (5) and GORIBAI v. LAKHMIDAS KHEMJI (6) followed.*

*If there'ore the daughter-in-law remains a dependent member of her husband's family, the mere fact of her residence elsewhere will not disentitle her to maintenance.*

*Where a daughter-in-law leaves her father-in-law's house during his lifetime with the intention of residing permanently in her father's house as a member of his household and demands and obtains from her father-in-law a Government promissory note belonging to her husband which was all the money she considered herself entitled to, and intends to and does sever herself from her deceased husband's family, though she leaves the house without any quarrel with her father-in-law, she ceases to be a dependent member of her*

(1) 2 B. L. R. (A. C.) 15 (1868).

(2) I. L. R. 11 All. 194 (1888).

(3) I. L. R. 17 Cal. 373 (1889).

(4) 20 W. R. 21 : s. c. 12. B. L. R. (P. C.) 238 (1873).

(5) I. L. R. 3 Bom. 372 (1879).

(6) I. L. R. 14 Bom. 490 (1890).

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*father-in-law's family, and there is no longer any moral liability on the father-in-law to support her. There being no moral liability on the father-in-law, there is no legal liability on the person who takes his property to maintain the widowed daughter-in-law.*

This was a suit for arrears of maintenance and for a declaration of the Plaintiff's right to future maintenance out of the property which the Defendant had inherited from his father. The facts were shortly these: One Buddun Chunder Sarkar, who was governed by the Bengal School of Hindu Law, died in 1888, leaving him surviving his son, the Defendant. The Plaintiff was the widow of one Navadip, a predeceased son of Buddun. Navadip married the Plaintiff some time in 1869 or 1870 and died two years later in 1872 without issue and leaving the Plaintiff, his widow.

The Plaintiff's case was that after the death of her husband she continued to reside in her father-in-law's house and was all along maintained by him up to his death in 1888, that after his death she was supported for some two years by the Defendant, when in 1890 she was turned out of her father-in-law's house; that she then went to reside in her father's house where she remained up to the time of bringing the present suit. The Defendant, on the other hand, alleged that the Plaintiff left her father-in-law's house two years after the death of her husband, namely, in 1874, and went to reside in her father's house; that she demanded and obtained during Buddun's lifetime a Government promissory note of the value of Rs. 500 which belonged to her husband and that she thereupon

ceased to be a dependent member of her father-in-law's family, and was not entitled to any maintenance from him.

*Messrs. Chaudhuri, Chakravarti and S. R. Das* (subsequently *Messrs. Knight and S. R. Das*) for the Plaintiff.

*Messrs. R. Mitra, Sinha and H. D. Bose* for the Defendant.

*Mr. Chaudhuri* (in opening for the Plaintiff).—It has been repeatedly held that it is the duty of a Hindu father-in-law to maintain his widowed daughter-in-law, and further, that the moral obligation in the father-in-law to maintain her becomes a legal obligation in the inheritor of his property, see *Kamini Dassee v. Chandra Pote Mondle* (3). It is altogether a question of fact as to whether the Plaintiff left her father-in-law's house in this case without the intention of ever returning to it and whether she took a certain promissory note from her father-in-law belonging to her husband's estate in full satisfaction of all claims to that estate or to maintenance against her father-in-law.

*Mr. Mitra*.—In the Bengal School the head of the family is the owner. The widow also succeeds under certain circumstances. The Plaintiff therefore was the heiress of her husband in this case. If she left the house as we say she did, she would not be entitled to maintenance. We say that she quarrelled with her father-in-law and the sending of the pleader's letter of demand was an outrage upon his feelings. Even a son who is hostile or inimical to his father is excluded from inheritance. See *Mayne on Hindu Law* (5th Ed.), para. 553.

She is not entitled to maintenance as

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she did not form a member of Buddun's family. Then again she is not entitled to maintenance in money: [COURT.—Do you say that till 1874 she was entitled to maintenance?] Certainly. [COURT.—Is there any authority to show that if she is once entitled to maintenance that right can cease, or has not unchastity or immorality to be shewn?] Yes. There was no actionable claim against the father-in-law at that date. If the moral liability could not be enforced during Buddun's lifetime, that cannot ripen into a legal liability. See *Golap Chandra Sastri's Hindu Law* (1897), p. 242; *Bhugwan Chunder Bose v. Bindoo. Bashinee Dassee* (7), *Rujjomoney Dassee v. Shib Chunder Mullick* (8). Then the lady cannot claim from her father-in-law maintenance in the shape of money, see Macnaghten's *Precedents*, Case XI; *Smriti Chandrika*, Chap. 11, sec. 1, para. 34; *Khetromoni v. Kushinath* (1). If the father-in-law's obligation was a moral obligation and she left, as we say, after quarrelling with Buddun and insulting him by sending the letter of demand, there was no longer any moral obligation. See the Tagore Lectures for 1879, p. 444 [COURT.—Do you say that it is only where the father-in-law succeeds to his son's property he is bound to maintain his widow, and not where he does not inherit any property?] Yes. As my father never maintained the Plaintiff she is not entitled to be maintained by me. If the obligation is broken once I am not bound to create it. In *Junki v. Nandram* (2) the son was joint with the

father and, whilst joint, the father died and it was therefore held that she was entitled to be maintained by the joint estate. That case does not touch me. In *Adhibai v. Cursandas Nathu* (9) the same thing was held. The distinguishing features in these cases are that the father-in-law inherited some property from the daughter-in-law's husband. In this case there was a complete separation when she took away everything that she was entitled to. See Mayne (6 h Ed.), p. 459; *Savitribai v. Luxmibai* (10). In *Kamini Dassee v. Chandra Pote Mondle* (3), the father-in-law all along maintained the widow and his dying wishes were that she should be maintained. That distinguishes the case from the present. See also *Kedar Nath Coondoo v. Hemangini Dassee* (11).

Here there is no allegation that she borrowed a rupee for her maintenance.

*Mr. Knight* in reply.—The case of *Rujjomoney Dassee v. Shib Chunder Mullick* (8) is rather in our favour. [COURT.—They say that after she left there was no moral obligation on the father-in-law which could ripen into a legal one.] Just so, but in *Junki v. Nandram* (2) it was held that there is a moral obligation to support us not only during his lifetime but even after his death, and the circumstance of our not residing in the family dwelling-house does not take away that moral obligation. See *Bhuttacharjee's Hindu Law*, p. 411 where all the cases are collected. (After

(1) 2 B. L. R. (A. C.) 15 (1868).

(2) I. L. R. 11 All. 194 (1888).

(7) 6 W. R. 286 (1866).

(8) 2 Hyde's Rep. 108 (1864).

(2) I. L. R. 11 All. 194 (1888).

(3) I. L. R. 17 Cal. 373 (1889).

(6) 2 Hyde's Rep. 108 (1864).

(9) I. L. R. 11 Bom. 199 (1886).

(10) I. L. R. 2 Bom. 573 (1878).

(11) I. L. R. 13 Cal. 386 (1886).

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arguing on the facts of the case).—If your Lordship does not believe either side, even then I am entitled to succeed, for the presumption would be that she still continued in the same position. [COURT—I can assist you to this extent, that in case the evidence is evenly balanced, the fact remains that her husband died in 1872 and the fact of her living away from her father-in-law's house, does not affect her right to maintenance.] In *Janki v. Nandram* (2), the daughter-in-law had all along resided away from her father-in-law's house. We are entitled to separate maintenance as well as to arrears, see *Ram Chandra v. Sagunbai* (12), *Gokibai v. Lakhmidas* (6) and *Gunga Dye v. Shama Bibee* (13).

*Mr. Das* followed on the same side.—[COURT—Supposing I find that she left with the intention of living as a member of her father's family, would she still be entitled to maintenance?] I have found no authority expressly on the point. But I would submit that she is still so entitled. I am prepared to show that the only ground on which she can forfeit her right to maintenance is unchastity, see *Shama Churn's Vyavastha Darpan* (2nd Ed.), p. 319, and the case of *Jadumoni Dassee v. Kshettra Mohan Shil* (14). That case lays down that the grounds on which the right to maintenance may be forfeited should be restricted rather than enlarged. The principle is shortly this: If a person has property in which her husband had an

interest, the widow can *legally* claim maintenance from him, or, in other words, the daughter-in-law can only claim maintenance from the father-in-law if the latter has taken property belonging to her husband. Following the same principle, a daughter-in-law cannot claim maintenance in the case of a *Mitakshara* father-in-law who has only self-acquired property and never in the case of a Bengal father-in-law because he has absolute power of alienation over his property, see *Janki v. Nandram* (2) where all the cases on the subject are considered. But though there is no legal liability under these circumstances, there is always a moral liability in the father-in-law, and this liability obviously does not depend upon the father-in-law having any property of his deceased son as in that case the liability would become legal, see *Khetromoni Dassee v. Kashinuth* (1); and the cases have gone so far as to say that this moral liability is not merely to provide for her during the lifetime of the father-in-law but even after his death, see *Janki v. Nandram* (2). This moral liability ripens into a legal one as against those who have taken from the father-in-law, *Janki v. Nandram* (2), *Kamini Dassee v. Chandra Pote Mondle* (3). This moral liability is not dependent upon her residing in her father-in-law's house. See the case of *Jadumoni v. Kshettra Mohan Shil* (14), *Raja Pirthee Sing v. Rani Raj Kower* (4), *Kasturbai v. Shivajiram* (5)

(1) 2 B. L. R. (A. C.) 15 (1868).

(2) I. L. R. 11 All. 194 (1888).

(3) I. L. R. 17 Cal. 373 (1889).

(4) 20 W. R. 21; s. c. 12 B. L. R. (P. C.) 238 (1873).

(5) I. L. R. 3 Bom. 372 (1879).

(14) *Shama Churn's Vyavastha Darpan* Precedents, 3rd Ed., p. 362.

(2) I. L. R. 11 All. 194 (1889).

(6) I. L. R. 14 Bom. 490 (1890).

(12) I. L. R. 4 Bom. 261 (1879).

(13) Unreported, Sale, J.

(14) *Shama Churn's Vyavastha Darpan* Precedents, 3rd Ed., p. 362.

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*Gokibai v. Lakhmidas Khimji* (6). In the Bombay cases she had never resided in the father-in-law's house. The fact therefore that she went to reside with her father would not deprive her of her right to maintenance. [COURT—Can you say that the lady who goes to her father's house and takes an antagonistic position to her husband's family, that even then she would be entitled to maintenance?] I cannot cite an authority expressly on that point, but the only ground on which she may be deprived of maintenance is unchastity, and the case of *Judumoni v. Kshettra Mohan Shil.* (14) shows that such grounds should not be enlarged. The father-in-law is not entitled to say "you must reside at my house, otherwise I shall not maintain you," *Raja Pirthee Sing v. Beni Raj Kover* (4). [COURT—Do you say the case of *Khetromoni v. Kashinath* (1) is not good law?]. No, I do not say that. But that case does not in a way go against my contention. There the suit was against the father-in-law and it was held that there was no legal liability in him inasmuch as he was not in possession of any ancestral property. [COURT—What is the extent of this moral duty? Does it pass away or still remain when she leaves his house and resides with her own father's family?] The moral obligation is merely in abeyance for the time being, since her residing away from her father-in-law's house does not deprive her of her right to maintenance.

That is, if the father-in-law was in possession of any property belonging to her deceased husband, she would be entitled to sue him for maintenance, though she may be residing away from his house, and if the obligation is merely moral, she cannot of course enforce it as against him, but she would be entitled to sue the persons taking from him upon his death. [COURT—Have you any authority for the proposition that even if she goes away and lives with her own father, then the moral duty of the father-in-law does not pass away?] I have no express authority, but the moral duty is to maintain a dependent daughter-in-law. She would not be any the less dependent because she is maintained by the charity of her father or any one else. Before you can get rid of that liability, it must be shewn that she was possessed of property out of which she could maintain herself, *Gokibai v. Lakhmidas Khimji* (6). It is not even sufficient to show that she has some property, it must be shewn that she has sufficient property, *Sib Dayee v. Doorga Pershad* (15).

THE JUDGMENT OF THE COURT was as follows:—

HARINGTON, J.—The Plaintiff in this action, Siddesury Dassee, sues Jonardan Sarkar for arrears of maintenance and for a declaration that she is entitled to future maintenance out of the property which the Defendant has inherited from his father.

The Defendant is the son of one Buddun. Buddun died in 1888 having been the father of a son, named Navadip and the Defendant in the present suit. Navadip

(1) 2 B. L. R. (A. C.) 15 (1868).

(4) 20 W. R. 21: s. c. 12 B. L. R. (P. C.) 238 (1873).

(6) I. L. R. 14 Bom. 490 (1890).

(14) Shama Churn's Vyavastha Darpan, Precedents, 3rd Ed., p. 262.

(6) I. L. R. 14 Bom. 490 (1890).

(15) 4 N. W. P. 63 (1872).

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married the Plaintiff about the year 1869 or 1870. He survived his marriage only two years, and died in the year 1872 leaving the Plaintiff surviving him.

Under those circumstances the Plaintiff says that as the widow of Buddun's son she is entitled to maintenance from Buddun's estate in the hands of his surviving son Jonardan.

Briefly stated, the Plaintiff's case is that after the death of her husband she continued a dependent member of her father-in-law's family; that she was supported by Buddun up to his death in the year 1888; that after his death she was supported for some two years by the Defendant Jonardan Sarkar, and that in or about the year 1890 she was turned out of her father-in-law's house. She then went to her father's house and resided there up to the time of bringing the present suit.

Shortly, the Defendant's case is that the Plaintiff left her father-in-law's house two years after the death of her husband, viz., in 1874; that she demanded and obtained during Buddun's lifetime the property to which she was entitled, and that she ceased to be a dependent member of her father-in-law's family, having gone back to reside in her father's house as a member of his household.

The Plaintiff in her evidence states that after the death of her husband she resided continuously with her father-in-law or rather in her father-in-law's house until she went to her father's house, and that for one or two years after her father-in-law's death the Defendant maintained her in the family house—he did not give her any money but that he maintained her, and she goes on to describe how she

was turned out and went to her father's house.

When cross-examined as to her residence she says that the longest period that she was absent from her father-in-law's house was a month, but when cross-examined further as to what happened when she obtained her property from Buddun it becomes clear that that statement is inconsistent with the story that she tells. She says that she demanded from Buddun a Government promissory note for Rs. 500 which is alleged to have been part of the property of her deceased husband, that the demand was made through a pleader, and the letter by which the demand was made has been produced. The letter is dated January 18th, 1884, and from the terms of it it is clear that at that date the lady was not residing at her father-in-law's house but was residing at her father's house. After that letter there was some further correspondence and the Government promissory note was handed over to the Plaintiff at her father's house and a receipt was given by the Plaintiff for it and the receipt bears date the 3rd of May 1884.

The lady's account is that she lived away from her father-in-law's house as long as this correspondence lasted. She says that she went back there after she got the Government security, and she also says that she went on pilgrimage as soon as she got the security. When she came back from pilgrimage it appears that she did not go to her father-in-law's house, but to her father's house and she said that she remained there two months.

These circumstances show that she must be inaccurate in stating that she



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resided continuously at her father-in-law's house until she went to her father's house in 1890. It is alleged by the Plaintiff that she was turned out in 1890. Any evidence that there is of turning out or ill-treatment is shadowy in the extreme. It is quite uncorroborated and if in fact she had been turned out in the year 1890 one would have expected evidence of those persons who had seen her immediately after she was turned out. One would expect evidence of remonstrances by her brother with the Defendant for turning her out, and moreover one would have expected the lady would have taken some steps on being turned out to assert her rights. This evidence is not given and I therefore think that the lady fails to establish the allegation that she was turned out of the house in 1890.

To corroborate her evidence she calls Behary Lal Biswas who is her brother and who appears to have married a daughter of Buddun. He in general terms corroborates the evidence given by the Plaintiff.

To show that the lady was in fact a resident in her father-in-law's house after the year 1874, a gentleman, named Jadu Nath Mullick, is called who professed to see the Plaintiff amongst other women from a neighbouring house. I must say as regards Jadu Nath Mullick that I am not inclined to place great reliance on his evidence. That he did see something may or may not be true, but he shows no reason why he should particularly observe the Plaintiff, and I do not think the ladies who were residing in Buddun's house would have exposed themselves to the observation of a strange gentleman in a neighbouring house.

The Defendant sought to show that

the lady would not be seen in Buddun's house by Jadu because the place where the ladies are said to have been seen is invisible from the house where Jadu Mullick is said to have seen them, and a plan was produced which shows that the view of one point from the other point was obstructed.

I had very considerable doubts whether this evidence was admissible at all, but having been admitted, the evidence did not carry the case one inch further. The plan did not show where Jadu Mullick is alleged to have stood or where the ladies were alleged to have been when they were seen and in the absence of evidence locating these two spots accurately, the plan was perfectly useless to show that the line of vision from one point to another was obstructed, and moreover the plan merely represents the buildings as they at present stand, and there is some reason for thinking that that part of the building is of more recent date than 1890.

The evidence therefore with regard to the buildings may be dismissed as nothing has been proved inconsistent with the evidence of Jadu Nath Mullick, but for reasons which I have stated I am not inclined to place credence on the story that the ladies allowed themselves to be observed by Jadu Nath Mullick or that he had any opportunity of noticing the ladies.

The other evidence on behalf of the Plaintiff's case is that of the witnesses Profulla and Sadanunda Sircar. Profulla's evidence is open to observation. It deals with the period when she was residing at Simla and she says that the Plaintiff lived continuously at her father-

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in-law's house until Buddun's death and was never away for more than a month or two the longest.

Sadanunda gives similar evidence as to the residence of the Plaintiff. He says that she was never away more than two or three days—he would have known if she had been away for four to six months. He said there was no dispute with reference to the promissory note and ornaments. That is shortly the evidence on behalf of the Plaintiff.

On behalf of the Defendant, Pannamony Dassee gives evidence. She generally denies the Plaintiff's case and her description of what happened when the Plaintiff left is that some one came for her from her father's house to take her away. She went and Buddun allowed her to go and she has never returned. This incident she places in 1874, two years after the death of Navadip.

The Defendant, Jonardan Sarkar, is called and he gives evidence to the same effect. He is cross-examined as to his having requested the lady to come back, and he says that no request was made to her to come back after the date of the pleader's letter.

The other evidence called to support the allegation that the Plaintiff was not living in her father-in-law's house in 1874 is that of Chuckerbutty who was priest to Buddun and Benoy Kristo Sircar.

As to these witnesses Mr. Knight pointed out with considerable force that they only came here to prove a negative. If they confined themselves to the statement that she was not in the house, no amount of cross-examination would make them say that she was, and it was pointed out that Chuckerbutty, the priest, has

an interest in supporting the Defendant's case, and Madan Mohun Sircar, is in respect of his widowed daughter-in-law, in precisely the same position that Jonardan was as to the Plaintiff at the time the suit was brought against him.

That shortly is the evidence called on both sides.

I pass over the evidence of the witnesses called for the purpose of enabling secondary evidence to be given of the letters, the originals of which are lost.

That being the oral testimony, it becomes important to see what light is thrown on the correspondence.

It is clear to my mind when the letter of January 1884 was written that the Plaintiff was not an inmate of her father-in-law's house. The reply in 1884 does not dispute the Plaintiff's right of the promissory note which she demanded. It merely intimates that she has got possession of the ornaments. No evidence is given of any letter in which the Plaintiff's right for the note was disputed, and eventually the correspondence closed with the handing over of the note and the giving of the receipt of May 3rd, 1884.

The conclusion that I come to is that this lady left the house of Buddun before 1884, and that she was continuously absent from Buddun's house for that year. None of the witnesses called on behalf of the Plaintiff admit this breach in her residence. I think what really happened was that she did not reside in her father-in-law's house until some period previous to the year 1884. Probably the evidence which puts her departure at 1874 is true. I think before 1884 she ceased to reside in her father-in-law's house, and in fact

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that she never returned to reside there again. She takes no proceedings till the institution of the present suit which was begun by a formal petition to me in *forma pauperis* in December 1897, and that delay in suing has not been explained. The excuse is that she had no money, but her answer to that excuse in the present suit is that she is suing in *forma pauperis*. The fact is, I believe, that she went to her father's house without having been turned out and without any quarrel with her father-in-law's family with the intention of living again as a member of her father's household.

Is she entitled to recover maintenance from her father-in-law?

There is plenty of authority for the proposition that it is the duty of the father-in-law to maintain his widowed daughter-in-law.

This obligation is legally enforceable where the father-in-law has by survivorship obtained property in which his son had a vested interest—as for example where there is ancestral property in a family governed by Mitakshara law and the father gains by survivorship the interest which his son had—in the ancestral property.

But where there is no ancestral property or where the father on the death of his son does not become entitled to any interest or property which the son had, the obligation to maintain the son's widow is merely a moral one, and cannot be enforced in a Court of law.

The authority for these propositions is to be found in the case of *Khetromoni Dassee v. Kashinath* (1), but in that case several of the Judges leave open the

question whether a dependent widowed daughter-in-law is not legally entitled to receive necessary subsistence in the house of the head of her husband's family.

In the present case the Plaintiff is not settling up a claim to be maintained in her father-in-law's house: so the question left open by some of the Judges in *Khetromoni Dassee v. Kashinath* (1) need not be considered. She is here claiming a monthly allowance: and *Khetromoni's* case is an authority for stating that she would not have been legally entitled to obtain such allowance from Buddun.

But there is another proposition on which the Plaintiff relies—namely, that what is a moral obligation in the father becomes a legal obligation in the inheritor of his property. This rests on the principle that an heir does not take property for his own benefit but for the spiritual benefit of his predecessor. This principle is illustrated and affirmed in the cases of *Janki v. Nandram* (2), and *Kamini Dassee v. Chandra Pote Mondle* (3). If therefore it be established that Buddun was morally bound to maintain the Plaintiff—then that moral obligation on Buddun would become in his heir Jonardan an obligation enforceable at law.

There are authorities to show that the right to be maintained where it exists is not necessarily forfeited by a widow who resides away from her father-in-law's house as long as she remains chaste. This has been affirmed by the Privy Council in *Raja Pithae Sing v. Ranj Kower* (4) and in two cases in the

(1) 2 B. L. R. (A. C.) 15 (1868).

(2) I. L. R. 11 All. 194 (1888).

(3) I. L. R. 17 Cal. 373 (1889).<sup>1</sup>

(4) 20 W. R. 21: s. c. 12 B. L. R. (P. C.) 238 (1873).

(1) 2 B. L. R. (A. C.) 15 (1868).

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Bombay High Court, *Kasturbai v. Shivaji-ram* (5) and *Gokibai v. Lakshmidas Khimji* (6).

If therefore the daughter-in-law remains a dependent member of her husband's family, it appears to be law that the mere fact of residence elsewhere will not disentitle her to maintenance.

The real question therefore in the present case is, Did the Plaintiff remain a dependent member of her husband's family? If she severed herself from her husband's family, then there could have been no duty on Buddun to maintain her.

I find in fact the Plaintiff left Buddun's house during his lifetime to go and reside in her father's house of her own free will; she made no claim for maintenance as against Buddun; she did claim indeed a promissory note for Rs. 500 and that was given her. She made a claim as against Buddun for property to which she considered herself entitled, and the claim was allowed at least so far as the Government promissory note was concerned; and as to the jewels it was either abandoned or was groundless. But the fact remains that she took away her productive property. There is no evidence that she ever claimed as against Buddun or as against the present Defendant Jonardan any maintenance. In view of her readiness to assert her right to the Rs. 500 note through a pleader one would have expected, that had she intended to remain as a dependent member of her husband's family, she would have asserted a claim to maintenance through the same channel, but there was no demand until 1897 when the demand

immediately preceding the present suit was made.

The inference I draw from these facts is that when the Plaintiff left Buddun's house she did so with the intention of residing permanently at her father's house as a member of his household and that when she demanded from her father-in-law the Rs. 500 note, she intended to obtain, and did obtain, all the money to which she considered herself entitled—and that she intended to sever, and did sever, herself from her deceased husband's family.

It has been pointed out in the case of *Kamini Dassee v. Chandra Pois Mondle* (3) that each case must be determined on its own particular merits—that in each case it must be determined whether, having regard to the relationship, means and various other circumstances of the party claiming maintenance the late proprietor was, according to the law, morally bound to maintain the Plaintiff.

Now under the circumstances of this case I do not think Buddun was morally liable to support this lady, because she was no longer a dependent member of Buddun's family. She had gone to her own family, she had taken with her what property she was entitled to through her husband. She was being maintained as a member of her father's family.

This being the state of things which existed, I do not think it could be said that Buddun was morally bound to maintain her, and if Buddun was not morally bound, it follows that the Defendant is not legally bound.

The result, therefore, will be that the present action must be dismissed with

(5) I. L. R. 8 Bom. 372 (1879).

(6) I. L. R. 14 Bom. 490 (1890).

(3) I. L. R. 17 Cal. 373 (1893).

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costs, and inasmuch as the Plaintiff is suing as a pauper the usual order directing stay of execution for costs must be made.

Costs will be taxed on scale No. 2.

*Babu N. C. Roy*, Attorney for the Plaintiff.

*Babu R. C. Mitter*, Attorney for the Defendant.

*Suit dismissed.*

**[CIVIL APPELLATE JURISDICTION.]****APPEAL FROM ORDER**

No. 11, OF 1900.

GHOSE, J. STEVENS, J. 1901. 27, March.	}	KEDAR NATH MUKERJEE, Defendant, Appellant, v. PROSONNA KUMAR CHATTERJEE, Plaintiff, Respondent.
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*Civil Procedure Code (Act XIV of 1882), sec. 244—Separate suit to set aside decree and sale—Jurisdiction—Fraud—Evidence Act (I of 1872), sec. 44.*

*A suit to set aside a decree and the sale in execution thereof and to recover the property sold is maintainable, notwithstanding the provisions of sec. 244, C. P. C., and should be brought in the Court in the jurisdiction of which the property is situated, although the decree sought to be set aside was passed by a Court in a different district.*

*It may not be competent to the Court to set aside the decree passed by another Court as fraudulent, but it is competent to the Court to investigate the question as to the character and validity of the decree for the purpose of giving relief to the Plaintiff in respect of the land which he lost by reason of the sale.*

**MEWA LALL THAKOOR v. BHUJHUN JHA** (1) *referred to.*

**ABDUL MAZUMDAR v. MOHAMED GAZI** (2), and **PRAN NATH ROY v. MOHESH CHANDRA MOITRA** (3) and **SRIMATI NISTARINI DAS v. RAI NANDA LAL BOSE** (4) *followed.*

This was an appeal preferred on the 4th of January 1900, against the order of Babu Jogendra Chandra Moulik, Additional Sub-Judge of Zillah Burdwan, dated the 17th of November 1899, reversing the order of Babu Satkarl Haldar, Munsif of Katwa, dated 13th March 1899, and remanding the case to him for trial on the merits.

The facts of the case appear from the judgment.

*Babu Shamatul Chandra Dutt* for the Appellant.

*Babus Karuna Sindhu Mukerjee* and *Susendra Nath Ghosal* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The facts, which led up to the suit out of which this appeal has arisen, are shortly these:

The Defendant brought a suit in the Court of Small Causes at Krishnagar (in Nadia) for a certain sum of money against the Plaintiff, and obtained an *ex parte* decree. That decree was transferred for execution to the Munsif's Court at Katwa, and in execution taken out against the Plaintiff a certain property belonging to him was brought to sale,

(1) 22 W. R. 213 : s. c. 13 B. L. R. App. 11 (1874).

(2) I. L. R. 21 Cal. 605 (1894).

(3) I. L. R. 24 Cal. 546 (1897).

(4) 8 C. W. N. 670 (1899).

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and was purchased by the Defendant himself. Subsequently, he (the Defendant) obtained possession of the said property. Thereupon the present suit was brought by the Plaintiff to have it declared that the *ex parte* decree, and the sale in execution thereof, were fraudulent and to obtain possession of the property in question. The suit was instituted in the Munsif's Court at Katwa (in Burdwan), that being the Court in which the execution proceedings, including the sale, took place, and within whose jurisdiction the property in suit is situate.

The Munsif, upon an objection being raised in the defence by the Defendant, held that he had no jurisdiction to entertain the suit, so far as it seeks to set aside the decree passed by the Small Cause Court at Krishnagar, and that a regular suit for setting aside the sale was barred by sec. 244 of the Code of Civil Procedure. He accordingly dismissed the suit.

On appeal by the Plaintiff, the Subordinate Judge at Burdwan has come to a different conclusion, relying upon the case of *Srimati Nistarini Das v. Rai Nanda Lal Bose* (4). He has held that, inasmuch as the property which was sold in execution is situate within the jurisdiction of the Katwa Munsif, and a suit to set aside the sale must be brought in that Munsif, the suit was properly brought there, and that the decree which the Defendant obtained in the Court of Small Causes at Krishnagar might be treated as a nullity for the purpose of determining the questions at issue between the parties, if that decree was

obtained by fraud. He accordingly set aside the judgment of the Munsif and remanded the case to him for trial on the merits.

Against this judgment, the Defendant has appealed to this Court, and the learned vakil on his behalf has contended that the view adopted by the Subordinate Judge is erroneous, and that inasmuch as the Plaintiff was not in a position to claim any relief unless and until the decree obtained by the Defendant in the Court at Krishnagar was set aside, the Munsif of Katwa had no jurisdiction to entertain the suit, and that it should have been brought in the Krishnagar Court.

The question raised before us is not altogether free from difficulty. In the case of *Mewa Lal Thakoor v. Bhujhun Jha* (1) it was held that when a decree is sought to be set aside upon the ground of fraud, the proper course is to apply for a rehearing, or a review, to the Court which made the decree. But in more recent cases, it has been held that that is not the only course, but that a separate suit lies to have the decree set aside: *Abdul Mazumdar v. Mohamed Gazi* (2) and *Pran Nath Roy v. Mohesh Chandra Moitra* (3). The decree in this case was passed by a Judge of the Small Cause Court, and a separate suit, such as this is, to have the said decree set aside would not lie in that Court, but would have to be brought in the ordinary Civil Court, and if the suit were confined to the decree being set aside, we should have, perhaps, been disposed to hold

(1) 22 W. R. 218; s. c. 13 B. L. R. App. 11 (1874).

(2) I. L. R. 21 Cal. 605 (1894).

(3) I. L. R. 24 Cal. 546 (1897).

(4) 3 C. W. N. 670 (1899).

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that it should have been instituted in the Krishnagar Civil Court. But in this case different considerations arise. The suit is not only to set aside the decree, but also the sale which took place in execution in the Katwa Munsifi and also to recover possession of the property sold. In the cases to which we have already referred, *Abdul Mazumdar v. Mohamed Gazi* (2) and *Pran Nath Roy v. Mohesh Chandra Moitra* (3), it has been also held that where the decree and the sale held in execution are impeached upon the ground of fraud, a separate suit would lie to have both the transactions set aside, notwithstanding the provisions of sec. 244 of the Code.

Indeed, as it seems to us, in such a case, two separate suits need not be brought, but the entire relief, to which the Plaintiff is entitled, might be obtained in one and the same suit; and it is obvious that in such a case, the suit ought to be brought in the Court which can give the Plaintiff complete relief. If therefore a suit should be brought in one and the same Court for the purpose of obtaining all the reliefs that the Plaintiff is entitled to, the reliefs asked for in the present case being (1) to have it declared that the decree was fraudulent; (2) to have it also declared that the sale held in execution of such decree was fraudulent; and (3) to recover possession of the land sold, which is situate within the Katwa Munsifi, it seems to us that in order to enable the Plaintiff to obtain effectual relief in one and the same suit, it was rightly brought in the Munsifi's Court at Katwa.

(2) I. L. R. 21 Cal. 605 (1894).

(3) I. L. R. 24 Cal. 546 (1897).

In the case of *Srimati Nistarini Dasi v. Rui Nanda Lal Bose* (4) referred to in the judgment of the Subordinate Judge, where the main object of the suit, brought in the Original Side of this Court, was for administration of the estate, and for a construction of the Will, left by the Plaintiff's husband and where the Plaintiff also asked that certain leases in respect of lands in the 24-Pergunnahs executed by the Defendant, the executor, upon the authority of an arbitration decree that had been passed in the Court of the 24-Pergunnahs, might be set aside, one of the questions raised was, whether the High Court had jurisdiction to entertain a suit, the object of which was, among other matters, to have it declared that the decree obtained in the Court of the 24-Pergunnahs was fraudulent. Mr. Justice Stanley, on a review of the whole of the authorities bearing upon the question, expressed himself as follows:—

"If the Plaintiff's case be true, I am of opinion that a decree so obtained cannot stand, and that this Court has jurisdiction, if not to set it aside, at least to treat it as a nullity and render its effect nugatory."

And this seems to be in accordance with the provisions of sec. 44 of the Evidence Act which runs as follows:—

Any party to a suit or other proceeding may show that any judgment or order or decree which is relevant under sec. 40, 41 or 42, and which has been proved by the adverse party was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

We think that in the present suit, the

(4) 3 C. W. N. 670 (1899).

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Court at Katwa is competent to go into the question raised between the parties whether the decree obtained in the Court of Small Causes at Krishnagar was properly or fraudulently obtained, and if it be found that the decree was fraudulently obtained, it might well treat it as a nullity, and not binding upon the Plaintiff, and then give the Plaintiff such relief as he might justly be entitled to.

It may not be competent to the Munsif of Katwa to set aside the decree passed by the Small Cause Court of Krishnagar as fraudulent; but we are disposed to think that it is competent to him to investigate the question as to the character and validity of the decree, for the purpose of giving relief to the Plaintiff, such as he may be entitled to, in respect to the land which he has lost by reason of the sale held in execution of that decree.

For these reasons we think that there is no just reason to interfere with the judgment of the Court below in this case. The result is that this appeal is dismissed. We make no order as to costs in this case.

S. C. S. *Appeal dismissed.*

**[CIVIL APPELLATE JURISDICTION.]**

APPLICATION NOS. 21 AND 22 OF 1900.

PRATT, J.	S. M. BIBI JARAO
BRETT, J.	KUMARI, Appellant,
	v.
1900.	GOPI CHAND BOTHRA
12, November.	and ors., Respondents.

*Execution, stay of—Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882), secs. 603, 608.*

*An application for stay of execution under sec. 608, C. P. C., cannot be granted*

*before an appeal to the Privy Council is finally admitted under sec. 603, C. P. C.*

This was a rule issued upon the opposite party, on the application of the Petitioner-Appellant, to shew cause why the execution of the decree appealed against should not be stayed pending the disposal of the appeal to Her Majesty in Council on sufficient security being taken from the Petitioner for the due performance of the decree appealed against or of any order which Her Majesty in Council may make on the appeal. In the meantime and pending the disposal of the rule the sale of the property under attachment in execution of the decree appealed against was stayed.

*The Advocate-General and Babu Joy Gopal Ghosha for the Petitioner.*

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows :—

A rule was granted by us on the 8th instant on a misapprehension of the facts, and the Advocate-General who appears for the Petitioner intimates that the rule in question will not serve the required purpose, and at his request we direct that it be cancelled. The Petitioner was Plaintiff in a suit which was dismissed. Her appeal to this Court was dismissed with costs.

On the 4th September last on the application of the Petitioner this Court granted a certificate that the case was a fit one for 'appeal to Her Majesty in Council. The security for costs has however not been completed, and the appeal has not yet been admitted under sec. 603, C. P. C.

Now we are asked to give a direction



S. M. BIBI JARAO KUMARI v. GOPI CHAND BOTHRA.

under sec. 608, cl. (d), respecting the subject-matter of the appeal, viz., to call upon the Respondent to show cause why he should not be restrained from executing a certain decree pending the disposal of the appeal, and to issue an *ad interim* injunction to that effect.

Our attention has been drawn to the case of *Dame Janbai v. Sale Mahomed Jafferbhoy* (1) where it was held that the Court is empowered to order stay of execution of its decree although the appeal to the Privy Council had not been admitted but only a petition presented for the purpose. With due deference to the learned Judges who expressed that opinion, we think from the express terms of sec. 608, C. P. C., that the intention of the Legislature was to confer on the High Court the powers therein indicated only in the event of the appeal having been already admitted. We find upon enquiry that this Court has uniformly refused to grant any application under sec. 608 before an appeal was finally admitted, and we are bound to follow this practice, which appears to us consistent with law and reason. The Appellant is not without remedy, for though she may now be too late to prevent the sale of the property against which execution has been taken out, she would, by depositing the necessary security in cash or its equivalent, have ample time to obtain an order prohibiting the confirmation of the sale.

The application cannot be now granted, but it may be renewed so soon as the appeal has been finally admitted.

*Application refused.*

S. C: S.

(1) I. L. R. 19 Bom. 10 (1894).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1040 OF 1900.

S. GORDON SIMS,  
1st Party, Petitioner,  
v.  
1901. JOHURRY LAL, 2nd  
13, February. ] Party, Opposite Party.

*Criminal Procedure Code (Act V of 1898), sec. 145—Dispute as to land—Specification of land, if and when necessary—Civil Court decree for possession—Decree, effect of—Magistrate, duty of—Procedure.*

*Although in a proceeding under sec. 145, Cr. P. Code, the disputed land should be thoroughly ascertained by both parties, yet where the parties were not at issue upon the question as to what the disputed lands were and neither the Court nor any body concerned in the dispute was under any misapprehension as to that point, there is no ground for holding that the Magistrate who tried the case had no jurisdiction to make an order under the section for want of proper specification of the lands in dispute.*

*The duty of a Criminal Court in a case under sec. 145, Cr. P. Code, where there is a decree of a Civil Court for possession in respect of the disputed land, is to find which party held such Civil Court decree, and then to maintain that party in possession; it is not necessary that such decree should be a decree for possession as between the parties to the proceeding under sec. 145, Cr. P. Code. 1*

DAULAT KOER v. RAMESSURI KOERI (1) followed. .

This was a rule issued on the 21st of December 1900 by Ameer Ali and

(1) I. L. R. 28 Cal. 625 (1899).

S. GORDON SIMS v. JOHURRY LAL.

Stevens, JJ., against an order of the Sub-divisional Magistrate of Beguseral, dated the 26th of September 1900.

The facts of the case are as follows :—

A proceeding was instituted under sec. 145, Cr. P. Code, upon a police-report of a dispute between the parties likely to cause a breach of the peace. The dispute was in respect of a certain plot of land of about 80 bighas area near the Indigo factory of Samstipur belonging to Mr. S. Gordon Sims, 1st party. At the trial, evidence of actual possession was adduced by both parties which consisted mainly of evidence of delivery of possession by Civil Court peons. The 1st party also claimed that possession was shewn by the fact of indigo growing on the disputed land and the 2nd party claimed that his possession was shewn by the fact that the land was being cultivated at the time of the order by his *raiya*s who held registered *kabuliyats* from him. The Sub-divisional Magistrate of Beguseral, in making an order under sec. 145, Cr. P. Code, maintaining the 2nd party, Johurry Lal, in possession observed as follows :—

As however it appeared at an early stage of the case that the principal claim of both parties was based on delivery of possession by order of the Civil Court, it became necessary to stay the taking of evidence in the usual way and to consider whether either party, and if so which, was possessed of an order of a competent Court giving him possession of the land in dispute. If there is such an order made out in favour of one of the parties, it becomes the duty of the Criminal Court to uphold it, and to declare possession accordingly. In the case of *Daulat Kcer v. Ramessuri Kcer* (1) it was ruled that "it is the duty of the Magistrate when the

right to possession has been declared within a time not remote from his taking proceedings under sec. 145 to maintain any order which has been passed by any competent Court, and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders is to assume a jurisdiction which the law does not contemplate."

In this case both parties claim to have such orders and it therefore became necessary to examine the nature and validity of the respective claims. On behalf of the 1st party there was filed an order of the Sub-Judge of Monghyr giving possession of an 18 gundas share in Mouzah Sandalpur, Towji No. 2537, and Sudder Jama Rs. 142 to one Mahomed Hashim. This is dated 27th April 1900 and the peon's receipt of delivery of possession is dated 18th May 1900. Another paper is filed, whereby Mahomed Hashim, in order to obtain the funds necessary for the pursuance of his suit for possession, hands over to Mr. Sims his share in Mouzah Sandalpur. This is dated 1st April 1897 and appears to be the basis of Mr. Sims' present claim to possession. No boundaries are stated in these documents or anything to show whether it was a share in an individual estate or a definite portion of land after *batwara* that was handed over, and without any knowledge of the practice of the Civil Courts in such matters, it certainly seems as though the 1st party had suffered by this ambiguity in the form of the Civil Court order. The 2nd party also filed several documents. Principal is an order of the Subordinate Judge of Monghyr for delivery of the share of Musst. Hafizunnessa to the 2nd party of her share in Mouzah Sandalpur. It is stated in this order that the towji number was 2537 before partition and since partition it is 2947. The date and receipt of delivery of possession is dated 29th January 1900 and 7th February 1900 respectively. It therefore became necessary to discover whether the portion of land under dispute bears any towji number of its own, and if so whether that number is identical with that of the share purchased by Johurry Lal. A Sub-Deputy Magistrate was deputed to make enquiry. He reported that the disputed area bears Towji No. 2947. I have therefore no option but to maintain this order

(1) I. L. R. 26 Cal. 625 (1899).

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of the Civil Court and to declare that the 2nd party is in possession of the land until evicted by due course of law and I direct the first party to abstain from interference with that possession until such eviction.

Against that order, the Petitioners moved the High Court and obtained the present rule.

*Mr. Abdur Rahim*, with him *Babu Nagendra Nath Mitter*, for the Petitioner.

*Mr. P. L. Roy*, with him *Babu Dasarathi Sanyal*, for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The order complained of in this case is an order of the Sub-divisional Magistrate of Beguseral maintaining the opposite or second party in possession of certain land which he finds that party held under a Civil Court decree for possession. This order is taken exception to on two grounds. It is contended in the first place that the Deputy Magistrate had no jurisdiction to institute these proceedings at all inasmuch as, in the initiation of these proceedings, no specification of boundaries of the disputed land was made and, that being so, it is contended that the Court ought not to have entertained the present proceedings for ascertaining which party was in possession. Now, having regard to the terms of sec. 145, C. Cr. P., it seems to us that the main question which the Criminal Court has to determine is as to the possession of the disputed land. There must be a dispute and a dispute about land, and there can be no question that what is required is that the disputed land should be thoroughly well ascertained by both parties. Our attention has been directed to the proceedings

in this case and to the report of the Magistrate deputed to inquire into the subject-matter of dispute, and we think it is abundantly clear that, from first to last, the parties were not at issue upon the question as to what the disputed lands were and not only were the parties not at issue on this matter but neither the Court nor anybody concerned in this dispute was under any misapprehension as to this point. The real question in dispute was which party held a Civil Court decree for possession of this land. That was the point to which the attention of the Deputy Magistrate was directed, and he finds that it was the second party which held the Civil Court decree for possession and the effect of his order is to maintain that party in possession of the land. It seems to us, therefore, that there is no ground for interfering with the proceedings so far as the first ground of objection is concerned.

The next objection is that there has been no finding of actual possession as regards either party. That possibly is the case, but it seems to us that the course which the Deputy Magistrate has taken is the correct one, and it is the course which is laid down by this Court in the case of *Doulat Koor v. Ramessuri Koori* (1). The duty of the Court was, under the circumstances of the dispute between the parties, to see which party it was that held the Civil Court decree for possession in respect of the disputed land and, having come to the conclusion that it was the second party which held such decree, the lower Court has maintained that party in possession. We think, having regard to the ruling just

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olited that that was the proper course for the Court below to adopt. It is said that the decree ought to have been a decree for possession as between the parties, but we are aware of no ruling which prescribes that the Magistrate is to maintain a party in possession in accordance with the decree of the Civil Court, only when the opposite party is a party to that decree. If the duty of the Magistrate were confined in that way, the result might be to bring the Civil Court into conflict with the Criminal Court. As a matter of fact, the Deputy Magistrate has confirmed that party in possession which the Civil Court has said was entitled to possession and, that being so, we think there is no reason for our interfering on this ground either. The rule is, therefore, discharged.

H. P. C.

*Rule discharged.*

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 101 OF 1901.

GHOSE, J.	BASANTA BAISTABI and
TAYLOR, J.	ors, Petitioners,
1901.	v.
4, May.	THE EMPEROR,
	Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 133, 139—Public nuisance—Prostitutes, trade and occupation of—Removal of house from road-side, order for—"Physical comfort" of the public—Jury, opinion of.*

*The mere existence of houses of prostitutes by the road-side and the fact that they ply their trade in those houses cannot affect the "physical comfort" of the passers-by.*

*In a proceeding under sec. 133, Cr. P. Code, certain prostitutes were called upon to remove their trade and occupation from the slopes and neighbourhood of a*

*road; they appeared and in shewing cause claimed a jury which was appointed; the jury were of divided opinion and the majority suggested that they should be directed to mend their habits but did not recommend the removal of their houses and the Magistrate made his conditional order of removal of their houses absolute:*

*Held—That the order of the Magistrate based upon the report of the jury, was neither reasonable nor legal, and must be set aside.*

This was a reference made by B. K. Mullick, Esq., Sessions Judge of Tippera, on the 20th April 1901, under sec. 438, Cr. P. Code, against the order of J. Vas, Esq., Assistant Magistrate of Chandpore, dated the 28th February 1901.

The facts of the case appear from the letter of reference which was as follows:—

"By an order, dated the 17th of January, the Sub-divisional Magistrate of Chandpore, in consequence of a police-report, directed a number of prostitutes to remove their 'trade and occupation' from the slopes and neighbourhood of the Bagadi Road, which, I understand, is within Chandpore town. At the request of the prostitutes a jury was appointed, three members being nominated by the Sub-divisional Magistrate and two by the prostitutes themselves. On the 28th of February the jury submitted their report, and on the same day the Sub-divisional Magistrate made his order of the 17th of January absolute under sec. 139, Cr. P. Code. Against this order the prostitutes, the Petitioners, invoke the revisional powers of the Hon'ble High Court.

"It is recommended that the whole order be set aside, being bad in law,

## BASANTA BAISTABI v. THE EMPEROR.

"The Sub-divisional Officer says that the houses of the prostitutes on the roadside, interfere with the 'physical comfort' of the public. Three members of the jury report, as the result of their enquiries, that the prostitutes sometimes quarrel in their houses under the influence of liquor and sometimes sit on the road, and suggest that they should be directed to mend their habits; the other two members deny that there is any cause for removing them at all. The report of the majority on which the Sub-divisional Magistrate has based his final order does not recommend that the Petitioners should remove their houses, and I think the order of the Magistrate was neither reasonable nor proper nor legal. If the prostitutes commit affrays on the public road or disturb people at night by their songs, they can be dealt with under the Penal Code. Ordering them to remove their houses does not appear to me to be a reasonable or legal remedy."

No one appeared on this reference.

The JUDGMENT OF THE COURT was as follows:—

The Assistant Magistrate of Chandpore on a police-report issued an order upon a number of prostitutes to remove their trade and occupation from the slopes and neighbourhood of a certain road. This was on the 17th of January 1901. On the 1st February he issued "a conditional order" and the prostitutes appearing in a body to show cause, a jury was appointed. After the report of the jury the order was made absolute by the Assistant Magistrate. The Sessions Judge has reported this order to this Court as bad in law. There appears no report

of the jury on the record. This should have been sent up. But we gather from the Sessions Judge's report that there was a division of opinion among the members of the jury and that the majority did not recommend that the prostitutes should remove their houses.

The learned Sessions Judge very rightly points out that the mere existence of the houses of the prostitutes by the roadside and the fact that they ply their trade in those houses cannot affect the "physical comfort" of the passers-by. If offences are committed they can be prosecuted and punished: and we agree with the Sessions Judge in holding that the order of the Magistrate is neither reasonable nor legal. We accordingly set it aside.

*Order set aside.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 918 OF 1900.

AMEER ALI, J.]

STEVENS, J. In the matter of CHINI-  
1901. BAS PAL, Petitioner.

2, January.

*Indian Penal Code (Act XLV of 1860), secs. 290, 447—Public nuisance—Criminal trespass—Conviction on a charge, not called upon to meet.*

*When the accused was called upon to answer a charge under sec. 447, I. P. C., and convicted under that section as also under sec. 290, I. P. C., and on appeal the Sessions Judge was of opinion that the conviction could not be maintained under sec. 447, but that sec. 290 was wide enough to cover the act:*

*Held—That as the accused was not called upon to meet the charge under*

## IN THE MATTER OF CHINIBAS PAL.

*sec. 290, I. P. C., and had no opportunity to give evidence in rebuttal thereof, the conviction could not stand.*

This was a rule issued on the 29th of November 1900, against the order of the Sub-divisional Magistrate of Nattore, dated the 20th of August 1900, which order was, on appeal, affirmed by the Sessions Judge of Rajshahye on the 3rd of November 1900.

The Petitioner who was the accused was called upon to answer a charge under sec. 447, I. P. C., of having committed criminal trespass. The accused extended the steps of his premises and verandah etc., by brick building over a drain running along a road controlled by the District Board; some time previously he had made the drain *pucca* in front of his premises. He asserted his landlord's title to the soil of the drain and claimed that by making the drain *pucca* he had possession to the exclusion of the local authority, so that there was no trespass. The first Court convicted him under secs. 447 and 290, I. P. C., and sentenced him to one day's imprisonment and Rs. 20 fine. The accused was never called upon to meet the charge under sec. 290. The Sessions Judge was of opinion that it was doubtful whether the act of the accused came within the definition of criminal trespass but that sec. 290, I. P. C., was wide enough to cover the case and he therefore dismissed the appeal.

*Sir Griffith Evans*, with him *Babus Dwarka Nath Chuckerbutty* and *Joy Gopal Ghosha*, for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner in this case was called

upon to answer a charge under sec. 447, I. P. C., of having committed criminal trespass on what was alleged to be land in the possession of the District Board. The Sub-divisional Officer convicted him under secs. 447 and 290, I. P. C. As has been already noticed, the Petitioner was never called upon to meet the charge under sec. 290 the ingredients of which are totally different from those constituting an offence under sec. 447 nor had he any opportunity to give evidence in rebuttal of the case alleged against him under sec. 290. The Sessions Judge has come to the conclusion that it is hardly possible to maintain the conviction of the Petitioner under sec. 447, but he is of opinion that sec. 290 is "wide enough to cover the act." He does not seem to have noticed that the Petitioner had no opportunity to 'rebut the allegations made against him under sec. 290, I. P. C. This rule was issued upon the District Magistrate calling upon him to shew cause why the conviction of, and sentence passed upon, the Petitioner should not be set aside on that ground. We think, having regard to the matters to which we have referred, that the rule ought to be made absolute. We accordingly set aside the convictions and sentences and send the case back to the Sub-divisional Officer to be tried under sec. 290 giving the Petitioner an opportunity to meet the charge laid against him under that section. The fines, if paid, will be refunded.

*Rule made absolute.*

S. C. S.

## PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL  
COMMISSIONER OF OUDH.]

LORD HOBHOUSE.	
LORD DAVEY.	AZIZ-UN-NISSA,
LORD LINDLEY.	Plaintiff, Appellant,
SIR R. COUCH.	v.
1901.	TASSADUQ HUSAIN
Heard, 22, Feby.	KHAN, Defendant,
Judgment, 9, Mar.	Respondent.

*Life interest—Perpetual gift—“Always and for ever,” meaning of.*

*The words “always and for ever” in a Will, award, order of Court or other document, do not per se extend the interest given beyond the life of the person who is named.*

*They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or the subsequent conduct of the parties may shew the intention with sufficient certainty, to enable the Courts to presume that the grant was perpetual.*

MOULVI MUHAMMAD ABDUL MAJID v. MUSSUMAT FATIMA BIBI (1) and TOOLSHI PERSHAD SINGH v. RAJAH RAM NARAIN SINGH (2) referred to.

This was an appeal from a decision of Mr. Blennerhasset, the Judicial Commissioner of Oudh, who had reversed, on second appeal, the decisions of two lower Courts in Oudh, that of the Subordinate Judge of Rai Bareli and also of the District Judge of Rai Bareli.

The question involved in this suit was whether the Appellant was entitled to the declaration she sought that the right to receive Rs. 70 per month which Chhedu Khan, the Respondent's father,

had obtained a decree for, had ceased at his death.

Plaintiff is the grand-daughter of one Abdul Hakim Khan to whom one moiety of the Amanwan Talukdari estate belonged. Her interest was one-fourth in that estate. The other Defendant to the suit was Mahommad Said Khan, the talukdar of the 12 annas portion; he admitted Defendant-Respondent's right to receive the said allowance. Abdul Hakim Khan was the brother of Chhedu Khan, and uncle of the Respondent.

Chhedu Khan died on 20th December 1889, and the Respondent had since received the said annuity and was in receipt of it when this suit was instituted.

The ownership of the whole estate Amanwan before the eight-anna share of it came to Abdul Hakim Khan, was with one Alladad Khan; he had two daughters, one of whom married Abdul Hakim Khan, and the other one married Saadat Khan, and these two sons-in-law became, in right of their wives, the owners of one moiety each of the estate.

During the rebellion these two brothers were in confinement, when by means of the exertions of Chhedu Khan with the rebel Government, they were released. They had been taken prisoners by one Raja Jagpal Singh, the talukdar of Tiloi.

By way of return for such services, on the 31st January 1858 (15th Janadi-us-Sani 1274 Hijri), Abdul Hakim Khan executed an agreement which covenanted that in consideration of the services rendered, “I shall have no objection to the giving of my brother's half share in the estate, when I get into possession of the estate, rather, at the time of the execution of the lease, I, the declarant,

(1) L. R. 12 I. A. 159 at p. 163 (1885).

(2) L. R. 12 I. A. 205 at p. 214 (1885).

AZIZ-UN-NISSA v. TASSADUQ HUSAIN KHAN.

shall myself get the name of the said brother entered therein conjointly with my own."

In addition to the above agreement, there was a special contract made before Major Orr, Deputy Commissioner, attested by him, and signed by Abdul Hakim Khan and Saadat Khan, they stipulating that the names of Chhedu Khan brother of Abdul Hakim Khan, and of one Shujaat Khan, brother of Saadat Khan, should be entered in the Khewat.

Considerable litigation took place between Chhedu Khan and his brother Abdul Hakim Khan, in 1860, 1863 and 1868, Chhedu Khan claiming a moiety of Abdul Hakim Khan's share for himself and his heirs for ever.

On the 5th August 1863 Major Macandrew, the Deputy Commissioner, decreed to Chhedu Khan Rs. 70 per month from the date Abdul Hakim Khan entered into possession of the Amanwan estate chargeable against the Defendant's share.

Abdul Hakim Khan appealed to the Commissioner, Colonel Barrow. He referred the matter to arbitrators; certain talukdars met by consent of parties and addressed the following award to Col. Barrow.

"Under your orders this case was committed to us for disposal. Accordingly we having summoned both the parties, and enquired into the case, took from them a deed of agreement to abide by our award. After having taken the deed of agreement, we decide as follows:—

"That from 1271 F. Abdul Hakim should always pay to Chhedu Khan Rs. 70 per mensem, and that the latter should give up his claim in respect of previous years, and should realise

from Abdul Hakim Khan Rs. 70 every month.

"Parties being present, our decision stated above was read over to them. Chhedu Khan accepted it but Abdul Hakim Khan did not.

"The arbitration award, together with the deed of agreement, is submitted to you for orders.

"Moreover (we hold) that Chhedu Khan should always remain obedient to Abdul Hakim Khan."

Thereupon Col. Barrow passed the following order:—

"In every way Abdul Hakim's obligation to provide for his brother is proved, and it has been likewise acknowledged by public opinion, for a former *punchayet* awarded, in September 1859, that he should pay Rs. 100 per annum. They did not consider the deed marked B a valid one, but still they decreed the money payment. Mr. Capper in the Revenue Court and Colonel Macandrew in the Civil Court have decreed Rs. 70 per mensem as the sum that should be paid monthly by Abdul Hakim to Chhedu Khan, and now these talukdars without the remotest interest in the matter have fixed on the same amount. They have remitted the arrears, and all things considered, I do not conceive a better decision can be come to. I uphold then the decision of the lower Court awarding Rs. 70 (seventy rupees) a month to Chhedu Khan to be paid by Abdul Hakim, but reverse so much of the decree as awards arrears of instalments."

Such allowance having been continued as aforesaid to Chhedu Khan's son, the present suit was instituted by the Appellant. She succeeded in two Courts, but



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ultimately her suit was dismissed by the said Judicial Commissioner, and she now appealed to His Majesty in Council.

*Mr. Degruyther* for the Appellant relied on the arbitration award, urging that the right to receive payment was limited to the life of Chhedu Khan and pointed to various misstatements in the Judicial Commissioner's judgment. He referred to *Moulvi Muhammad Abdul Majid v. Massumat Fatima Bibi* (1) and to *Toolshi Pershad Singh v. Rajah Ram Narain Singh* (2).

*Mr. C. W. Arathoon* first raised a preliminary objection to the appeal, urging that as the Appellant's right to the annuity was to one-fourth of the sum of Rs. 70 a month, the Judicial Commissioner under sec. 596 could not give leave to appeal, the amount in appeal between the parties to the suit being under the appealable value.

**LORD LINDLEY.**—But the decision would govern the whole annuity.

*Mr. Arathoon.*—The Appellant is not interested in the Respondent's right to get the three-fourth from her co-sharer owning the three quarters of the taluk, who moreover has admitted Respondent's right. Chhedu Khan's claim against Abdul Hakim Khan was to half the estate and a claim based on a contract, not a maintenance claim granted out of favour. The obligation Col. Barrow referred to was a legal obligation. *Mr. Arathoon* referred to the earlier proceedings.

*Mr. Degruyther* was not called on to reply.

Their LORDSHIPS' JUDGMENT was delivered by

**SIR RICHARD COUCH.**—The question in this appeal is the construction of an award made on the 11th December 1863 in the proceedings which followed the institution of a suit in the Court of the Deputy Commissioner of Rai Bareli by Chhedu Khan against Abdul Hakim Khan. The facts which led to it are these: Taluk Amanwan was formerly the property of Alladad Khan. He had two daughters who married Abdul Hakim Khan and Saadat Khan and after the re-annexation of Oudh this estate was settled with the husbands of these ladies and a *sanad* was granted to them. Chhedu Khan and Abdul Hakim were brothers and on the 13th December 1859 Chhedu instituted a suit in a Revenue Court against Abdul Hakim for a quarter share of the taluk as in accordance with an agreement with Abdul Hakim and Saadat said to be embodied in the proceedings, dated 4th June 1858, of the Court of Captain Orr, late Deputy Commissioner of the District of Rai Bareli. These proceedings are not in the record of this appeal, but there is in it an agreement, dated 31st January 1858, by which Abdul Hakim after stating that his brother Chhedu Khan by instituting the proceedings got his brother Saadat and himself released from prison said "I hereby declare and commit it to writing that I shall never and on no account be on bad terms with the said brother and shall have no objection to the giving of my brother's half share in the estate when I get possession of the estate, rather at the time of the execution of the lease." The suit was dismissed on the 13th October 1860 on the ground

(1) L. R. 12 L. A. 159 at p. 163 (1885).

(2) L. R. 12 L. A. 205 at p. 214 (1885).

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that the claim was not cognizable by a Revenue Court, Chhedu being told that he was at liberty to have recourse to the Civil Court for damages incurred from time to time on account of Abdul Hakim's breach of promise.

Thereupon Chhedu Khan brought a suit in the Court of the Deputy Commissioner of Rai Bareli against Abdul Hakim claiming Rs. 70 a month from the 15th September 1860 "compensation for breach of contract" in not giving him a share of the taluk as promised in the agreement and the Deputy Commissioner made a decree for him for "Rs. 70 per mensem from the date that Defendant entered into possession of his share of the taluk Amanwan chargeable against Defendant's share." Abdul Hakim appealed to Colonel Barrow, the Commissioner at Lucknow, who appears to have doubted if Chhedu could recover any damages. In his judgment (Rec. p. 33) he says "the document A (the agreement) is no specific contract, for no amount is mentioned in it, but it is a clear expression of Appellant's determination to do something for his brother (Respondent) but the allusions here are also to land and not to cash." The Commissioner followed this by saying that the case was susceptible of adjustment out of Court. After the judgment was delivered the parties being present agreed to refer to three native gentlemen who were named the decision as to the amount that should be paid by Abdul Hakim to Chhedu Khan. The award was made on the same day (11th December 1863) and is as follows: "That from 1271 Fasli (1864) Abdul Hakim shall always pay to Chhedu Khan Rs. 70 per mensem, and that the latter should give up his

claim in respect of previous years and should realise from Abdul Hakim Khan Rs. 70 every month. Parties being present, our decision stated above was read over to them, Chhedu accepted it but Abdul Hakim Khan did not. This arbitration award together with deed of agreement is submitted to you (the Commissioner) for orders. Moreover (we hold) that Chhedu Khan should always remain obedient to Abdul Hakim Khan." Thereupon the Commissioner upheld the decision of the Deputy Commissioner awarding Rs. 70 a month to Chhedu Khan to be paid by Abdul Hakim but reversed so much of the decree as awarded arrears of instalments.

Chhedu Khan has died, and the question in this appeal is whether the Respondent who is his son is entitled to the Rs. 70 per month, a suit having been brought by the Appellant, the grand-daughter of Abdul Hakim, for a decree declaring that the right to receive it ceased at the death of Chhedu Khan, the payment of it having continued to be made to the Respondent by the lambardar of the estate. The Subordinate Judge who first heard the suit held that the agreement was purely and simply a grant to Chhedu personally and not to his heirs and made the decree prayed for. On an appeal to the District Judge of Rai Bareli he held the same and referred to the sentence in the award that Chhedu was to continue to obey his brother as being a personal obligation. He dismissed the appeal and there was then a further appeal to the Judicial Commissioner who reversed the decree and dismissed the suit. The reasons which he has given in his judgment for this deci-

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sion are unsatisfactory. He begins by saying that the District Judge had based his judgment almost entirely on the interpretation of the word *hamesha* (always or for ever) and that there are several circumstances which the Court does not appear to have considered, and it has held that Chhedu Khan had a valid agreement in his favour which would have entitled him to claim half the estate. The District Judge did not hold this, on the contrary he says in his judgment that an agreement was said to have been executed admitting Chhedu Khan to share in a moiety of the taluk, that the Rent Courts rejected the agreement as not genuine, the Civil Court of first instance accepted it, but the Appellate Court doubted its genuineness and held it to be invalid. The Judicial Commissioner then says that, construing the award together with the circumstances he refers to it, appears to him that the word *hamesha* used therein was intended to grant an estate of inheritance and sets aside the decree of the District Judge and dismisses the suit. Now it has been held by this Board that the words "always and for ever" in a Will do not *per se* extend the interest given beyond the life of the person who is named (*Moulvi Muhammad Abdul Majid v. Mussumat Fatima* [1]). They are not inconsistent with limiting the interest given but the circumstances under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Courts to presume that the grant was perpetual (*Toolshi Pershad Singh v. Rajah Ram Narain Singh* [2]). This ruling

applies equally to the award and the Commissioner's order upon it. Their Lordships do not see in the circumstances under which the award was made any which would enable them to pronounce that the Rs. 70 a month were to be paid after the death of Chhedu Khan. The last line of the award seems to indicate that it was for him personally. If Chhedu had any title to a share in the taluk before the Government took possession of it in 1858, he had none after the *sanad* which was granted by the Government as his name was not in it. This is noticed by the Commissioner in the judgment he gave before the reference to the arbitrators. Chhedu's right was only under the agreement and the Commissioner concluded his judgment by saying that the issue was reduced to "what consideration is Chhedu Khan entitled to in consequence of Abdul Hakim's promises and agreements with him?" The arbitrators say in the award that they had inquired into the case and they may have considered that justice would be done by giving to Chhedu the Rs. 70 per month for his life that being a sufficient reward for his services in obtaining the release of Abdul Hakim and Saadat from prison.

Their Lordships will humbly advise His Majesty to reverse the decree of the Judicial Commissioner and order the appeal to him to be dismissed with costs.

The Respondent will pay the costs of this appeal.

*Messrs. T. L. Wilson & Co.*, Attorneys for the Appellant.

*Messrs. Barrow Rogers & Neville* for the Respondents.

*Appeal allowed.*

C. W. A.

(1) L. R. 12 I. A. 159 at p. 163 (1885).

(2) L. R. 12 I. A. 205 at p. 214 (1885).

## [CRIMINAL APPELLATE JURISDICTION.]

REF. NO. 44 OF 1900.

AMEER ALI, J. } THE QUEEN-EMPRESS  
 STEVENS, J. } v.  
 1901. } SURENDRA NATH  
 17 & 21, January. } SARKAR, Accused.

*Criminal Procedure Code (Act V of 1848), secs. 209, 436, 532—Discharge of accused of an offence triable exclusively by Court of Session—Murder—Commitment made by District Magistrate—"Order him to be committed for trial," meaning of—Magistrate, competency of, to himself commit—Magistrate, power of—Evidence of witness partly against and partly in favour of accused—Evidence of witness as to what he heard from deceased—Hearsay evidence—Evidence Act (I of 1872), secs. 6, 8, 11, 14.*

*Under sec. 436 of the Code of Criminal Procedure the Sessions Judge and the District Magistrate have co-ordinate powers either to order a commitment upon the evidence already taken or to direct a fresh enquiry.*

QUEEN-EMPRESS v. KRISHNABHAT (1) referred to.

*It is improper to accept a portion of the evidence given by a witness which is in support of the case for the prosecution and to discard or discredit the other portions which go against it; and so far as the accused is concerned, he is entitled to ask the Court to consider all the facts deposed to by that witness and to shew to the Court that his evidence, taken as a whole, is in material contradiction of the evidence of the other witnesses.*

*A statement of a witness as to what he heard from the deceased when it does not relate to the cause of his death or the circumstances of the transaction which resulted in his death is hearsay and is not*

*admissible; they must be proved in the ordinary way, viz., by evidence of a primary character and not by hearsay testimony.*

This was a reference made by the Sessions Judge of Burdwan on the 1st of December 1900, under sec. 307 of the Code of Criminal Procedure, from an acquittal by the jury of the accused Surendra Nath Sarkar upon a charge under sec. 302, I. P. Code.

The facts of the case appear fully from the judgment of the Court.

At the hearing of the reference on the 17th January a preliminary objection was taken on behalf of the accused that the District Magistrate had no power to order the committal of the accused when he had been discharged by the Deputy Magistrate.

Mr. Gordon Leith (Deputy Legal Remembrancer) in support of the Reference.

Mr. P. L. Roy and Babu Jadunath Kanjilal for the Accused.

THEIR LORDSHIPS delivered the following judgment on the preliminary point:—

Mr. Roy takes a preliminary objection to the trial in the Sessions Court on the ground put forward in the Court below (p. 3 of the paper-book). It appears that an inquiry was held in this case by a Deputy Magistrate who discharged the accused under sec. 209, C. Cr. P. The District Magistrate, upon going through the record, came to the conclusion that the prisoner had been improperly discharged; he thereupon called upon the accused to show cause why he should not be committed to the Court of Session and after hearing his pleader directed his commitment.

Mr. Roy's contention is that the com-

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mitment is bad and ought to be quashed under sec. 532, C. Cr. P., as the District Magistrate had no power himself to commit; he could only direct the officer who had discharged the accused to do so. In support of this contention, he refers to the language of secs. 436 and 437, and urges that the words "order him to be committed for trial" in sec. 436 mean that the Sessions Judge or the District Magistrate can only order the inferior Court to commit the accused for trial. In our opinion sec. 437 deals with a totally different class of subjects. In considering the present objection we have to confine our attention to sec. 436 with its provisos. We think that under that section the Sessions Judge and the District Magistrate have co-ordinate powers to order a commitment upon the evidence already taken instead of directing a fresh inquiry. The first part of the section runs as follows:—"When, on examining the record of any case under sec. 435 or otherwise, the District Magistrate," as in this case, "considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the District Magistrate may cause him to be arrested." The second part goes on to say:—"and may thereupon," that is, upon the recorded evidence, "instead of directing a fresh inquiry order him to be committed for trial upon the matter of which he has been in the opinion of the District Magistrate improperly discharged."

As mentioned before, the latter portion of the section is divisible into two parts: The District Magistrate may either direct a fresh inquiry by the inferior

Court which has improperly discharged the accused or he may, in his discretion, order the commitment of the accused for trial before the Court of Session. This meaning is made clear by the proviso which follows:—

"Provided that the accused has had an opportunity of showing cause to such Magistrate why the commitment should not be made," not to be made by any body else but by the Magistrate himself. The second proviso declares:—"If such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence. Proviso (a) taken in connection with proviso (b) cannot leave any reasonable doubt that the commitment there intended is a commitment upon the record by the Sessions Judge or the District Magistrate who, upon a perusal of the evidence, is of opinion that the accused has been improperly discharged. This view of ours is in accord with the case of *Queen-Empress v. Krishnabhat* (1) and no authority holding the contrary view has been laid before us. We therefore overrule the objection.

On the 21st January, their LORDSHIPS delivered the following judgment on the appeal:—

THEIR LORDSHIPS' JUDGMENT was a follows:—

This is a reference by the Sessions Judge of Burdwan under sec. 307, C. Cr. P., from an acquittal by the jury of the accused Surendra Nath Sarkar upon a charge under sec. 302, I. P. C. The deceased Assam Baistabi, was a public

(1) 1. L. R. 10 Bom. 319 (1885).

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prostitute who plied her trade sometimes in Burdwan and sometimes in her native village Mankar. On the morning of the 21st April, at about 2 A.M., she was found by a number of people who had gone to her house with Dhiru Chowkidar lying murdered on the *pira* of her hut. She appears to have returned from Burdwan some three weeks before this event. The case for the prosecution is that the chowkidar heard groans issuing from her house. He woke up a number of neighbours, and, with them, proceeded to the hut. They found what is called the *sadar* door closed or rather hooked from inside and were unable to open it for some time, until some sort of instrument was brought and the hook was raised. They then entered the house of the deceased. Dhiru Chowkidar says that he saw the present accused running out of the house through a *khirki* door which is towards the east of the hut opening towards the north. The accused was pursued but he entered his house which is not far off and bolted the door. Dhiru says that he went and informed Raghu Nath Singh Constable who was in the village at that time. The constable came and placed some guards round the house of the accused and also at the Railway station to prevent persons suspected of the crime from absconding. Dhiru then states that, at about 3 in the morning, he went off to the Galsi thana to give information regarding the murder. He arrived there at about 9 A.M. His information was taken down and he returned to the village later in the course of the day. After Dhiru had left the village the accused is alleged to have

been arrested outside his house when he had come out to answer a call of nature. He was kept under arrest until the arrival of the Daroga or Sub-Inspector of Police who says he arrived at the place between 10½ and 11 in the morning. The prosecution has called a number of other witnesses whose evidence we shall have to refer to in some detail. Enough to say at this stage that that is substantially the case for the prosecution, but it seeks to establish the guilt of the accused by several other circumstances which, it is alleged, corroborate the direct testimony of Dhiru that the accused was the man directly concerned in the crime. It is alleged that, when the inner room of the deceased woman's hut was broken open, the constable, on entering it, found under a pillow a black serge coat from the pockets of which certain post-cards and letters were taken out, all addressed to the accused, and it is suggested that the finding of the letters in the coat in that house is a piece of circumstantial evidence which is conclusive against the accused. It is unnecessary to refer to the other circumstances upon which the learned Sessions Judge relies in his charge to the jury as well as in his reference to this Court, for, we shall have to deal with them in the course of the examination of the evidence. It is necessary, however, to mention the exact position of the house which was occupied by the murdered woman. It seems to be an ordinary one-roomed hut with a sort of compound wall forming a semicircle in front. The *sadar* door is stated to be towards the west. The *khirki* door is, as has already been mentioned, towards the east opening towards the

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north upon a piece of bare ground where there are some trees and a *khejur* jungle not far off. There are houses close by, the house of Jagannath Das being only about 25 cubits from that of the deceased. Her brother-in-law, Kunja Das, also lives close by. On the east is the house of Ram Das. Another near neighbour is Mani Metoni. The place Kalitola whence the chowkidar heard the groans is said to be 2 *russis* off. The witnesses state that a lane or, as the Sessions Judge calls it, an alley leads to the *khirki* door towards the east. Before the Deputy Magistrate, the chowkidar stated that the lane or alley was about 12 or 13 cubits in length. Before the Sessions Court, he stated that it was about 2 or 2½ cubits in length which would make it probably about the width of the *pira*, and the *khirki* door then would be along the line of the wall of the inner room of the hut. The house of the accused is on the other side of a tank called the Bhundry tank, and the allegation is that the accused ran through the *khirki* door round the house of the deceased, crossed a water passage towards the west of the deceased's house, jumped over a wall and then after rounding a tank, entered his house. Admittedly the *khirki* door is so small that the accused or the person who escaped on that night through that door, had to bend himself considerably to get out of it. The Deputy Magistrate who held the enquiry and who discharged the accused appears to have gone to the house and seen the *khirki* door himself. We have looked into his judgment and find a very clear description of that *khirki* door in it. He says "the *khirki* door is a very small one. It is like the

door used in the privy of a poor woman's house. I can never believe that the accused who is a tall healthy man escaped through it."

Another circumstance of material importance in considering the value of what is called the corroborative circumstantial evidence deserves notice. Indra Narain Biswas, the Sub-Inspector, was not at Galsi thana on the day in question. He appears to have been away on some other duty. He was returning by rail from Chuck Tantulia to Burdwan. At the Galsi station, he met another chowkidar by name Gosta, who gave him the information regarding the murder of Assam Baistabi. The Sub-Inspector says that he sent off Gosta to the thana to fetch a pair of hand-cuffs. By the next train he went to the Mankar Railway Station and arrived there at 10 or 10-30 A.M. His statement is that, on his arrival, he went to the place where the accused was and found him in custody outside the house of Assam Baistabi. He states further that he did not search the house of the accused until late in the afternoon. Upon the evidence of the other witnesses, however, it is perfectly clear that the Sub-Inspector, upon his arrival, did, as one would naturally suppose, he would do, go to the house of the accused and thereafter came back to the deceased's hut. Jonab Ali, witness No. 9, states in cross-examination as follows:—"Darogah on his arrival went to Surendra's house to search it after he had been to Assam's house for a short time. He did not then inspect her body nor caused the door of the room to be opened." According to another witness there seem to have been two visits paid

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to the house of the accused, one about noon and the other later on. The bearing of these facts will be observed, when we come to deal with the letters and post-cards found in the pocket of the serge coat. The Sub-Inspector was in the village the whole of that day (21st) and apparently also on the 22nd. He came to Burdwan on the 23rd on which date he received certain instructions from the Inspector of Police, and on the 24th he took the statements of the boy Khetra Nath Dass. Up to that time apparently there was no evidence forthcoming against the accused of any motive on his part for the crime. Khetra's evidence before the committing Magistrate is of a meagre character, but before the Sessions Court he made a long statement both in chief and in cross-examination deposing to facts upon which the Sessions Judge has laid considerable stress in his charge as proving the visit that night of the accused to the house of the deceased and also as showing some degree of motive on his part. With these remarks, we proceed to deal with the evidence of Dhiru Chowkidar and of the other persons who accompanied him to the hut of the deceased Assam Baistabi. Dhiru Chowkidar states that he was on his rounds at about 11 P.M. in the night. He called out to the woman, got an answer and proceeded to other places. He came back to her house at about two in the morning. He called out to her again but received no answer. He then went to Kalitola to which reference has already been made to have a smoke. There he heard groans from Assam Baistabi's house whereupon he proceeded shouting in that direction. He goes on

to say that Kalidas Bairagee, Jagannath Bairagee, Gosta Das Bairagee and Ram Das Bairagee then came out and told him to see why Assam had cried out. He went to the *sadar* door of Assam Baistabi. There they all began to call out to her, but got no answer, and as they were unable to open the outer door which was secured by a hook inside, they called Kunjadas Bairagee, the brother-in-law of the deceased woman, who came with an instrument and opened the door. The chowkidar further states that as he passed through the *sadar* door and entered the house, he saw Surendra Nath Sarkar, the accused, open the *khirki* door and pass out when he at once gave chase. Kali Bairagee who was on the north side of the hut attempted to seize the accused, but being threatened with a weapon the accused had in his hand, Kali could not catch him. The accused then ran up to the Bhundari tank with the weapon in his hand pursued by the chowkidar and others. But he got to his house, pushed open the *sadar* door and, after entering, bolted it. Dhiru says that he, Kali Bairagee and Jagannath Das had pursued the accused. It is quite clear, upon the evidence of the other witnesses, that the *khirki* door of the murdered woman's hut cannot be seen from the *sadar* entrance. This was put to the chowkidar in cross-examination. He saw the force of it and in page 11, he states as follows :—"I could see accused Surendra on entering the *sadar* of Assam, because he had not then gone into the lane leading to the back door. If he had entered the lane then I would not have been able to see him." In connection with this matter, we may mention



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that before the Magistrate he had stated as follows :—"When I saw the accused I saw him standing near the *khirki* door."

The statement that he made in chief was, no doubt, similar to, if not identical with, what he had stated before the Magistrate, but when cross-examined he saw the difficulty of his position, and he began then to prevaricate. His evidence in cross-examination comes to this that although he could not have seen the accused if the latter had entered the lane or got to the back door he saw him because he had not entered the lane leading to the back door. Kali Prosad who also is a witness for the Crown, but whose evidence has been, to some extent, discredited by the Sessions Judge as it did not wholly support the case for the prosecution, tells quite a different story. It is not easy to imagine how a portion of Kali Prosad's evidence is to be taken in support of the case for the prosecution and the other portion which goes against it discarded or discredited. So far as the accused is concerned, he is entitled to ask the Court to consider all the facts deposed to by Kali Prosad, and his evidence, taken as a whole, is in material contradiction of the evidence of the other witnesses; the accused is entitled to any benefit that may accrue to him therefrom in the consideration of the case. Apparently, Kali Prosad had gone round to the back door after having been in front before, for he says as follows :—

"Kunjadas went home and fetched thence a pair of tongs. Ramdas peeped through an opening between the leaves of the door and said "who are you sitting on the *pira*, open the door." I then went round the back door with a view to see

if any man came out of the house that way. As I was standing there, I saw a man open the back door and come out of it. The door was closed before. As the man got out I caught hold of him round his waist. He had a weapon in his hand. He aimed a blow with it at me and I let go my hold on him. The man then ran toward the west, I could not recognise him." He then gives the names of the persons who pursued the man, *viz.*, Jagannath, Gosta and Dhiru Chowkidar. It will be noticed that Dhiru Chowkidar does not mention Gosta as having given chase to the accused. He mentions only Kali, Jagannath and himself as the pursuers of Surendra. Kali Prosad then goes on to say "when the pursuers returned, I questioned Dhiru Chowkidar who the man was. He said the man has gone in the direction of the Sirkar's house, can he be Surendra?"

In cross-examination the witness says :—"The alley behind the back door was dark when the back door was opened by the man. There are trees on one side of the alley and their shade makes it dark and that is why the alley was dark then. When the man came out, none said he was Surendra Sarkar. Dhiru Chowkidar did not then cry out there goes Surendra." He states further that the man had a white "*jama* on and a cloth round his head covering his cheeks and chin. He had shoes on when running away." Jagannath Das whose house, as we have said, is only about 25 cubits distant from that of the deceased says :—"Dhiru Chowkidar woke me up that night at 2 or 2-30 A.M. I asked him why he woke me up." The difference between the two statements will be

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noticed at once. The witness goes on :—  
 “He said why is Assam groaning, let us come and see. Ram Das, Gosta, Kalu, Bolai, Moti and myself went with the chowkidar to the *sadar* door of Assam’s house. We began to call up to her but got no answer . . . . I brought a pair of tongs and with it opened the *sadar* door. Dhiru Chowkidar entered the house and we all of us stood outside. As Dhiru entered the house, the man inside it ran out of the *khirki* door. At that time none said anything about that man to us. Kalu stood outside the *khirki* door. Kalu called out to me ‘Dada, come and catch the man, he is running away.’ I saw the man from a distance. I ran after him as far as the *uthan* of Mani. He had a weapon or a *lathie* about 2 cubits long in his hand, and just as I was about to seize his *jama* he flourished the weapon towards me. As I wanted to ward off the blow, I fell down near a wall. The man ran away through the cavity or along the bank of Bhundry tank. He ran towards the west. I was not able to recognize that man. Dhiru Chowkidar and Gosta had been after the man. They came back from the pursuit. I asked him who the man was. He said the man entered the house of the Sirkars. He also said he could not recognize the man well but he appeared like Surendra.”

And he adds in cross-examination “from the *sadar* door, the *khirki* door is not at all visible. The man had a white *jama* while he ran away. He had a cloth wrapped round his head covering chin and cheeks and the lower end of the nose. He had shoes on. I did not go with the chowkidar Dhiru that night to

the house of the Sirkars. Gosta ran with Dhiru part of the way. The man jumped over the wall standing in the *uthan* of Mani. I struck against that wall and fell. The wall was then about one cubit high. I cannot say what the man did with his weapon. When the man jumped over the wall, his weapon slipped out of his hands.” Gosta Behari was the other man who came with Dhiru and pursued the man who was seen running away. He corroborates Jagannath as to what took place at first. He says :—  
 “Dhiru Chowkidar woke me up that night. It was then 2 or 2-30 o’clock. I came out and asked ‘Dhiru what was the matter. He said ‘why did Assam groan?’ Then Jagannath, Kalu Das, Ram Das and myself went to the *sadar* door of Assam with the chowkidar. We pushed the door and found it shut from inside. We called out to Assam but got no reply. Dhiru then fetched Kunja Das the brother-in-law of Assam. He also called out to Assam but got no response. Dhiru then opened the *sadar* door with a pair of tongs. Dhiru then entered the house. I saw a tall and powerful man ran away across the *uthan* of Mani Metoni towards the west. The man was tall and powerful like the accused Surendra. I could not recognize him. I did not tell any one that I had recognized the man. I ran after the man to some distance, that is, as far as the eastern ghat of Bhundry tank. Dhiru ran after the man followed by Jagannath and myself. I cannot say how far Dhiru pursued the man. He ran a longer way than me. I cannot say which house the man ran to. I did not tell previously to any one that the man entered a particular house.”

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Further on, the witness says "I asked the chowkidar who was the man and where had he gone. He said either that the man went in the direction of the house of the Sirkars or that he had ran into the Sirkar's house, which statement he made I do not exactly remember. He did not tell me at all who was the man." This is all in chief. In cross-examination he states as follows:—"It is a fact that at that time no one said that he had been able to recognize the man. Dhiru even did not say that he had recognized the man. I do not remember if Dhiru or any one else said where the man had run to. On his return from the pursuit Dhiru Chowkidar did not say he had recognized the man. The man had no *jama* or coat when running away. He had no *pagri* round his head or any cloth round his face and chin. His chin and face were perfectly bare. I did not particularly note whether he had any weapon in his hand." The seventh witness Ram Das Bairagee was not examined before the committing Magistrate. He is brought forward to say that the chowkidar did mention that night he had recognized Surendra as the person running away and that he had seen him enter the house of the Sirkars. His statements in cross-examination, however, are peculiar. He says as follows:—"I did not give evidence before the Deputy Magistrate. The Police did not send me up as a witness. The Police did not examine me. I cannot see well at night. The chowkidar came back to Ashat-tola and there he spoke of having chased the man. Kali, Jagannath and Gosta and others were then present. Gosta and Kali and myself asked the chowkidar

who was the man that had run away from the house. The chowkidar said it was Surendra who did so. The chowkidar said Surendra ran away. I recognized him. Then he says:—"I do not remember exactly whether the chowkidar said 'the man appeared like Surendra.' When they cried out—'there he goes through the *khirki* door,' no name was mentioned." The other witness to the incidents of that night is Kunja, the brother-in-law of the deceased. After stating how he with others went to the house of the deceased, he goes on to say:—"Dhiru Chowkidar, Jagannath, Gosta and myself entered the house. The chowkidar first entered it, Gosta and Jagannath entered next, I entered it after them. Dhiru called out 'who are you.' The answer was 'ho!' This was given not by Assam but by some one else. The voice came from near the *khirki* door. I could not see the person. Dhiru Chowkidar said 'Surendra, is this your work?' I did not then go in the direction of the *khirki* door as I was pouring water into the mouth of Assam. She was then dead." He then says:—"I did not tell any one that I had recognized the murderer but the men who had recognized the murderer named him to me. There were Kali Baistab, Dhiru Chowkidar, Gosta Das and Jagannath Das. They gave me the name of the murderer immediately after they came back from the pursuit. They named Surendra Sarkar." It is needless to observe that this statement is in direct contradiction of the statements of the other witnesses. Before the committing Magistrate, this man did not say that Dhiru Chowkidar said 'Surendra, is this

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your work?' His statement there was in the following terms:—"Dhiru Chowkidar went ahead towards the *khinki* of the house and shouted 'who are you!' I did not see the man whom the chowkidar addressed. I heard the opening sound of the *khinki* door." After he had been examined for some time in chief the Court put to him a somewhat peculiar question: "Is it not a fact that Surendra Sirkar used to visit Assam and got annoyed if any other man visited her?" The answer was "I do not know." We cannot help expressing our opinion that the question put <sup>by</sup> the Court was not a proper one nor does it appear to us that any reason was shown why this man should be regarded as a witness hostile to the prosecution or that any case was made out for allowing him to be cross-examined. However, he was allowed to be cross-examined and the answers he gave did not help the case in any way. In cross-examination by the accused's pleader he said what he had stated in the Court below that he neither saw Surendra nor was he able to recognize him that night. One statement, however, made by this witness in answer to the Government prosecutor is of some importance, namely, where he says that his son Khetra used to sleep with him at night. We suppose he means to say when the boy used to be at Mankar. This is all the evidence relating to the incident of the night including the discovery of the murdered woman and the running away of a man from her house.

The next stage begins with the information given by Dhiru Chowkidar to Raghu Nath Singh Constable. Dhiru states that he went and spoke to Raghu

Nath Singh Constable that Assam Bais-tabi was murdered and named Surendra Nath as her murderer. Raghu Nath in the Sessions Court corroborates that statement. In cross-examination, however, he was asked whether as a matter of fact Dhiru Chowkidar did not really tell him that night only that a murder had taken place without mentioning the name of the person who was supposed to have committed it, and his answer is as follows:—"I did not depose before the lower Court 'Dhiru Chowkidar simply told me there was a murder. He did not say anything else,' and then he goes on 'I do not remember whether I deposed then. When I came to the house of the deceased with Dhiru Chowkidar, I saw there nobody else.'" There can be no question whatever that before the Deputy Magistrate Raghu Nath's statement was as follows:—"Dhiru Chowkidar, simply told me there is murder. He did not say anything else. When I came to the house of the deceased with Dhiru I saw there nobody else."

No doubt some sort of guard was placed around the house of the accused that night. It is also clear that the accused was arrested when he was either going out of his house or returning.

The next important stage begins with the arrival of the Darogah. The Darogah, as we have already said, came first to the house of the deceased for a little while, then he went to the house of the accused, and he came back to the deceased's house and drew up the *surathal* which is on the record; and it was while he was there drawing up the *surathal* that the coat was discovered in the pocket of which the letters and post

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cards produced are said to have been found. The witness Kali Prosad states: The constable put his hand into the pillow below the door sill from outside and picked up some letters which he handed over to the Darogah. The Darogah read them and said they are letters. Kailash Constable was the man who picked up the letters. He did not enter the room. Kailash Constable, however, has not been examined, and so we do not know what he would have said on the subject. The other witnesses, however, state that, when the room was opened one of the constables entered and brought out a *jama* or coat and from its pocket took out the post-cards and letters and handed them to the Darogah. Before we proceed further with the examination of this evidence, it is desirable to deal with the statements of Khetra Nath Das as his evidence has been relied upon for the purpose of showing that the accused visited the house of the deceased on the night of the 20th. It is to be noted that this boy was found only on the 24th. He states that on the night of the occurrence he had gone to take his meal as usual at the deceased's house. Surendra came there, saw him and told him to leave the place. He came to his father and told him that Surendra had driven him away. He goes on to say: "Surendra used to visit Assam now and then" and in chief he adds "on the day of the murder itself, Assam went to a tank and a Brahmin also went there when Surendra told the latter if you come to-day I shall make you lie on a bed of flowers. That very night Assam was murdered." He goes on to say: "I did

not go to the tank when that conversation took place, but I heard it from Assam." He was cross-examined upon this statement and to that cross-examination we shall presently refer. The Sessions Judge thinks that Khetra's statement regarding what he heard from the woman is admissible under four different sections of the Evidence Act, viz., secs. 6, 8, 11 and 14. We think, however, that the learned Judge is in error on this point. Khetra's statement is unquestionably hearsay and is not admissible under the sections referred to. Those sections declare certain facts to be relevant under certain circumstances, but those facts, although relevant, must be proved in the ordinary way, viz., by evidence of a primary character and not by hearsay testimony. In this case Khetra says that he heard something from Assam regarding something which she had heard accused say to a totally different person. No threat had been held out to her so that what she told Khetra could not be treated as a complaint. If the jury had convicted the accused upon this hearsay statement which, in our opinion, was wrongly admitted and wrongly placed before them, it would have been our duty to exclude it from consideration. But in this case notwithstanding Khetra's testimony they came to the conclusion that the prosecution had failed to make out a case. It is therefore necessary for us to express some opinion upon the facts deposed to by Khetra.

Upon a careful consideration of his evidence both in chief as well as in cross-examination, we have no hesitation in holding that he cannot be believed.

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It is impossible to suppose unless the deceased was insane that after hearing the threat uttered by the accused she would come back to her house repeating it loudly so as to be heard by Khetra. Has there been any incident of the character desposed to by the boy, primary evidence of that circumstance would have been forthcoming from the man against whom the threat was uttered, but no such case was made either before the Court of the committing Magistrate or before the Sessions Court. Again the threat was uttered against the Brahmin who is said to have been on friendly terms with the deceased. It was not uttered against the woman herself, and it is difficult to conceive the motive of the attack upon the woman herself that night. There is no evidence to show that the Brahmin in question visited the deceased that night or that the accused happened to go there, and that in consequence of any favouritism shown by her the accused attacked her in the way in which she is proved to have met her death. If we eliminate the evidence of Khetra, which, upon full consideration, we have no hesitation in doing, the least semblance of motive disappears and there remains nothing except the testimony of Dhiru Chowkidar as to the accused being the man who was seen running out of the deceased's house that night. We may put out of our consideration the foot marks on the *uthan* which, it is said, tallied with those of the accused, because although one witness does state that they coincide, another flatly contradicts him. We have already shown that the Bairagee witnesses do not profess to say that they recognized the man who ran away from

the house after they entered, and three of them state that Dhiru did not mention to them that he had recognized the man. Ram Dass' evidence regarding the chowkidar's recognition is inconclusive, as he himself admits that he does not remember what he exactly said. The whole case, therefore, rests upon the evidence of Dhiru and the corroboration which it is said to receive from the discovery of the letters and post-cards. The coat has not been identified as that of the accused, and considering the way in which this case has been managed by the investigating officer, we have very grave doubts whether these letters and post-cards were really found in the pocket of the coat, as it is alleged they were, on the 21st when the room of the deceased was opened. Considering the statements of Kali Prosad and the other witnesses and the way in which the constable was sent in first in the room, if he did really enter the room at all, we are led to the conclusion that these letters and post-cards were probably introduced into the pocket of that coat. A little consideration would show the absurdity of the idea that the accused would go to the house with incriminatory letters in his pocket, take off his coat, fold it up carefully and put it under the pillow and after committing the murder, leave the coat behind in a locked up room, materials which would furnish incontrovertible evidence against himself. It is not that he had no time to take away what he had brought with him, for, according to the evidence of the witnesses the men who had gathered with Dhiru Chowkidar at the *sadar* door were there nearly 2 ghories trying to open the door. It is

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extremely unlikely that the accused who was in no hurry would make no effort to carry away his coat with the papers which were in the pocket. That circumstance also throws distrust on the story of Dhiru Chowkidar that when he entered the *sadar* door, he saw the accused entering the lane. Taking a reasonable view of the matter it is obvious that if the neighbours had collected together and were making a noise at the *sadar* door of the woman's house, any man who had committed the crime would have at once decamped from the spot and not waited to be recognized by the men who were trying to enter the house. From Dhiru's various statements it is quite clear to us that he could not possibly have recognized the man whom he said he pursued afterwards. With witnesses of this character, suspicion very soon leads to belief and the belief soon gathers force and becomes personal knowledge, and it is not unlikely that, from the appearance of the man and the direction he took when running away Dhiru suspected the accused. There are certain other circumstances which we cannot overlook in dealing with the reference made by the Sessions Judge. Upon the evidence of some of the prosecution witnesses it is clear that the woman used to be visited by various people, and that, on that very night, a number of men had come to her house. The accused's statement is that although he was intimate with her some years ago, that intimacy had ceased. The chowkidar admits, and it must be remembered that he is the chowkidar of the village, that he never saw Surendra, the accused, in the deceased's house except on that night,

whereas he gives the names of other persons who frequently visited her. Having regard to all these facts, it is impossible for us to hold upon this evidence that the prosecution has succeeded in making out a sufficient case against the accused. We have gone into the facts in some detail in view of the length of the reference and the strong opinion expressed by the Sessions Judge. We are of opinion that it has not been established in this case that the accused murdered the woman Assam Baistabi, and we accordingly acquit him and direct that he be set at liberty.

*Verdict upheld : Accused acquitted.*

H. P. C.

## PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD MACNAGHTEN.	MUSST. JAFRI BEGUM
LORD DAVEY.	and anr., Defend-
LORD LINDLEY.	ants, Appellants,
SIR RICHARD COUCH.	v.
1901.	SYED ALI REZA,
Heard, 19, February.	Plaintiff, Respond-
Judgment, 9, March.]	ent.

*Award—Arbitrator, powers of—Entry by arbitrator after award made—Devolution of property, alteration of, by arbitrator.*

*Where a Plaintiff seeks to enforce an award so far as it is operative in law but disputes the legal effect of a particular clause and contends that an unauthorised addition to the award by the arbitrator after the award had been made is ultra vires :*

*Held—That it is not a suit to cancel or set aside an award, and Art. 91, Sch. II of the Limitation Act does not apply.*

*An entry made by an arbitrator in*

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*the schedule of the property after he had made his award to the effect that a particular portion had been given to the Defendant as dower and was her separate property, is no part of his award and confers no title on the Defendant.*

*An arbitrator has no power to alter the devolution of property in a mode at variance with the ordinary principles of the law governing the parties, in the absence of a special custom prevailing in the family. He has no power to make property which is divisible by law indivisible for ever.*

This was an appeal from a judgment of the Judicial Commissioners of Oudh modifying the decree of the District Judge of Sitapur.

The litigation related to the property of one Syed Ashik Ali, a Shiah Mahomedan, who died on the 15th January 1885, leaving him surviving two widows, Ajabunnissa and Najibunnissa, and two daughters by the former, the Appellant Jafri Begum, and Abbasi Begum, the mother of the minor Respondent.

In or about 1881 Jafri Begum married the 2nd Appellant, Tassadduk Husain, and three years later Abbasi Begum married the abovenamed Mahomed Reza.

At the time of Syed Ashik Ali's death Tassadduk was 25 years of age and Mahomed Reza 18 years of age. Upon the death of Ashik Ali questions arose regarding the rights of the various members of his family in and to his estate.

Special family custom was asserted and in order to ascertain amicably the rights of the respective claimants one Mahfuz Ali, the brother of Ashik Ali, deceased, was appointed arbitrator by mutual consent.

The reference was as follows:—

"As the deceased Syed Ashik Ali has,

on the 15th January 1885, departed this mortal world therefore we, with our free will and consent, appoint Syed Mahfuz Ali Sahib, Rais of Karba Pihani, Hurdoi District, who is our elder and patron as umpire for the decision of the arrangement (or management) of the estate and adjustment of the dispute of the heirs of the deceased one with another."

The award provided—

That the two daughters should be absolute owners of the whole property in equal shares, that neither should have the right to partition her share.

That Tassadduk Husain should be the manager of the whole property and render half-yearly accounts to each of the daughters. The fifth clause of the award was in the following terms:

"5. That since the partition and subdivision of an integral estate belonging to a well-known gentleman, is calculated to lead to its ruin and destruction, the principle of partition should not be considered legal (i.e., eligible) in this estate, so that the constitution of the estate should continue as usual, and there may be no occasion for the mischief-monger to raise troubles."

The said award was presented to the Sub-Registrar of the district for registration on the said 19th January 1885, when, being of opinion that under sec. 88 of Act III of 1877 (the Indian Registration Act), which deals with documents executed by a public functionary, he was entitled to refer to the arbitrator for information respecting such document, and to require of him a description of the property according to the provision of sec. 21 of the Act, he sent the said award back to the arbitrator calling upon



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him to specify the property dealt with by such award.

The said arbitrator, upon receipt of the said award, drew up a list of the property which he had dealt with by his award and in the "remarks" column thereof he stated that out of the village Kukargoti, 5 biswas was given to Jafri Begum as dower and belonged to her.

Disputes soon after arose and Abbasi Begum's title being denied in the Revenue Courts, she was referred to a civil suit.

On the 22nd March 1890 she instituted the present suit, and on her death her son, the present Respondent, was put on the record as her representative.

By her plaint she claimed separate possession by partition of one-half share of the estate of Ashik Ali with mesne profits. She alleged that the whole 8 biswas, 5 biswansis recorded in Ashik Ali's name at the time of his death constituted a portion of his estate, and that 5 biswas thereof had never been gifted to Appellant. She also alleged that on 21st September 1883 Tassadduk Husain had from funds in his hands as manager purchased in his own name a share of the village Ludhai and she claimed one-half of it.

The Defendants filed a very lengthy written statement, but the material pleas may be reduced to five.

- (1) That the suit was barred by limitation.
- (2) That by special family custom, the widows of the deceased excluded the daughters from inheritance.
- (3) That the Plaintiff could claim no title under the award, giving her a right to partition, and independent of the retention of Tassadduk Husain as manager.

(4) That 5 biswas in Kukargoti constituted the separate property of Jafri Begum, and

(5) That the share in Ludhai was acquired by Tassadduk Husain from his separate funds.

The District Judge fixed 18 issues raising these, and a number of collateral and immaterial questions. On a subsequent date he began the examination of the first witness Tassadduk Husain, and on the 20th April 1892 came to the conclusion that he would dispose of certain legal arguments, and postpone the determination of the amount of mesne profits till execution of the decree.

On the 21st April 1892, he delivered judgment, and decided that Plaintiff was entitled to a half share in the estate, that it was inadvisable to partition, that sufficient cause had not been shown to remove Tassadduk Husain from his position as manager, and decreed Plaintiff one-half of the profits, the exact amount to be determined at the time of execution of the decree.

From this decree the Plaintiff alone appealed, and the Judicial Commissioners remanded the case for proper trial and determination of the other issues.

Further evidence was taken on remand, and on questions now material, the District Judge found

- (1) That the suit was not barred by limitation.
- (2) That the custom relied on by Defendants had not been established.
- (3) That the 5 biswas in dispute in Kukargoti had been given by Ashik Ali to Jafri Begum as dowry, but that the award in

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regard thereto was not binding, because the arbitrator was *functus officio* at the time of expressing his opinion.

- (4) That Tassadduk Husain had purchased the share in Ludhai from his private funds.

After the receipt of these findings, the Judicial Commissioners passed final judgment. They confirmed the findings that the suit was not barred by limitation, and that the alleged custom had not been proved. They also agreed with the District Judge that the arbitrator had exceeded his powers in attempting to decide that Jafri Begum was the owner of 5 biswas in Kukargoti, but came to the conclusion that the gift of this property to Jafri Begum had not been established, and that Ludhai had been purchased from the profits of Ashik Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tassadduk Husain could be removed from the post of manager. In the result a decree for separate possession of one-half of the property in suit was passed in favour of the Plaintiff, together with mesne profits.

Mr. Branson for the Appellant, *inter alia*, contended that the suit, so far as it was to set aside an award, was barred by Art. 91 of the Indian Limitation Act, having been acted upon more than three years before suit. That the proceedings of the Registrar did not affect or invalidate the award.

That the first Court was right in its finding as to Mouzah Ludhai, that under sec. 211, C. P. C., mesne profits could only be given by the decree until posses-

sion or until expiration of 3 years from the date of decree.

Mr. Degruyther for the Respondent supported the decision of the Judicial Court. He submitted that the opinion of the arbitrator after the return of the award to him by the Registrar was gratuitous, outside the reference to arbitration and was made when he was *functus officio*; so far as the award deals with specific interests it is good. He referred to the Transfer of Property Act, sec. 11.

Their LORDSHIPS' JUDGMENT was delivered by

LORD LINDLEY.—This is a family dispute between a daughter and a grandson of a Shiah Mahomedan named Syed Ashik Ali who died on the 15th January 1885. He left two widows, Mussammats Ajabunnissa and Najibunnissa, and two daughters by the former, *viz.*:—Jafri Begum, the Appellant, and Abbasi Begum, the mother of the Respondent. In or about the year 1881, Jafri Begum married Tassadduk Husain, the other Appellant, and about three years later Syed Mahomed Reza married Abbasi Begum. At the time of Ashik Ali's death, Tassadduk Husain and Mahomed Reza were respectively about 25 and 18 years of age. Ashik Ali had no children by his second wife.

After the death of Ashik Ali disputes arose between his daughters, and on the 19th January 1885 they agreed to refer these disputes to the arbitration of a friend of the family named Syed Mahfuz Ali; and on the same day he made his award.

His decisions were, so far as is material, as follows:—

1. That mutation of names of all the

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property left by the deceased should be effected in the names of the two daughters of the deceased in equal shares, and that the management of the said estate should be entrusted to the Appellant Syed Tassadduk Husain, who was to manage the said estate, and render to the two daughters half-yearly accounts of such management.

2. That the said Tassadduk should look after the education of the said Syed Mahomed Reza, and support and maintain him.

3. That the two widows of the said Syed Ashik Ali should be treated with due respect, and properly provided for.

4. That the two daughters were the owners of, and had full authority over, all the property left by the deceased, except that which was in possession of the widows which would be theirs for their lives, and that the two daughters were to see to proper provision being made for the said widows.

The 5th clause of the said award was as follows (Rec. 75, l. 6) :—

5. That since the partition and subdivision of an integral estate belonging to a well-known gentleman, is calculated to lead to its ruin and destruction, the principle of partition should not be considered legal (*i.e.*, eligible) in this estate, so that the constitution of the estate should continue as usual, and there may be no occasion for the mischief-monger to raise troubles.

This award was signed by the arbitrator, the two widows and by both the daughters and their husbands.

The said award was presented to the Sub-Registrar of the district for registration on the said 19th January 1885, and

he sent the said award back to the arbitrator to specify the property dealt with by such award.

The arbitrator accordingly drew up a list of the property, and the award and the list were afterwards registered.

One of the properties which had belonged to the said Syed Ashik Ali, was a share in the village Kukargoti; of this share, it was stated in the said specification of the property (Rec. 76, column 3), that its extent was 8 biswas 5 biswansis, and in the 4th column, under the heading "remarks," was the following note :—

"Out of 8 biswas 5 biswansis of village Kukargoti entered in this list, 5 biswas was given by the ancestor as dower to his elder daughter Mussammat Jafri Begum, in respect of which mutation of names should be effected in favour of the said lady. The remaining 3 biswas 5 biswansis should be entered in the names of both the daughters in equal shares."

On the 26th January 1885, the said document with the said specification of property was registered (Rec. 78, l. 1), and the Appellant Tassadduk took upon himself the management of the said estate under the said award.

On the 18th August 1885 the names of the two daughters were substituted for the name of their father in the Revenue registers and later in pursuance of an order, dated the 28th September 1885, the entry of the name of Jafri Begum alone was sanctioned in respect of 20 biswas. These 20 biswas represented the 5 biswas share of Kukargoti already mentioned. This change in the register appears to have been procured by Tassadduk Husain as manager of the

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property and without the knowledge of the Plaintiff's mother.

Tassadduk Husain's management gave rise to disputes. The right of his wife to the 5 biswas in Kukargoti was denied by her sister and some land in Ludhai which Tassadduk Husain said he had bought with his own money was claimed by his sister-in-law as part of Syed Ashik Ali's estate on the ground that it had been paid for out of income of such estate.

On the 20th March 1890 the present suit was instituted by the Plaintiff's mother Abbasi Begum against Jafri Begum and her husband Tassadduk Husain. The Plaintiff's mother died shortly after the suit was instituted, indeed on the same day, but it was revived in May 1890 by her son Ali Reza, the present Plaintiff and Respondent. For all practical purposes, therefore, the suit may be regarded as an original suit by him and it has been so treated in the Indian Courts. The suit is for partition and for the removal of Tassadduk Husain as manager and for an account of his receipts and payments. The suit is based upon the award of Mahfuz Ali, but the Plaintiff disputes the validity of the 5th clause prohibiting partition so far at any rate as it applies to him; he also disputes the title of Jafri Begum to the 5 biswas share of Kukargoti, and he claims the land in Ludhai as joint property.

The Defendants filed a long written statement of defence. The material defences are:—

- (1) That the suit was in effect to set aside the award and was barred by limitation.

- (2) That by special family custom, the widows of the deceased excluded the daughters from inheritance.

- (3) That the award prohibited partition and the removal of Tassadduk Husain as manager.

- (4) That five biswas in Kukargoti constituted the separate property of Jafri Begum, both by the award and by reason of a gift made to her on her marriage.

- (5) That the share in Ludhai was acquired by Tassadduk Husain from his separate funds.

The District Judge fixed 18 issues raising these, and a number of other questions.

On the 21st April 1892, he delivered judgment, and decided that the Plaintiff was entitled to a half share in the estate, but not to partition, that sufficient cause had not been shown to remove Tassadduk Husain from his position as manager, and decreed Plaintiff one-half of the profits, the amount to be determined at the time of execution of the decree. The Judge said nothing about the five biswas share of Kukargoti nor about the Ludhai property.

From this decree the Plaintiff appealed, and the Judicial Commissioners remanded the case for another trial and the determination of the other issues.

Further evidence was taken and the District Judge found:—

- (1) That the suit was not barred by limitation.
- (2) That the custom relied on by Defendants had not been established.

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(3) That the five biswas in dispute in Kukargoti had been given by Ashik Ali to Jafri Begum as dowry, but that the award in regard thereto was not binding, because the arbitrator was *functus officio* at the time of expressing his opinion.

(4) That Tassadduk Husain had purchased the share in Ludhai from his private funds.

On these findings, the Judicial Commissioners passed final judgment. They confirmed the findings that the suit was not barred by limitation, and that the alleged custom had not been proved. They also agreed with the District Judge that the arbitrator had exceeded his powers in attempting to decide that Jafri Begum was the owner of five biswas in Kukargoti, but came to the conclusion that the gift of this property to Jafri Begum had not been established, and that Ludhai had been purchased from the profits of Ashik Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tassadduk Husain could be removed from the post of manager. In the result the Plaintiff obtained a decree for everything he claimed with costs.

From this judgment the present appeal is brought by Jafri Begum and her husband Tassadduk Husain.

As regards the defence that the suit is barred by limitation of time, their Lordships are of opinion that the suit is based on the award and is not a suit to set it aside. No doubt the Plaintiff contends that the 5th clause prohibiting partition is invalid or at any rate is not binding upon him; and that the arbitrator hav-

ing made his award was then *functus officio* and had no jurisdiction to make the entry which he afterwards did make respecting the 5 biswas share of Kukargoti. But these contentions do not bring the case within Art. 91, Sch. 2 of the Indian Limitation Act, 1877. Under that Act a suit to cancel or set aside an award must be brought within three years from the time when the facts entitling the Plaintiff to have it cancelled or set aside became known to him. It is obvious that this limitation has no application to the controversy respecting the five biswas of Kukargoti. A Plaintiff who contends that an arbitrator has no power to make an unauthorised addition to an award already made and sought to be enforced by him is not in any sense seeking to cancel or set aside the award. Neither does the contention that the 5th clause is *ultra vires* and invalid bring the case within the Act. The Plaintiff disputes the legal effect of that particular clause, but does not seek to cancel or set aside the award. On the contrary he seeks to enforce it so far as it is operative in point of law. As regards the effect of the 5th clause their Lordships agree with the Judicial Commissioners that it affords no defence to the present action. It may have bound the parties who agreed amongst themselves to abide by it. But as against the present Plaintiff the clause has no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan law in the absence of a special custom prevailing in the family. He had no power to make property which was divisible by law, indivisible for ever.

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As regards the alleged family custom by which the widows of Syed Ashik Ali excluded his daughters from the inheritance, it is sufficient to say that the award excludes its application, and that even if it did not, the alleged custom is not proved. Both Courts below have found against the existence of the custom; and the evidence in support of it is far too inconclusive to induce their Lordships to differ from the Courts below on this matter and to depart from their general rule not to disturb a finding of fact concurred in by two Courts who have investigated it.

The claim of Jafri Begum to a 5 biswas share of Kukargoti rests upon an alleged gift to her by her father Syed Ashik Ali on his marriage.

It is for the Defendants to prove that this gift was made and they called several witnesses who say that many years ago Ashik Ali gave her this property as her dowry. But no entry of the gift was made in his lifetime; no change of possession is proved; no separate receipt of rents is proved. Nothing in fact is proved sufficient to turn a loose verbal expression of a gift actual or intended into a completed gift or into a clear and distinct trust in favour of the daughter. Having carefully considered the evidence upon this part of the case their Lordships have come to the conclusion that the alleged gift is not proved. It is hardly necessary to add that the entry made by the arbitrator in the schedule of property after he had made his award is no part of his award and cannot confer any title on the Defendants.

There remains the share of Ludhai, purchased by the Defendant Tassadduk

Husain, in September 1885 for Rs. 4,000. If the Defendant bought this out of his own money, he of course will not be entitled to credit in respect of it on taking the accounts of Ashik Ali's estate. On the other hand if he paid for this share out of money for which he has to account he will get credit for the amount so paid, but then the share of Ludhai will belong to that estate. Until the accounts of Ashik Ali's estate are taken, and the application by the Defendant of the moneys he has received from it has been ascertained, it is difficult, indeed it is impossible, to determine out of what funds the purchase-money of the Ludhai share was paid. At present the case stands thus, there is no direct proof that Tassadduk Husain in fact bought the Ludhai share out of moneys which came to his hands as manager of Ashik Ali's estate. He has given no account of the application of his receipts. He has adduced evidence in order to show that he had in September 1885 means of his own sufficient to pay for the Ludhai share, but there is no satisfactory proof that he had; and no evidence that he did in fact pay for the share out of his own money. The District Judge thought that he had means to pay for it and found the share to be his. The Judicial Commissioners took a different view; they were not satisfied that in September 1885 Tassadduk Husain had means of his own sufficient to enable him to pay Rs. 4,000, and in the absence of any statement by him of the application of the revenues of Ashik Ali's estate, they held the Ludhai share to belong to that estate. Their Lordships consider the evidence insufficient to come to any satisfactory decision on this point.

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one way or the other; and they are of opinion that its decision should be postponed until the accounts are taken.

The result therefore will be that they will humbly advise His Majesty that the decree appealed from, should be varied by inserting a declaration that if on taking the accounts under the decree it shall appear that the whole or any part of the Ludhai share was paid for by the Defendant Tassadduk Husain out of his own separate property, then such share or such part thereof as may be found to have been so paid for is to be treated as his separate property.

Their Lordships are of opinion that in substance the appeal has failed, and that, notwithstanding the modification in the decree as regards the share of Ludhai, the costs of the appeal must be borne by the Appellants.

Solicitors: Messrs. Barrow, Rogers and Neville for the Appellants.

Solicitors: T. L. Wilson & Co. for the Respondent.

*Appeal dismissed:*

*Decree modified.*

C. W. A.

# [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 150 OF 1898.

STANLEY, J. } UPENDRA NATH MITTER  
1901. } v. \*  
18, January. } OBHOY KALI DASSEE.

*Sale by Registrar—Dwelling-house—Conditions of sale—Title, abstract of, misstatement in—Acceptance of title by purchaser—Payment into Court of balance—Subsequent discovery of misstatement—Sale, rescission of—Compensation.*

*A purchaser of a dwelling-house at a Registrar's sale accepted the conditions of*

*sale whereby he was required to furnish requisitions and objections, if any, within a fortnight after delivery of the abstract (and in this respect time was of the essence of the contract) and he was not entitled to call for any other documents except those abstracted or for the originals of documents of which the vendor had only copies and was to accept the title as shown in the abstract of title. By the abstract it was represented to the purchaser that he was purchasing the entire sixteen annas of the house and premises. The purchaser accepted the title as shown in the abstract and paid the balance of the purchase-money into Court without reserving any right to object to the title. He now applied to be discharged from such purchase and for leave to withdraw the purchase-money from Court, on the ground that he had subsequently discovered that only an eight-twelfth share of the house had been sold to him and that he had been misled in the purchase by misrepresentation contained in the conditions of sale and the abstract of title:*

*Held—That, although there was no fraud on the part of the vendor, he knew or had the means of knowing, that the sixteen-annas share of the property could not be sold, and if the purchaser's allegations are true, the Court would not enforce the contract.*

LACHLAN v. REYNOLDS (1), M'CULLOCH v. GREGORY (2), THOMAS v. POWELL (3), ELSE v. ELSE (4) and *In re BANISTER, BROAD v. MUNTON* (5) referred to.

*That in the case of a purchase of a*

(1) Kay's Rep. 52 (1858).

(2) 1 Kay & Johnson 286 (1855).

(3) 2 Cox. 394 (1794).

(4) L. R. 18 Eq. 196 (1872).

} Ch. Div. 181 (1879).

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*dwelling-house, it is impossible to compensate a person in respect of such a material misstatement, and the Court must either enforce the contract or rescind the sale. It is different in the case of land occupied for agricultural or such like purposes where there is a deficiency in area.*

*Ordered—That it be referred to the Registrar to enquire and report whether a title can be made to the property by the vendor. Further hearing adjourned until the return of the report.*

This was an application by one Mohendra Nath Dutt, the purchaser of premises Nos. 38 and 38/1, Cathedral Mission Lane, sold by the Registrar under an order of this Court in the above suit, to be discharged from such purchase. The facts are shortly these:—One Digamber Dey died intestate in November 1894 leaving a widow and seven sons and, it was alleged, possessed of the house and premises in question. Administration to his estate was granted to his widow, the Defendant abovenamed, and she applied to this Court for liberty to raise a sum of Rs. 5,000 on a mortgage of the property of Digamber Dey in order to satisfy the outstanding liabilities of the estate. Permission was given to her to mortgage the property of the deceased, and she executed a mortgage of the above premises in favour of the Plaintiff. The present suit was instituted on the said mortgage, and on the 4th August 1898 the ordinary preliminary mortgage decree was made. The property was subsequently put up for sale under an order of this Court and was purchased by the applicant on the 11th August 1900 for Rs. 9,500.

The conditions of sale provided, *inter alia*, that the purchaser should furnish

requisitions and objections, if any, within a fortnight after delivery of the abstract of title and upon the expiration of a fortnight (and in this respect time was to be deemed of the essence of the contract) the title was to be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions, if any. Condition 14 provided as follows:—"There are no documents of title in the possession of the Plaintiff except the abstracted documents. The purchaser will not be entitled to call for any other documents or the original of documents of which the Plaintiff has only copies—he will assume that the recitals and statements contained in the abstracted documents are true and will accept the title as shown in the abstract of title."

On the 16th of August the abstract of title was furnished to the purchaser. The abstract started with the following recital:—"Digamber Dey was the owner of the premises No. 38, Panchanuntollah Lane (which lane has since been changed into Cathedral Mission Lane) in the town of Calcutta." Later on it stated "Digamber Dey died intestate on the 17th of November 1894, and his widow, the Defendant, Obhoy Kali Dassee, obtained letters of administration to the property and credits of her said deceased husband Digamber Dey, comprising, amongst others, the said premises No. 38, Panchanuntollah Lane, since changed into No. 38, Cathedral Mission Lane." On the 28th August the attorney for the purchaser inspected the documents of title; no objection or requisition whatsoever was made by the purchaser. On the 10th September he made an application



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to the Court for liberty to lodge the balance of the purchase-money. Permission was granted and he lodged the same without reserving his right to object to the title.

The purchaser now alleged that he had been misled by the representations contained in the conditions of sale and the abstract of title furnished to him into believing that Digamber Dutt was entitled to the whole sixteen annas share in the property sold to him, whereas he had since discovered that Digamber's interest in the said house was only eight-twelfths. According to the case made out by the applicant by his affidavit it appeared that on the 5th November he caused his attorney to write and send a letter to the tenant of the said premises demanding payment of the rent, and shortly thereafter he communicated with the adult sons of the said Digamber and his widow and asked them to attorn to him as tenants which at first they agreed to do; later on he was informed by them for the first time that he was not entitled to the whole of the house, but that there were other owners thereof than Digamber whose interest alone was sold at the Registrar's sale. The applicant thereupon made searches and inquiries and discovered that Digamber was only entitled at the time of his death to four-sixths of the house, that subsequent to the date of his death and on the 7th March 1895 the seven sons of Digamber had purchased the share of the only son of Gunga Narain Dey, a brother of Digamber, that on the 18th of March 1895 they had again purchased the shares in the property of two of the sons of Mathur Mohan Dey, another brother of

Digamber. That is to say, he found that three-twelfths of the house belonged to the sons of Digamber in their own right and one-twelfth to the two other sons of Mathur Mohan who did not sell their interest. He therefore applied that the sale be rescinded and liberty given to him to withdraw the purchase-money which was still in Court to the credit of this suit.

*Mr. Pugh* (Mr. Biswas with him) for the Applicant.—We are not too late in making this objection. So long as the purchase-money remains in Court, the Court will in a proper case rescind the contract and not force upon the purchaser such a title as has been shewn in this case. We were clearly misled in the purchase by the statement in the abstract of title that Digamber was the owner of the house. See *In re Banister, Broad v. Munton* (5). That was a stronger case than the present, and yet the Court rescinded the contract.

*Mr. J. G. Woodroffe* for the vendor-Plaintiff.—The purchaser is not entitled to re-open the matter now. He inspected the documents of title, but he raised no objections and made no requisitions for any other documents. The facts which he alleges he has discovered, he could have discovered then if he had made the ordinary searches. The sale has already been confirmed by the Court, and it is too late for him now to put forward objections and requisitions. Upon confirmation of the sale and the payment of the purchase-money, a purchaser must be deemed to have accepted the title. At all events, a reference should be made to the Registrar to inquire and

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report whether a title can be made to the property.

*Mr. Pugh* replied.

*Mr. Aveloom* for the Defendant.

The JUDGMENT OF THE COURT was as follows :—

STANLEY, J.—The application in this case is made by one Mohendra Nath Dutt to be discharged from the purchase of premises Nos. 38 and 38/1, Cathedral Mission Lane, in the town of Calcutta, which was sold under an order of this Court in suit No. 158 of 1898. The grounds of his application are that he was misled in the purchase by misrepresentation or misrepresentations contained in the conditions of sale and the abstract of title furnished to him by the vendor. The suit was instituted on the 19th of February 1898 by Upendra Nath Mitter against Sreemutty Obhoy Kali Dassee as administratrix of the estate of Digamber Dey for recovery of monies due to him and secured by a mortgage of the 9th April 1897. The circumstances under which the mortgage was granted are as follows :—

Digamber Dey died intestate on the 17th of November 1894 leaving a widow and seven sons and possessed of the house and premises in question or of shares in this house. Administration was granted to the widow and she applied to the Court under sec. 90 of Act V of 1881 as amended by Act VI of 1889 for liberty to raise a sum of Rs. 5,000 on a mortgage of the property of the deceased Digamber Dey in order to satisfy outstanding liabilities of the estate. Permission was given to her so to mortgage the property of the deceased

Upendra Nath Mitter agreed to make the requisite advance, and a mortgage of this house abovementioned in his favour was executed. The mortgage debt having been called in and not having been paid, Upendra Nath Mitter instituted a suit for recovery of the amount due to him, and on the 4th of August 1898 the ordinary preliminary mortgage decree was made. The debt was not paid within the time limited by the decree and in consequence the property was put up for sale and was sold to Mohendra Nath Dutt on the 17th August 1900 for a sum of Rs. 9,500. On the 16th of August the abstract of title was furnished to the purchaser, and on the 28th of August the attorney for the purchaser had an opportunity of inspecting and he inspected the documents of title. No objection or requisition whatever was made by the purchaser, and on the 10th September he made an application to the Court for liberty to lodge the balance of the purchase-money and the same was lodged unconditionally, that is, without reserving his right to object to the title. Now the conditions of sale were somewhat stringent. It is necessary for me to refer to two, viz.: Conditions 6 and 14. By condition No. 6 it was provided that the purchaser should furnish requisitions and objections, if any, within a fortnight after delivery of the abstract and upon the expiration of a fortnight (and in this respect, time was to be deemed of the essence of the contract), the title was to be considered as approved of and accepted by the purchaser subject only to such objection and requisitions, if any. Condition 14 provides as follows :

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"There are no documents of title in the possession of the Plaintiff except the abstracted documents. The purchaser will not be entitled to call for any other documents or the original of documents of which the Plaintiff has only copies; he will assume that the recitals and statements contained in the abstracted documents are true and will accept the title as shewn in the abstract of title."

No condition could be much more stringent than the 14th. Now the case which the purchaser makes is set out in an affidavit which has been filed by him on the 13th December 1900, and his case appears from a perusal of a few of the paragraphs in that affidavit. He says after referring to his purchase that on the 5th November 1900 he caused his attorney to write and send to Suresh Chunder Biswas, the only tenant of the said premises, a letter demanding payment of the rent, and shortly thereafter he communicated with the adult sons of the said Digamber Dey and his widow and asked them to attorn as tenants to him which at first they agreed to do, but later on he was told by them for the first time that he was not entitled to the whole of the house, and that there were other owners thereof than Digamber Dey whose interest alone was sold at the Registrar's sale. He then says he made searches and enquiries, and he discovered that Digamber Dey was only entitled at the time of his death to four-sixths of the house and premises; then he refers to two purchases made by the seven sons of Digamber Dey subsequent to the date of his death, one purchase being on the 7th of March 1895 of the share of the

only son of Gunga Narain Dey, one of the brothers of Digamber Dey, of the share which Gunga Narain had in the property, and the other was a purchase made on the 18th of March 1895 of the shares in the property of two of the four sons of Mathur Mohan Dey, another brother of Digamber Dey. He alleges that three-twelfths of the property belong to the sons of Digamber Dey in their own right, and one-twelfth belongs to the two sons of Mathur Mohan Dey who did not sell their interest in the transaction of the 18th of March 1895. If this be correct, then it is clear that the administratrix of Digamber was only entitled to eight-twelfths of the property whereas, according to the abstract of title, it was represented to the purchaser that he was purchasing the entire sixteen annas share of the house and premises. If there was a misrepresentation such as is alleged, it appears to me to be clear that the matter is not one for compensation, but that the Court must either enforce the contract or rescind the sale. It would be impossible to compensate a purchaser in respect of such a material misstatement in the case of a purchase of a dwelling-house. In the case of land occupied for agricultural or such like purposes a deficiency in area, if it were not a deficiency of very great extent, would not entitle the purchaser to rescind his contract but would be a proper subject of compensation but to say that a purchaser, who believed that he was the purchaser of an entire dwelling-house and then discovers that what he is purchasing is not the entire but only an undivided share of such house, is to accept the undivided portion with

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compensation in respect of the remaining shares under his contract, is a very different matter and appears to me to be wholly unreasonable and contrary to fairness and justice. Whether the allegations contained in the affidavit of the purchaser are well founded or not, it seems to me it would not be proper for me without further investigation to determine. The evidence which he has furnished, undoubtedly, leads me to suspect that at all events two of the sons of Mathur Mohan Dey have some interest in the property. I should not, however, be justified in making any absolute order upon this application without giving the vendor an opportunity of having the entire title thoroughly sifted.

Mr. Woodroffe on behalf of the vendor however has argued and argued with great force that the purchaser is not entitled, having regard to his conduct and to the fact that the sale has already been confirmed by the Court to re-open the matter, and that it is too late for him after confirmation of the sale to put forward objections and requisitions. The administratrix has given the Court no assistance although presumably she must be aware of the purchases alleged to have been made by his sons in 1885. She has not given any explanation as to these purchases. She led the mortgagor undoubtedly to believe that Digamber was entitled to the entire dwelling-house in question and she induced him to advance his monies on the faith of her representation that such was the fact. Whether the purchases were made by her sons out of the assets of their father I am unable to say. It very possibly is the case that the purchase was so made.

Even, however, if it were shown that their interest in equity belonged to the estate of Digamber, there still would remain the difficulty to be dealt with as regards the interest which is stated to be enjoyed by the two sons of Mathur Mohan Dey.

Mr. Pugh on behalf of the purchaser contends that the purchaser is not too late in making this objection. He says that so long as the purchase-money remains in Court, the Court will in a proper case rescind the contract and not force upon the purchaser such a title as is the title which has been shewn in the present case.

Now let us see what are the misleading statements alleged by the purchaser. By order of this Court the administratrix was empowered to sell the interest of Digamber in his immoveable property. The abstract of title starts with the following recital:—

“Digamber Dey was the owner of the premises No. 38, Panchanuntollah Lane, (which lane has since been changed into Cathedral Mission Lane) in the town of Calcutta.” This is a positive statement that Digamber was the owner of the premises No. 38. Was there anything to justify this statement? Further on in the abstract, before the recital of this grant of letters of administration to the widow of Digamber, is the following statement:—“Digamber Dey died intestate on the 17th of November 1894, and his widow, the Defendant Obhoy Kali Dassee, obtained letters of administration of the property and credits of her said deceased husband Digamber Dey, comprising amongst others the said premises No. 38, Panchanuntollah

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*Lane*, since changed into No. 38, Cathedral Mission Lane." There again is a positive statement that the property which has been put up for sale were the premises, (I take it the entire sixteen annas share) No. 38, Cathedral Mission Lane. Such a statement was undoubtedly in my opinion calculated to mislead a purchaser. I don't say that it was inserted in the abstract fraudulently or intentionally. On the contrary the statement was inserted, I believe, perfectly *bonâ fide* and in the belief induced by the conduct of the administratrix that Digamber at the time of his death was possessed of the entire sixteen annas share in the premises. If it was necessary for the purchaser to establish any case of fraudulent misconduct or wilful misleading on the part of the vendor in the preparation of the abstract, I should be unable to say that he had succeeded in doing so. Is then the objection which is now raised open to the purchaser, having regard to the fact that he has accepted the title so far as acceptance can be inferred from raising no objection or requisition and from paying the balance of the purchase-money into Court without reserving any right to object to the title, and having regard to the rule of Court which declares that upon confirmation of sale and payment of the purchase-money a purchaser is to be deemed to have accepted the title? I think so.

In the case of *Lachlan v. Reynolds* (1) there was a sale by the direction of the Court; the particulars of sale stated, that Lot 12 comprised a house "at present in the occupation of a Mrs. Clark at a rental of per annum £42."

The purchaser of this lot paid the deposit, and his purchase was confirmed by order absolute, and he then obtained an order for payment of the remainder of the purchase-money into Court. The purchaser afterwards discovered that Mrs. Clarke was not tenant to the vendors, but to some person who claimed by an adverse title. It was held by the Court that this representation "amounted to such bad faith on the vendor's part, as would induce the Court to discharge the purchaser from his contract."

It is to be observed in this case that the Court found bad faith on the part of the vendor. I only cite the case for the purpose of establishing the proposition that the Court will set aside the sale even after the sale has been confirmed by an order absolute. In the case of *M'Culloch v. Gregory* (2), a purchaser under a decree having accepted the title and paid the purchase-money into Court discovered that a Will had been misstated in the abstract, in such a manner as to conceal an important defect in the title. Upon petition before conveyance, the purchaser was discharged from his purchase, and his purchase-money was ordered to be repaid but without interest inasmuch as his solicitor had omitted to examine the original Will though reminded to do so by the counsel who advised upon the abstract. For the same reason the purchaser was ordered to pay the costs of all parties except of the person who had the conduct of the sale. It was further held that a purchaser is not conclusively bound by the acceptance of the title by his counsel; but if he pays his purchase-money into Court, he is bound. This

(1) Kay's Re p. 52 (1853).

(2) Kay & Johnson 286 (1855).

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rule, however, does not apply to a case where the counsel is misled by the abstract of title.

Vice-Chancellor Sir W. Page Wood says at p. 291 :—"The purchaser here received an abstract which he supposed to be correct. It often happens with regard to copies of instruments of this description, that the purchaser rests satisfied, although the conveyancer invariably suggests, as he did in this case, that the probate or an official extract of the Will should be examined. If the conveyance had been executed, the purchaser must have taken all the conveyances, and, as it is said in *Thomas v. Powell* (3), he must have rested on the covenants, and having neglected the opportunity of examining the original documents, he could not now rescind the purchase."

These are cases in which there was misleading by the abstract. In *Else v. Else* (4), where a sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as root of title, and which made recitals in deeds more than twenty years old conclusive, a recital, covered by this condition, was so framed as to conceal a defect of title prior to the date fixed for commencement of title. The purchaser inquired into the prior title, and refused to complete on the ground that the prior title was bad; and the Court, being of opinion that such objection was well founded, held that the sale being by the Court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase.

Lord Romilly at p. 200 says :—"I am of opinion that these conditions of sale are not such as a Court of Equity can enforce on a purchaser. They amount to a condition, in fact, to the effect that if you find you have not got the property, and cannot keep it, you shall not object. Practically this is a condition saying that although you imagine you have been sold the fee, still, though you find that you have only bought an estate for the life of a man advanced in years, you must keep the property and pay the price because you have been foolish enough to buy subject to such conditions of sale. The argument is, that you have shut your eyes, and have got the property at a reduced price (which is probably true); and you therefore have run the risk of being ultimately ejected against the reduction of price. I do not mean to express any opinion as to how the Court would look at this question if it arose between two strangers.

"A buyer, no doubt, knows that unusual conditions of sale are framed to meet peculiar difficulties; and these are quite fair, even where framed by the Court, if they will still, in the opinion of the Court, leave the purchaser in the complete possession of the thing he has bought, even though he does not get what is called a marketable title; but if not, the Court has no right to enter into such contests, and try to fence with and outwit purchasers, and sell on the chance of the purchaser being able to resist a suit for the recovery of the possession of the lands on a defect not disclosed to him. I am of opinion that such a condition would be bad as a fraudulent misleading condition in any sale,

(3) 2 Cox. 394 (1794).

(4) L. R. 13 Eq. 196 (1872).

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for it professes, or induces the buyer to believe, that the recital accurately represents the Will, which it does not. But in a sale under the authority of the Court of Chancery, which, above all things, ought to teach others, and set them the example of straightforward dealing, and telling the truth, and the whole truth, such a condition under the circumstances of this case, is, in my opinion, binding on no one. No good title being shewn, and the purchaser not being bound by the conditions of sale to accept a bad one, he must be discharged from his purchase, and have his costs of the whole proceedings."

Mr. Pugh relied very strongly on the case of *In re Banister, Broad v. Munton* (5). In that case there was a provision in the conditions of sale, that the purchaser should be satisfied with the title which had been acquired by one Esther Banister, the predecessor in title of the vendor. "The condition further stated that it was not accurately known, and could not be satisfactorily explained, how she, Esther Banister, acquired the property, and it was expressly stipulated that no other title than as above should be required or inquired into."

It turned out on inquiry that Esther Banister was a mortgagee in possession and had no title against the mortgagor except under the statute of limitations by adverse possession and these facts were known to this vendor. The learned Judges in the Court of Appeal in holding that the condition was misleading, and that the purchaser was entitled notwithstanding the condition to have a good holding title or else to rescind his

contract, carefully abstained from finding that there was any fraudulent conduct on the part of the vendor in the matter of the conditions. Lord Justice Brett refers to the doctrine upon which I am prepared to base my decision in this case and which appears to be sound and consistent with the practice of the Court of Equity. At page 147 he observes as follows:—

"But then there comes in the doctrine that if there be a misrepresentation of facts, however innocently made, the Court of Equity will not enforce the performance of the contract. Now here you have facts which were known to the trustee before the condition was drawn up, which when shown to the Court oblige the Court to say that it would be wrong to ask the purchaser to assume that which is the purport of the assumption he is required to make. And there are facts which were known to the trustee which when shown to the Court oblige the Court to say that it might have been accurately known and satisfactorily explained how Esther Banister acquired the property."

Under the circumstances he held that the title could not be forced on the purchaser. In the present case, the vendor knew or at all events had before him the means of knowing that it was only the interest of Digamber Dey in this property which was comprised in his mortgage, and therefore it appears to me that if the allegations of the purchaser are true and as a matter of fact a third of the beneficial interest in the house and premises is not vested in the vendor, the conditions of sale were misleading, and this Court ought not to enforce this contract,

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Mr. Woodroffe has asked me, in case I should be against him upon the question as to the right of the purchaser to have a rescission of the contract, under any circumstances I should first refer it to the Registrar to enquire and report whether a title can be made to the property, and, as I have already intimated, this is a proper course in my opinion. I shall therefore refer it to the Registrar to ascertain and enquire whether title can be made by the vendor and I shall adjourn the further hearing of this application until the return of the report. It appears to me that in any event the purchaser who has been very negligent in carrying out this sale and who purchased with his eyes open under stringent conditions of sale and now seeks to be relieved of his purchase, must bear the costs of this application, but for the present, I prefer to reserve the question of costs. I may observe as regards the administratrix that she appears not to be entitled to any consideration in the matter of costs; however I shall also reserve the question of costs in her case, as also the vendor's costs. The case is one of no little difficulty. Whatever be the result of the enquiry I have directed, it is perfectly clear in the matter of this small mortgage transaction that the parties have subjected themselves to a very heavy burden in the matter of costs.

*Babu S. S. Banerjee*, Attorney for the Plaintiff.

*Messrs. Kally Nath Mitter & Sarbadhi-cary*, Attorneys for the Defendant.

*Mr. J. N. Dutt*, Attorney for the Purchaser.

### PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD HOBHOUSE.	JAGDISH BAHADUR,
LORD DAVEY.	Plaintiff, Appellant,
LORD LINDLEY.	v.
SIR R. COUCH.	SHEO PERTAB SINGH,
1901.	Defendant,
23, March.	Respondent.

*Oudh Tulukdari Estate—Succession—Elder son born of younger wife—Younger son born of first wife—Oudh Estates Act (I of 1869), sec. 22, cl. 11—Nature of estate—Conflict between ambiguous and unambiguous texts of Hindu law—Interpretation, rule of—Communis error facit jus—Oudh Estates Act (I of 1869), list 2, secs. 8 and 22, Manu, Chap. XI, verses 122 to 125.*

*An estate taken under cl. 11 of sec. 22 of Act I of 1869 descends as an impartible estate under the provisions of Act I of 1869, list 2, secs. 8 and 22.*

DEWAN RAN BIJAI BAHADUR SINGH v. RAE JAGATPAL SINGH (2) followed.

*The eldest son, though born of a younger wife, is entitled to succeed in preference to the younger son though born of the first wife. The principles, upon which the first-born son has been held to be entitled to succeed, apply equally to a son of a first-married wife and sons of other wives.*

RĀMALAKSHMI AMMAL v. SIVANANTHA PERUMAL SETHURAYAR (3) and PEDDA RAMAPPA NAYANIVARU v. BANGARI SESH-AMMA NAYANIVARU (4) referred to and followed.

*In construing texts of Hindu law where certain verses are inconsistent, and one is reasonably free from ambiguity*

(2) L. R. 17 I. A. 178 (1899).

(3) 14 Moo. I. A. 570 (1872).

(4) L. R. 8 I. A. 1 (1880).



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and the meaning of the others at the best ambiguous and doubtful, the plain language of the one ought not to be over-ridden or controlled by the obscure utterances of the others.

Where it was alleged that the interpolation of the words "but of a lower class" in *Manu*, Chap. IX, verse 122, was by mistake attributed by Sir William Jones to Kalluka Bhatta whereas it was interpolated by a later and inferior commentator and the interpolation had been accepted by the Indian Courts:

Held—That the maxim communis error facit jus is a sound maxim.

*Manu*, Chap. IX, verses 122 to 125 discussed.

The suit related to the succession of the taluk of Pawansi which after the annexation of Oudh was by a *sanad* granted to a lady, named Kablas Kunwar, widow of Mahpal Singh. Her name was entered in the first and second lists under sec. 8 of the Oudh Estates Act. In *Brij Indar Bahadur Singh v. Ranee Janki Koer* (1) their Lordships of the Privy Council had held that the *sanad* conferred a full proprietary and transferable right in the estate upon Kablas and her heirs male according to the rule of primogeniture, and that the succession to her descendants must be governed by the provisions of sec. 22 of Act I of 1869, and that accordingly the estate descended to Janki Kunwar, the daughter and only child of Kablas Kunwar.

Janki Kunwar died childless on the 16th December 1888. There was no dispute that the succession must be to the heirs of her father and both or one or other of the sons of Raghunath if

(1) L. R. 5 I. A. 1 (1877).

living would be entitled to succeed to the taluk on her death.

The parties were related to Raghunath in the following manner:—

RAGHUNATH.

Bishnath Kunwar, 1st wife.	Raj Kunwar, Junior wife.
Sitla Baksh.	Shankar Baksh.
Jagdish Bahadur, great-grandson and heir, (Plaintiff).	Sheo Pertab, (Defendant).

Shankar Baksh was born before his half-brother Sitla Baksh. The suit was originally instituted by Sitla Baksh on the death of Janki Koer, and the present Appellant was substituted in his place on his death.

*Mr. Branson* for the Appellant.

*Mr. Mayne* and *Mr. Cowell* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DAVEY.—The present Appellant is the great-grandson and heir of Sitla Baksh, the original Plaintiff, and was substituted for the latter on his death after the commencement of the suit. The Respondent is the son and heir of Shankar Baksh. Sitla Baksh was the son of Raghunath by his first wife Bish Nath Kunwar. Shankar Baksh was also the son of Raghunath but by his junior wife Raj Kunwar. Shankar Baksh was born before his half-brother Sitla Baksh and was therefore the elder-born son of Raghunath.

The suit relates to the succession of the taluk of Pawansi which after the annexation of Oudh was by *sanad* granted to a lady, named Kablas Kunwar, the widow of Mahpal Singh. Her name was

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entered in the first and second lists mentioned in sec. 8 of the Oudh Estates Act, 1869. In the case of *Brij Indar Bahadur Singh v. Rane Janki Koer* (1) the succession of the taluk on the death of Kablas Kunwar was determined by this Board. Their Lordships there held that the *sanad* conferred and was intended to confer a full proprietary and transferable right in the estate upon Kablas and her heirs male according to the law of primogeniture and as regards the succession they considered that the rights of the parties claiming by descent must be governed by the provisions of sec. 22 of Act I of 1869. This Board, therefore, held that under cl. 11 of sec. 22 the estate descended to Janki Kunwar, the daughter and only child of Kablas Kunwar, as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject.

Janki Kunwar died childless on the 16th December 1888. It is not disputed that the succession must be to the heirs of her father and both or one or other of the sons of Raghunath if living would be entitled to succeed to the taluk on her death.

The Plaintiff by his plaint claimed to be entitled to the entire taluk together with all other moveable and immoveable property of Janki on the ground that being born of the first wife he was entitled to inherit the entire taluk and other property according to the custom obtaining among his clan and by law. Alternatively he contended that the taluk was or had become partible and claimed to be entitled to a

9 annas share as son of the first wife of Raghunath or at any rate to an 8 annas share.

The latter claim was maintained on the ground that Janki having succeeded under the provisions of clause 11 of sec. 22 the estate was no longer subject to the provisions of the Act of 1869 but descended from her as an estate under the ordinary Hindu law and not as an impartible estate and was therefore partible between the two brothers. By his defence the Defendant contended that the estate was impartible by custom. A vast amount of evidence was taken upon this question but in the opinion of their Lordships unnecessarily. The point is concluded by authority. In the case of *Dewan Ran Bijai Bahadur Singh v. Rae Jagatpal Singh* (2) their Lordships said:—"A question might arise upon the construction of clause 11 of sec. 22 whether the estate descended as an impartible estate. Their Lordships are of opinion looking to the provisions of Act I of 1869, list 2, sec. 8 and sec. 22, that it was the intention of the Legislature that the estate should descend as an impartible estate."

The only question which remains as regards the succession therefore is whether the original Plaintiff as son of the first wife of his father was either by custom or by the common law entitled to succeed in preference to his elder brother born of a junior wife. Evidence was taken by the District Judge on the claim by custom, and that learned Judge, after an exhaustive review of the evidence, came to the conclusion that the alleged custom was not proved, and that

(1) L. R. 5 I. A. 1 (1877).

(2) L. R. 17 I. A. 173 (1890).

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decision was affirmed in the Court of the Judicial Commissioner. There being thus two concurrent judgments on a question of fact, their Lordships are relieved from examining the evidence and were not asked by counsel to do so.

The question involved in the claim of the Plaintiff by law apart from custom has been considered by this Board in two cases. In *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (3) this Board decided that the son of a junior wife was entitled to succeed to an impartible zemindary in preference to the later-born son of a senior wife. It is true that in that case the mother of the younger son, although married before the mother of the elder son, was not the first wife and therefore it is said not to be a direct authority. In *Pedda Ramappa Nayanivaru v. Bangari Seshamma Nayanivaru* (4) a first-born son, though by the fourth wife, was held to be entitled to succeed in preference to a younger son born of the third and senior wife whose marriage was subsequent to the deaths of the first two wives. The grounds of the judgment are shown very clearly in the passages which are quoted at length by the Judicial Commissioner (Rec. p. 456) and their Lordships will not repeat them. It was laid down that the principles upon which the Board held in the former case that the first-born was entitled to succeed apply equally to a son of a first-married wife and sons of other wives and that being so it lay upon the Defendant to show some positive rule of Hindu law supported either

by ancient text or modern decision to the contrary effect which had not been done.

The grounds upon which the learned counsel for the Appellant endeavoured to escape from the authority of these cases were these. The verses of the laws of Manu which were referred to by their Lordships are those numbered 122 to 125 in Ch. 9. In Sir William Jones' translation the 122nd and 125th verses are as follows:—"122. A younger son being born of a first-married wife after an elder son had been born of a wife last married *but of a lower class* it may be a doubt in that case how the division shall be made. 125. As between sons born of *wives* equal in their class and without any other distinction there can be no seniority in right of the mother but the seniority ordained by law is according to the birth." The words printed in italics were accepted by Sir William Jones as being and, until recently, were generally believed to be, the interpolation of an ancient commentator of great eminence named Kalluka Bhatta. It is said to have been discovered by the research of scholars that the interpolation was not made by Kalluka Bhatta but by a later and inferior commentator named Prakash, and that statement seems to have been accepted in the Court of the Judicial Commissioner. It is thereupon argued that verse 122 (with the omission of the interpolated words) and the two following verses are inconsistent with verse 125 which thus loses any binding authority.

Their Lordships assume for the purposes of their judgment that Sir William Jones was mistaken in attributing the

(3) 14 Moo. I. A. 170 (1872).

(4) L. R. 8 I. A. 1 (1880).

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words interpolated in verse 122 to Kal-luka Bhatta. But they observe that Sir William Jones' version was probably founded on the tradition of the time at which he wrote and has been accepted in the Indian Courts without question. *Communis error facit jus* is a sound maxim. Their Lordships, however, do not rely upon this consideration alone. The Judicial Commissioner has learnedly discussed the various translations which have been proposed by scholars and the interpretations given by them to the four verses in question and their relation to each other, and he refers to the opinion expressed by Dr. Jolly in his Tagore Lectures, 1883. The Judicial Commissioner concludes:—"As the correct translation of verse 123 is doubtful, and as Manu's own answer to the question propounded by him in verse 122 cannot be clearly ascertained, it appears to me that the Appellant has failed to establish satisfactorily his contention by the texts quoted by him."

Their Lordships think this is firm ground for decision. The language of verse 125 is reasonably free from ambiguity while the meaning of the previous verses is at the best ambiguous and doubtful. The plain language of the one ought not to be overridden or controlled by the obscure utterances in the other. They, therefore, think that no sufficient reason is shewn why they should not follow the two previous decisions of this Board and that they ought to do so. They, therefore, hold that according to Hindu law the Respondent who represents the eldest son of his father is entitled to succeed in preference to the Appellant who represents the

younger son though born of the first wife. Their Lordships will only add that this decision appears to them as it did to their predecessors to be in accordance with the religious tenets of Hindus. It is by the birth of his first-born son that a Hindu discharges the duty which he owes to his ancestors and obtains spiritual benefits for himself and therefore it is to that son that pre-eminence should be given.

A subsidiary point was raised by the Appellant's counsel, *viz.*, whether any difference is to be made in the succession to the moveable property of Janki. No such point was raised by the plaint in which the moveable and other immoveable property is treated in the same category with the taluk itself, and the same considerations are treated as applicable to the whole property as one corpus. The fifth issue is whether the Plaintiff is by law or custom entitled to the whole of the taluka with other property pertaining to it. And no issue is directed to any distinction between different portions of the property claimed. The District Judge held that the question did not arise and if it did, there was no evidence to show that such property was subject to a different rule of devolution. He also referred to the case of *Thakur Ishri Singh v. Baldeo Singh* (5) before this Board.

The Judicial Commissioner took the same view and their Lordships entirely agree.

They will therefore humbly advise His Majesty that the appeal be dismissed and the Appellant must pay the costs of it.

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Solicitors : *Messrs. Barrow, Rogers & Neville* for the Appellant.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondent.

C. W. A. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 291 of 1899.

BANERJEE, J.

BRETT, J.

1901.

15, January.

UMESH CHANDRA  
PRAMANICK and others,  
Plaintiffs, Appellants,

v.

MATHUR MOHAN  
HAIDAR & ors., Defend-  
ants, Respondents.

*Succession Certificate Act (VII of 1889),  
sec. 4—Usufructuary mortgage—Right to sue  
accruing after the death of the mortgagor.*

*A executed a usufructuary mortgage in  
favour of B, under which B was not  
entitled to sue for the mortgage money so  
long as the property continued in his  
possession. After B's death, the heirs of  
B were deprived of a portion of the  
security at the instance of a third party  
who successfully claimed a paramount title  
to that portion of the property. The  
heirs of B sued to recover the mortgage  
debt from the mortgagor personally :*

*Held—That sec. 4 of the Succession  
Certificate Act had no application to the  
case and the suit was maintainable with-  
out a certificate as the heirs of B were not  
suing to recover a debt due to the de-  
ceased mortgagor.*

This was an appeal preferred on the  
6th of February 1899, against the decree  
of C. P. Caspersz, Esq., District Judge  
of 24 Pargunnahs, dated the 2nd of Sep-  
tember 1898, reversing a decree of Babu

Bulloram Mullick, Subordinate Judge,  
1st Court, Alipore, dated the 11th of  
November 1897.

The facts of the case appear from the  
judgment.

*Dr. Asutosh Mukerjee, Babu Jnanendra  
Nath Bose and Babu Biraj Mohun Majum-  
dar* for the Appellants.

*Babu Saroda Churn Mitter and Babu  
Dasrathi Sanyal* for the Respondents.

The JUDGMENT OF THE COURT was as  
follows :

This appeal arises out of a suit brought  
by the Plaintiffs-Appellants to recover  
money due under a mortgage deed exe-  
cuted by the Defendants in favour of  
the predecessor in title of the Plaintiffs,  
and for certain other sums of money  
claimed as damages, on the allegation  
that the mortgage security has been  
impaired by reason of a decree obtained  
by one Bhagoban Chandra Naskar against  
the Plaintiffs, and that the Plaintiffs had  
to incur expense in the litigation with  
Bhagoban Chandra Naskar.

The defence, so far as it is necessary  
to refer to it for the purposes of this  
appeal, was a denial of liability, on the  
ground of no money having been borrow-  
ed on the mortgage deed, and also on  
the ground that the Plaintiffs' prayer  
for foreclosure and sale was illegal, and  
on the further ground that the mort-  
gage security was not impaired by any  
wrongful act on the part of the Defend-  
ants.

The first Court held that the Plain-  
tiffs were not entitled to any decree for  
sale of the mortgaged property, but that  
they were entitled to a decree making  
the Defendants personally liable for the

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amount claimed by reason of the mortgage security having been impaired through the wrongful conduct of the Defendants.

Against that decree the Defendants preferred an appeal; and they were allowed by the Appellate Court to take the objection, not raised by them either in the first Court or in their memorandum of appeal, that the Plaintiffs were not entitled to any decree by reason of their not having taken out a certificate under the Succession Certificate Act, VII of 1889; and the lower Appellate Court has given effect to that objection and dismissed the suit under sec. 4 of the Succession Certificate Act.

From that decision of the lower Appellate Court the Plaintiffs have preferred this appeal; and it is contended on their behalf that the Court of Appeal below was wrong in holding that sec. 4 of the Succession Certificate Act was a bar to the maintenance of this suit, and that the Court of Appeal below was further wrong in allowing the objection under that section to be raised in the appellate stage of the case, without giving the Plaintiffs an opportunity of producing a certificate under the Succession Certificate Act.

If the first branch of the Appellants' contention is right, it will be unnecessary to go into the second. We are of opinion that the first branch of the Appellants' contention is correct. The mortgage in this case was a usufructuary mortgage, and one of the objections successfully urged by the Defendants in the first Court was that the Plaintiffs were precluded by the terms of the mortgage deed from suing for the money, the

ground upon which the Plaintiffs were held by that Court to be entitled to a decree was that by reason of events that subsequently happened their mortgage security was impaired, and they acquired the right to obtain a personal decree against the mortgagors. If that was so, can it be said that the money for which this suit has been brought was a debt due to the estate of the deceased mortgagor within the meaning of sec. 4, sub-sec. 1, cl. (a) of the Succession Certificate Act? We are of opinion that the question must be answered in the negative. The case before us is not like a case in which the money was due to the deceased person upon the expiry of a certain time when it fell due. The case before us is one in which, if the security had remained unimpaired, the right to demand payment of the money would never have accrued to the mortgagee or his legal representatives, and the right to obtain a personal decree against the mortgagors arose only upon the happening of a contingency which might never have happened, namely, the obtaining of a decree by Bhagoban Chunder Naskar which deprived the mortgagee's heirs, the Plaintiffs, of a part of the mortgaged property. That decree was obtained not against the original mortgagee but against the Plaintiffs themselves. That being so, we think the right to demand payment of the money accrued for the first time to the Plaintiffs, and sec. 4 of the Succession Certificate Act was therefore no bar to the Plaintiffs obtaining a decree in this suit.

In this view of the case it becomes unnecessary to consider the second branch of the Appellants' contention; but we

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may observe that it is open to doubt whether the District Judge was right in allowing the objection under sec. 4 of the Succession Certificate Act to be taken in the appellate stage of the case, when the objection was not raised before the first Court, without giving the Plaintiffs an opportunity of meeting it by producing a succession certificate.

The result is that the decree of the lower Appellate Court will be set aside, and the case sent back to that Court in order that it may dispose of the other points raised in the appeal before it.

The Appellants are entitled to the costs of this appeal. All other costs will abide the result.

*Appeal allowed : Case remanded.*

J. B.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 316 OF 1901.

AMEER ALI, J.	} In the matter of W. Y.	
PRATT, J.		REILY, Petitioner,
1901.		v.
26, April.		THE KING-EMPEROR, Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 195, 477—"May commit," meaning of—Procedure to be observed under the section—Charge, framing of, if essentially and absolutely necessary—Preliminary enquiry, necessity of—Penal Code (Act XLV of 1860), secs. 193, 466, 471—Wilful perjury—Forgery—Using a forged document knowing it to be forged.*

*Sec. 477 of the Code of Criminal Procedure is an empowering section, and authorises a Court of Session when an offence referred to in sec. 195 of the Code has been committed before it or brought under its notice as mentioned in*

*the section, to charge the offender and to commit or admit to bail and try him upon its own charge.*

*The word "may" in sec. 477 ought not to be read as meaning must; there is no warrant for the view that it should be so read.*

*Having regard to the phraseology of the law, if a Court of Session proceeds to take action under sec. 477 of the Code, it must in the first instance frame a charge so as to enable the accused to know the exact nature of the offence he is alleged to have committed, the Court of Session may then either commit the accused for trial before itself upon the charge so framed or admit him to bail for the same purpose.*

*A charge is a precise formulation of the specific accusation made against a person, who is entitled to know its nature at the earliest stage.*

*A preliminary enquiry is only necessary for the purpose of determining whether there is a prima facie case against the person accused, it is improper and illegal for a Sessions Judge to have a person arrested and committed to jail in view of an enquiry preliminary to commitment before a charge is actually framed or a commitment made.*

*The elements of fraud or dishonesty, as explained in the Penal Code, must be present in the mind of the person accused to bring his act under secs. 466 and 471 of the Penal Code.*

This was a rule granted on the 18th of April 1901, against an order of A. P. Pennell, Esq., Sessions Judge of Noakhali, dated the 16th February 1901, instituting proceedings against the Petitioner.

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under secs. 193, 466 and 471 of the Indian Penal Code.

The proceedings which gave rise to the present rule arose out of the case of the King-Emperor against Sadak Ali and others under sec. 302, I. P. Code. The Petitioner, who was holding at the time the office of District Superintendent of Police of Noakhali, was cited as a witness for the defence in that case. He was, however, called by the Sessions Judge himself on the 16th of January 1901, and was examined for three consecutive days. On the 7th of February he was ordered to enter into recognizances for appearance in the Sessions Court on the 11th following, and on any subsequent date to which the case might be adjourned. On the 15th February the Sessions Judge delivered his judgment in the case, and on that day he had the Petitioner arrested and committed to jail on charges under secs. 193, 466 and 471 of the Indian Penal Code. The 25th was fixed for commencing the preliminary inquiry. No proceeding was, however, drawn up on that date (the 15th), the order which is the subject of the present rule being recorded only on the following day, *viz.*, the 16th of February.

The order was in the following terms:—

"In the course of the Sessions trial of Empress *v.* Sadak Ali and three others decided yesterday, I came to the opinion, for reasons stated in my judgment then delivered, that W. Y. Reily, Superintendent of Police of this district, has committed offences under secs. 193, 466 and 471 of the Indian Penal Code, and that it is my duty to hold an inquiry preliminary to committing him to the High Court to be tried for those offences.

Mr. Reily was yesterday arrested and committed to jail. There was then no time owing to the lateness of the hour to draw up this formal proceeding. He will be produced before me as directed in the warrant on the 25th February, when evidence will be taken."

After the disposal of the appeal in the murder case (Empress *v.* Sadak Ali and others) in the High Court, the Petitioner applied for and obtained the present rule in the following terms:—

"Let a rule issue on the Magistrate of the district to show cause why the proceedings instituted against the Petitioner under secs. 193, 466 and 471 of the Indian Penal Code by the Sessions Judge of Noakhali on the 16th February last should not be set aside, *first*, on the ground that they are not warranted by law, as there was no formal proceeding drawn up on the day when he was committed to jail; *secondly*, on the ground that no specific statements are set out in the proceeding drawn up on the 16th of February upon which the Petitioner is charged with having committed perjury; *thirdly*, on the ground that there are no statements in the said proceeding showing the character of the forgery charged against him under the sections referred to above; and, *fourthly*, on the ground that otherwise there is no foundation for the proceeding against the Petitioner or why such other order should not be made as to this Court may seem fit and proper."

"Meanwhile all proceedings will be stayed. The usual time for making rules returnable from the district of Noakhali is a fortnight, but as the records are here, and the Petitioner states in his verified



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petition that he is a public officer under suspension, we make this rule returnable this day week."

"We have ascertained from the officer of the Court that in special cases this has been done and we see no reason why we should not take the same course."

"Let the rule be issued to-day."

*Mr. Henderson* and *Babu Kritant Kumar Bose* for the Petitioner.

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows :—

This proceeding arises out of the case of the King-Emperor against Sadak Ali and others disposed of by us on the 17th instant. The Petitioner, who was holding at the time the office of District Superintendent of Police at Noakhali, appears to have been cited as a witness for the defence in that case. He was, however, called by the Sessions Judge himself on the 16th of January and was examined for three consecutive days. On the 7th of February he was ordered to enter into recognizances for appearance in the Sessions Court on the 11th following, and on any subsequent date to which the case may be adjourned. On the 15th of February the Sessions Judge delivered his judgment in the case, and on that day he had the Petitioner arrested and committed to jail on charges under secs. 193, 466 and 471 of the Indian Penal Code. The 25th was fixed for commencing the preliminary inquiry. No proceeding was drawn up on that date (the 15th), the order now before us being recorded only on the following day, namely, the 16th of February. That order is in these terms :—"In the course

of the Sessions trial of *Empress v. Sadak Ali* and three others decided yesterday, I came to the opinion, for reasons stated in my judgment then delivered, that W. Y. Reily, Superintendent of Police of this district, has committed offences under secs. 193, 466 and 471 of the Indian Penal Code, and that it is my duty to hold an inquiry preliminary to committing him to the High Court to be tried for those offences. Mr. Reily was yesterday arrested and committed to jail. There was then no time owing to the lateness of the hour to draw up this formal proceeding. He will be produced before me as directed in the warrant on the 25th February, when evidence will be taken." "After the disposal of the case in this Court, the Petitioner applied for and obtained the present rule, calling upon the Magistrate of the District to show cause why the proceedings instituted against him under those sections by the Sessions Judge of Noakhali on the 16th of February should not be set aside, *first*, on the ground that they are not warranted by law, as there was no proceeding drawn up on the day that he was committed to jail; *secondly*, on the ground that no specific statements are set out in the proceeding drawn up on the 16th upon which the Petitioner is charged, with having committed perjury; *thirdly*, on the ground that there are no statements in the said proceeding showing the character of the forgery charged against him under the sections referred to above; and, *fourthly*, on the ground that otherwise there is no foundation for the proceeding against him. The Sessions Judge has purported to act under sec. 477 of the Code of

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Criminal Procedure, which provides that "subject to the provisions of sec. 444 the Court of Session may charge a person for any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding and may commit or admit to bail and try such person upon its own charge." It is an empowering section, and authorises a Court of Session when an offence referred to in sec. 195 of the Code of Criminal Procedure has been committed before it or brought under its notice as mentioned in the section, to charge the offender and to commit, or admit to bail and try him upon its own charge. We observe that the Sessions Judge in one part of his judgment thinks the word "may" ought to be read as "must." There is no warrant, however, for that view. Having regard, then, to the phraseology of the law, it appears to us that if a Court of Session proceeds to take action under sec. 477 it must in the first instance frame a charge so as to enable the accused to know the exact nature of the offence he is alleged to have committed. A charge is a precise formulation of the specific accusation made against a person, who is entitled to know its nature at the earliest stage. After the accusation has been formulated in the shape of a charge, the Sessions Court may then either commit the accused for trial before itself upon the charge so framed, or admit him to bail for the same purpose. In the matter before us the Sessions Judge had framed no charge when he had the Petitioner arrested and sent to jail, nor was his proceeding of the 16th of February in any sense a charge or order of commit-

ment. It contains no particulars of the statements made and acts done by the Petitioner upon which perjury and forgery are charged against him. In our opinion the proceeding of the 16th of February was not warranted by law. The order states that "Mr. Reily was yesterday arrested and committed to jail. There was then no time, owing to the lateness of the hour, to draw up this formal proceeding. He will be produced before me, as directed in the warrant, on the 25th February, when evidence will be taken." So that the Petitioner against whom no definite accusation had been formulated up to that time, and in whose case, according to the Sessions Judge himself, a preliminary inquiry was necessary, was to be kept in jail for nine days before even the matter could be inquired into. A preliminary inquiry is necessary for the purpose of determining whether there is a *prima facie* case against the person accused. As the Sessions Judge did not charge the Petitioner as he was empowered to do, and as he considered a preliminary inquiry necessary, it seems to us that until then, in the opinion of the Sessions Judge, there was not even a *prima facie* case against the Petitioner. In view of these facts we cannot help regarding the action of the Sessions Judge with the strongest disapproval.

Apart from the illegality of the order as already mentioned, and dealing with the merits of the case, we are of opinion that there is no foundation for the proceeding. We have already expressed our opinion in the judgment in the main case respecting the allegations of perjury made against the Petitioner. We do not desire to repeat our observations. We

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may add, however that we have again gone through the judgment of the Sessions Judge, and beyond surmises and assumptions we find nothing to justify the view that the Petitioner wilfully perjured himself or intentionally gave false evidence in Court.

There is less ground even for the charge of forgery. On the 15th of September the Petitioner had visited the village and had a sketch map prepared of the locality by the writer head-constable Mohim Chunder. A fair copy was made afterwards and both the draft and the fair copy were produced at the trial and are marked respectively as Exhibits Aa and A. Exhibit A bears the signature of the Petitioner, and the date 15th September. The learned Sessions Judge thinks that Exhibit A could not have been prepared on the 15th, and he therefore comes to the conclusion that the Petitioner had purposely antedated his signature, "because he did not want Mr. Ezechiel to know that Exhibit A was a copy. He wanted Mr. Ezechiel to believe that it was a plan made by himself on the 15th instead of being, as it really is, a copy made after the 15th of a plan made partly in and in great part (and that the most important part) out of Mr. Reily's presence on the 14th, 15th and possibly subsequent dates." It is worthy of note that not a single question was put to the Petitioner to enable him to explain the circumstances under which he came to put the date on the map as the 15th September. Again, it appears that there are two pencil marks on Exhibit Aa which the Petitioner states were intended to indicate two breaks on one of the roads. These

two pencil marks are not shown on Exhibit A. The Petitioner explains the absence of those marks by saying:—"It might be an omission on the part of Mohim Chunder. The Sessions Judge, however, thinks that the Petitioner tampered with Exhibit Aa after it had been prepared. We must quote here the Judge's own language. Referring to the draft he says as follows:—

"The rough map is Exhibit Aa. Mr. Reily admits that he had it in his hand two days before Tarak Babu examined him, i.e., on the first day of his examination. He had therefore the opportunity of tampering with it. And it is very significant that Bharat Babu, who says in cross-examination that he saw the draft as it was made, declared, even without taking it into his hand, that he did not see Exhibit Aa the plan Mr. Reily swears is the draft, and when pressed says that he cannot say for certain whether or not it is the draft. I think most likely it is the draft, but that Bharat Babu knows it has been added to and does not want to be asked about the additions. Both Exhibits A and Aa are the work of the head constable Mohim Chunder Mozumdar. And as Exhibit A has nothing of Mr. Reily's but his signature and the date, so Exhibit Aa has nothing of his but certain pencil marks shortly to be noticed. Both the entries are false documents within the meaning of sec. 464 of the Indian Penal Code; for in each case Mr. Reily's intention, when he made the entry was to make people (in the first case Mr. Ezechiel, in the second this Court) believe that the entry was made at a time later at which he knew that it was not made, and as

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the documents purported to be made by a public servant in his official capacity, Mr. Reily, by making them, appear to have committed offences under secs. 466 of the Indian Penal Code, and by using them, as genuine, to have committed offences under sec. 471." In page 127 occurs this remarkable passage :—"I now come to the draft Exhibit Aa. Mohim Chunder Mozumdar who made this draft says he did not show any break in it at all, that he was never told to, and did not think it necessary to. But Mr. Reily points to two pencil marks at the place marked Exhibit Aa and says he made these to indicate the break, and so I have no doubt he did make them, but I have equally little doubt that he made them on the 16th January 1901, and not on the 15th September 1900. Mr. Reily explains the absence of any such marks from Exhibit A by saying it might be an omission on the part of Mohim. But the far more obvious explanation is that Mr. Reily was unable to tamper with Exhibit A."

It is needless to refer to the absence of sequence in the reasoning or the assumptions on which it proceeds. Taking it however that Exhibit A was purposely antedated to deceive Mr. Ezechiel, and that the pencil marks were put in Exhibit Aa after it had been prepared, we fail to see how the Petitioner could be charged under secs. 466 and 471 of the Indian Penal Code. Sec. 463 which defines the term "forgery" runs as follows :—"Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person or to support any claim or title, or to cause any person to part with

property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery." Sec. 464 then explains the expression "making a false document." The elements of fraud or dishonesty, as explained in the Penal Code, must be present in the mind of the person accused to bring his act under secs. 466 and 471 of the Indian Penal Code. In our opinion the charge against the Petitioner of committing forgery or making use of a forged document even upon the assumptions of the Sessions Judge cannot be sustained. But in our judgment there is no ground for the assumption of the Judge that Exhibit A was purposely antedated. The inspection of the locality having unquestionably taken place on the 15th and the results noted in Exhibit Aa, the fair copy, when ever prepared (and excepting the hypothesis of the Sessions Judge there is nothing to show it could not have been prepared on that day) would naturally bear the date of the inspection, and any other date would misrepresent the fact.

As regards the pencil marks on Exhibit Aa, there is absolutely no reason for suggesting them to be dishonest interpolations by the Petitioner or for not accepting the explanations regarding their omission from Exhibit A. It was no doubt wrong on the part of the Petitioner not to have insisted on the breaks being shown on the maps, and that error of judgment is deserving of censure, but in our opinion the imputation of forgery and of having used a forged document is not only groundless but a straining of the law as well as the facts.

We may observe in this connection

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that the offence of giving false evidence under sec. 193 is bailable, so also is the offence of using a forged document, sec. 471, whilst forgery, sec. 466, is non-bailable. It was unfortunate that the Sessions Judge applied sec. 466 against the Petitioner in the way he has done, as it gives colour to the suggestion made at the Bar that it was purposely used to deprive the Petitioner of the right of bail.

We regret to observe that in dealing with this matter the Sessions Judge does not seem to have maintained a judicial balance of mind.

\* For these reasons we think that his order must be set aside, and we set it aside accordingly.

H. P. C. *Rule made absolute.*

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 215 OF 1901.

AMEER ALI, J.	}	MOHIM CHUNDER
PRATT, J.		MOZUMDAR, Petitioner,
1901.		<i>v.</i>
17, April.		THE KING-EMPEROR, Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 195, 477—Bail, order for, before commitment—Preliminary enquiry—Charge, framing of, if absolutely necessary—Jurisdiction—Penal Code (Act XLV of 1860), sec. 193—False evidence, giving of.*

*Sec. 477 of the Code of Criminal Procedure contemplates that there should be a charge upon which the commitment is based; in other words, the person accused of having committed the offence should know the specific nature of the accusation against him so as to be able to answer it.*

*Where an order was made directing a witness to give bail before a Court of*

*Session, and to appear when called upon before such Court to answer charges under sec. 193, I. P. Code, without any reference to the specific false statements alleged to have been made by the witness in the course of a judicial proceeding, it was held that the order could not be regarded as a commitment under sec. 477, Cr. P. Code.*

*Such an order is not warranted by law and is without jurisdiction.*

This was a rule issued on the 12th of March 1901, against the order of the Sessions Judge of Noakhali, dated the 16th of February 1901.

The rule was in the following terms:—

Let a rule issue on the Magistrate of the District to show cause why the order of the Sessions Judge of Noakhali made on the 16th February last requiring the Petitioner to give bail of Rs. 300 to appear when called upon before the Court of Session to answer charges under sec. 193, I. P. C., should not be set aside on the ground, *firstly*, that it is wholly irregular and made without jurisdiction, and, *secondly*, that no opportunity was given to the accused to read over his deposition, nor was any charge framed, against him so as to enable him to know the nature of his offence, nor any enquiry made as required by sec. 477 of the Code of Criminal Procedure or why such other order should not be made as to this Court may seem fit and proper: and let the record and proceedings connected with this matter be sent for.

Pending the hearing of the rule all further proceedings will be stayed.

The facts of the case were as follows:—

The Petitioner, a suspended head constable of Police, was a witness for the

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defence in the case of *Empress v. Sadak Ali* and others in the Court of the Sessions Judge of Noakhali.

He was examined before A. P. Pennell, Esq., Sessions Judge of Noakhali, on the 21st January 1901.

On the 16th February 1901, the day after the judgment in the case of *Empress v. Sadak Ali* and others was delivered, the Sessions Judge of Noakhali recorded an order by which the Petitioner was committed to the Court of Session to take his trial for offences under sec. 193, I. P. C.

Before the order of commitment of the Petitioner to the Court of Session was passed, no proceedings against him were drawn up in which the reasons of his having committed offences under sec. 193, I. P. C., were set forth; nor was any formal charge drawn up against him and the Petitioner was not required to give in his list of witnesses he wished to summon to give evidence on his trial.

*Mr. C. R. Das* and *Babu Surendra Nath Guha* for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

This rule arises out of the case which we disposed of to-day, in which three people were convicted under sec. 302 of the Indian Penal Code by the Sessions Judge of Noakhali.

The Petitioner, Mohim Chunder Mozumdar, who was the Court head constable and prepared a map of the locality, was cited as a witness for the defence. On the day following the conclusion of the case, namely, the 16th February, the Sessions Judge recorded an order against the Petitioner in the following terms :—

“The witnesses Krista Chunder Bhadra and Mohim Chunder Mozumdar are Police head constables. It is necessary in my opinion that they should be committed to the Sessions, but as I am about to take proceedings in the capacity of a committing Judge against Mr. Reily, and their case is mixed up with his, it may perhaps be desirable that I should not try them myself. It is also highly probable that an Additional Sessions Judge will be sent here before long. It is therefore ordered that these two witnesses do give bail of Rs. 300 each to appear when called upon before the Court of Session to answer charges under sec. 193, I. P. C.”

This is hardly a commitment under sec. 477 of the Code of Criminal Procedure, which requires, as we read it, that when an offence referred to in sec. 193 is committed before a Court of Session or is brought to its notice in the course of a judicial proceeding, that Court may commit the case to itself and try the same, or admit the accused to bail, and try the case upon its own charge. If any offence was committed by the Petitioner before the Sessions Judge, the matter would, no doubt, fall under sec. 477, but the section contemplates that there should be a charge upon which the commitment is based, in other words, the person accused of having committed the offence should know the specific nature of the accusation against him so as to be able to answer it. In the order under consideration there is not the slightest reference to what the offence alleged to have been committed by the Petitioner is, or what the specific false statements are for which he is to be tried. The

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order is absolutely vague and indefinite. It requires him to give bail to appear when called upon before the Court of Session to answer charges under sec. 193. We have referred to the judgment in the case itself to see whether there is any indication there of the specific false statements alleged to have been made by Mohim Chunder, but we failed to discover any.

We think that the whole proceeding is bad in law and made without jurisdiction; and we accordingly set it aside.

H. P. C. *Rule made absolute.*

## [FULL BENCH REFERENCE.]

IN APPEAL FROM ORIGINAL DECREE

No. 14 OF 1899. \*

MACLEAN, C. J.	}	KHADEM HOSSEIN,
PRINSEP, J.		Defendant No. 1,
BANERJEE, J.		Appellant,
AMEER ALI, J.		v.
RAMPINI, J.		EMDAD HOSSEIN,
1901.		Plaintiff, Respondent,
Heard,		and
12, February.		APIPUNNESSA BIBI and
Judgment,		others, Defendants,
20, March.		Respondents.

*Partition suit—Preliminary decree—Final decree—Appeal—Right to question preliminary decree in appeal from final decree.*

*Held—By the Full Bench (MACLEAN, C. J., and RAMPINI, J., dissenting), that in an appeal against the final decree in a partition suit it is open to the Appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law.*

*BOLORAM DEY v. RAM CHUNDRA DEY (7) overruled.*

(7) I. L. R. 23 Cal. 279 (1895).

BISWA NATH CHAKI v. BANI KANT DUTTA (8) *approved of.*

This was a reference to a Full Bench made by Sir Francis Maclean, C. J., and Banerjee, J., on the 14th of August 1900, in appeal from original decree, No. 14 of 1899.

The facts of the case appear from the following order of reference:—

In this appeal, which arises out of a suit for partition and which was preferred after the final decree in the suit was passed by the Court below, the Appellant seeks to impugn the propriety of the preliminary order or decree for partition though he did not prefer any separate appeal against that order. The learned vakil for the Respondents contends that it is not competent for the Appellant to do so, as the preliminary order for partition was, as has been held by a Full Bench of this Court in *Dulhin Golab Koer v. Radha Dulari Koer* (1), a decree, within the meaning of sec. 2, C. P. C., and was therefore appealable, and no appeal having been preferred against it within the time allowed by law, it is become final and conclusive; and in support of this contention, the case of *Boloram Dey v. Ram Chundra Dey* (7) is cited. The learned vakil for the Appellant, on the other hand, argues that though the preliminary decree for partition was appealable, and no appeal was preferred against it, that does not preclude him from questioning its correctness when he has appealed against the final decree in the case; in support of this argument the case of *Biswa Nath*

(1) I. L. R. 19 Cal. 463 (1892).

(7) I. L. R. 23 Cal. 279 (1895).

(8) I. L. R. 28 Cal. 406 (1896).

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*Chaki v. Bani Kant Dutta* (8) is relied upon. These two cases, which are both in point, being in conflict with one another, we submit for the decision of the Full Bench the following question:—

“Whether in an appeal against the final decree in a partition suit it is open to the Appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law.”

*Babu Hari Charan Sarkhel* for the Appellant.

*Babu Uma Kali Mukerjee* for *Moulvie Mahomed Yusuf* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—The question submitted for our decision is “whether in an appeal against the final decree in a partition suit it is open to the Appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law.”

The first point to consider is whether the preliminary order or decree is a decree within the meaning of sec. 2 of the Code of Civil Procedure. The Full Bench case of *Dulhin Golab Koer v. Radha Dulari Koer* (1) is a distinct authority to the effect that such an order is a decree within sec. 2, and this view is clearly supported by the recent case of *Raja Bhup Indar Bahadur Singh v. Bejai Bahadur Singh* (2) before the Judicial Committee of the Privy Council

in which judgment was given on the 21st July 1900. There it was held that an order upon an issue, “For what period are mesne profits recoverable” was final and not interlocutory, that it was a decree within the definition of sec. 2 of the Code and consequently appealable under sec. 540. Their Lordships then say:—“Treating the question as if it were whether the order under consideration is final or interlocutory in its nature, and testing it by the ordinary principles applicable to such questions their Lordships think not only that the High Court are right in the particular circumstances of the case, but that there is not any need to rely upon the accident that the District Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause which is final against the party denying liability to account and is appealable; though it is also in another way interlocutory and may result in the exoneration of the accounting party or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect and as such equally open to appeal.” If a decree adjudicating upon the question of liability to account be final, a decree in a partition suit, which completely determines the shares of the parties must equally be so. It is clear then that

(1) I. L. R. 19 Cal. 463 (1892).

(2) 5 C. W. N. 52; s. c. L. R. 27  
1. A. 209 (1900).

(3) I. L. R. 23 Cal. 406 (1896).



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the preliminary order here was a decree appealable and final as opposed to being interlocutory in its nature. I am not dealing with the question whether a statement in a judgment as to the rights of the parties where no formal decree has been drawn up and where the declaration of such rights has not been embodied in a formal decree, is a decree within the meaning of the Code. That point is not now before us. I would only add for the guidance of Judges in the mofussil, that, in my opinion, preliminary orders in partition suits and in suits for account, if they declare the rights of the parties either as to their shares of the property to be partitioned or as to liability to account, ought to be drawn up formally as decrees in compliance with sec. 206.

But now arises the question submitted to us and upon this there are the two conflicting decisions mentioned in the reference.

Neither party suggests that the case is within sec. 591, which appears to me to have codified in a statutory form the principles involved in the Privy Council cases of *Moheshur Sing v. The Bengal Government* (3), *Forbes v. Ameeroonissa Begum* (4) and *Sheonath v. Ramnath* (5). The question is whether the principle of these cases apply to a final order, an order which finally decides the rights of the parties as to the shares to which they are entitled, and which is appealable. In *Moheshur Sing v. The Bengal Government* (3) their Lordships said—the point being whether it was open to the Appellant to impugn the regularity of certain

proceedings to grant a review—"We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided and brought hither by appeal for adjudication." The same opinion was entertained by their Lordships in the cases of *Forbes v. Ameeroonissa Begum* (4) and *Sheonath v. Ramnath* (5) and again in *Shah Makhun Lal v. Sree Kishan Singh* (6). But as I read these judgments they were all cases of interlocutory as opposed to final orders and the question now before us is whether the same principle applies to the case of a decree which is final in its

(3) 7 M. I. A. 283 (1859).

(4) 10 M. I. A. 340 (1865).

(5) 10 M. I. A. 413 (1865).

(4) 10 M. I. A. 340 (1865).

(5) 10 M. I. A. 413 (1865).

(6) 12 M. I. A. 157 (1868).

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essence and effect. In all these cases the orders are referred to as interlocutory orders. If they were intended to apply to final as well as to interlocutory orders then the present case is covered by their authority, by which we are bound. But as I have said I do not so read these cases.

It is said that sec. 396 indicates that there can be only one decree in a partition suit, and that decree after the Commissioner's report: but this argument is inconsistent with, and cannot be reconciled with the view that the first order which declares the shares of the parties is a final and not an interlocutory decree. The Code affords us but little direct assistance on the point, but upon the best consideration which, looking to the Code, to principle and to the authorities, I can give to the case, I am of opinion, when there is in a particular suit a decree declaratory of the rights of the parties, a decree which is, in point of law, final as regards those rights, and also appealable, and the time allowed for appealing has expired, that decree cannot be challenged upon an appeal from a subsequent decree in the suit, say, the decree confirming or dealing with the Commissioner's report. To hold otherwise would be to extend the time for appealing to an indefinite period, contrary to the period of limitation defined by the legislature. The inconvenience and costs to the parties of the opposite view is manifest. All the expense incident to a partition by metes and bounds, of the Commissioner's report and so forth,—proceedings which might occupy years,—would be thrown away, and though, no doubt, such useless expenditure might in some

cases be met by special provision as to payment of costs by those who had caused it, such compensation in many cases might prove inadequate, for costs are not always recoverable. I can find nothing in the Code nor in principle which imposes upon me the necessity of arriving at such a conclusion, and I therefore, prefer to arrive at one which appears to me to be consistent with convenience, as opposed to one which is calculated to produce endless delay and grave and unnecessary expense.

In my opinion the question ought to be answered in the negative and the case with this expression of opinion returned to the Division Bench for ultimate decision, the costs of the reference to abide the result.

PRINSEP, J.—In this suit which is for a partition by metes and bounds amongst certain co-sharers in a certain property the Subordinate Judge, by his order of the 23rd July 1898, found that the parties to the suit, including the persons made on that date parties to the suit, had certain shares, and he accordingly directed a Commissioner to be appointed for the purpose of making a partition amongst the parties in those specific shares. There was no appeal filed against that order such as the law permits. A final decree has now been passed and the question referred to a Full Bench is:—"Whether in an appeal against the final decree in a partition suit, it is open to the Appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law." This reference is made because there are two

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contradictory decisions on this point, a Division Bench of this Court having held, in the case of *Boloram Dey v. Ram Chundra Dey* (7) that no appeal having been made against the preliminary order, it was barred by the operation of the law of limitation and, on the other hand, another Division Bench of this Court having held, in the case of *Biswa Nath Chaki v. Bani Kant Dutt* (8) the judgment being delivered within a few months of the judgment in the first case and before it had been reported, that it was competent to an appellant, in appeal against the final decree, to reopen the entire case. The first case, I may mention, was a suit for partition and, therefore, on all fours with the case now before us. The second case was a suit for dissolution of partnership and an account in which the Court of first instance overruled the objection of one of the Defendants and found that the Plaintiff was a partner and entitled to an account. The Defendant, however, did not appeal against that order until after a final decree on accounts taken. The same principle is however involved in both cases.

The law gives the right of appeal (certain cases being excepted) from the decrees of the Courts exercising Original Jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts (sec. 540, C. C. P.) and inasmuch as a decree has been defined to mean the formal expression of an adjudication upon any right claimed or any defence set up in a Civil Court when such adjudication, so far as regards the Court

expressing it, decides the suit or appeal, it has been held that an appeal lies from an order declaring the rights of parties to certain shares in a suit for partition by metes and bounds and also against an order declaring that certain parties are partners in a suit for dissolution of partnership and an account before the actual decree in the suit has been passed.

\* There was much uncertainty in this respect, but the matter has at last been finally settled, so far as this Court is concerned, by the judgment of the Full Bench in the case of *Dulhin Golab Koer v. Radha Dulari Koer* (1) and their Lordships of the Privy Council have also finally set this matter at rest by their judgments in more than one reported case. These cases, it may be observed, commence from the case of *Moheshur Sing v. The Bengal Government* (3), decided in 1859, the last case on the subject being *Saigud Muzhar Hossein v. Bodha Bibi* (9), decided in 1894. So far as regards the right of appeal, the law is now settled. The question raised on this reference, however, is whether, the right of appeal existing and no appeal having been made, it is competent to a party in the suit to appeal against the final decree on the whole case, as if he had no such right of appeal at an intermediate stage. I may observe that though, by reason of the definition of a decree this right is given, a decree, as explained in sec. 206 and the following sections of the Code, clearly means the final decree in the suit, for, under sec. 206, it is stated that the decree shall

(1) I. L. R. 19 Cal. 403 (1892).

(3) 7 M. I. A. 283 (1859).

(9) I. L. R. 17 All. 112 (1894).

(7) I. L. R. 23 Cal. 279 (1895).

(8) I. L. R. 23 Cal. 406. (1896).

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set out the particulars of the claim in the suit and shall specify the relief granted or other determination of the suit. From this, I have always understood (and this *has* been the practice of our Courts) that, notwithstanding the definition of the expression 'decree' first given in the Act of 1879, in amendment of the then existing Code of Civil Procedure, a decree within the terms of sec. 206 means the final decree in the suit and that it is such a decree which is contemplated in giving a right of appeal under sec. 540. There is only one decree within the terms of Chapter XVII in the suit and that is the final decree. Any order passed in the course of the trial of a suit, though it may, in some respects, be an adjudication of the rights of the parties, if it does not finally dispose of the suit, is not a decree within the terms of that chapter because with any other findings already arrived at, in the suit, it must be embodied in the decree drawn up in accordance with sec. 206.

The terms of sec. 396 are also significant in connection with the matter now under consideration. That section provides that the Court, after ascertaining the several parties interested in the property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights, and it further provides that, on consideration of the Commissioner's report and any objections thereto, the Court shall either quash the same and issue a new commission or *pass a decree* in accordance therewith. That decree is the decree within the terms of sec. 206 and, in my opi-

nion, it is also the decree within the terms of sec. 540. There is no provision of the law taking away a right of appeal on the entire case when such a decree has been passed.

In the same manner, in an administration suit, sec. 213 declares that the Court, before making a decree, shall order such accounts and inquiries to be taken and made, and give such other directions, as it thinks fit and, under sec. 394, the Court may issue a commission to any person directing him to make such examination or adjustment of accounts as it may consider to be necessary. So also, in a suit for dissolution of partnership, sec. 215 declares that the Court, before *making its decree* may pass an order fixing the day on which the partnership shall stand dissolved and directing such accounts to be taken and other acts to be done as it thinks fit. Now, it would be impossible for a Court to declare accounts to be taken unless it had previously found that the parties were partners and, as such, entitled to receive or bound to render accounts. Similarly, sec. 215A declares that "when a suit is for an account of pecuniary transactions between a principal and agent and in all other suits not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken the Court shall, *before making its decree*, pass an order directing such accounts to be taken as it thinks fit." Now, in such a suit, it may happen and constantly does happen that a party denies his liability to account and, if an order be passed against him, although he

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may have the right of appeal because the order is within the definition of a decree, still no decree is passed until an account has been taken showing the amount due to the Plaintiff. These matters were all fully considered in the case of *Biswa Nath Chaki v. Bani Kant Dutta* (8) by a Bench consisting of myself and Mr. Justice Hill and we also considered several judgments of the Privy Council referred to in our judgment bearing on this point, as well as the rules laid down in several well-known treatises on the interpretation of statutes. No authority has been shown to us for a contrary view except the judgment in the case of *Boloram Dey v. Ram Chundra Dey* (7). In that case, the authorities on which we relied were not referred to or considered. The *argument ab inconvenienti* has, however, been pressed upon us on the ground that it is not reasonable to require a party to go to the expense of an enquiry into accounts or to settle a partition by metes and bounds when it was open to him to stop that inquiry and the expense consequent thereon by asserting his rights, if he still maintained that he had them, by exercise of the right of appeal given him under the law. It seems to me that instances may be given where a party may reasonably abstain from exercise of this right of appeal without any prospect of putting his adversary to such an expense and, at the same time, reserve to himself the right of appeal, once for all, instead of delaying the proceedings and appealing on two separate occasions and it may be added, that this

very objection was considered by Hill, J., and myself in the case before us, for we pointed out that, on appeal against the final decree, a party who had not exercised his right of appeal against the intermediate finding or decree against him, "would certainly suffer in costs in consequence of his having without objection allowed the subsequent proceedings to take place" and, as an authority for this, we referred to the concluding remarks of their Lordships of the Privy Council in the case of *Forbes v. Ameeroonissa Begum* (4). Their Lordships there stated, "considering that the Appellant might have appealed against the order and that his conduct in the subsequent proceedings in the Court below had not been satisfactory, that they 'are not disposed to recommend that he should have costs in those proceedings against the opposite party.'" There would, therefore, be protection in such a case to the Respondent. If, however, the position be considered in another point of view, it does not seem altogether unreasonable to grant the right of appeal on the whole case. By the exercise of his right of appeal against what I may term the intermediate decree, the proceedings in the suit would be prolonged, if that appeal were unsuccessful and, if he had good grounds to appeal against the final decree, the Appellant would be put to the expense of two appeals. But if there was only one appeal on the whole case, it would be dealt with by the Appellate Court once for all, while, if the Appellant succeeded on the point decided by the intermediate decree, he might, as I have already pointed out,

(7) 1. L. R. 23 Cal. 279 (1895).

(8) 1. L. R. 23 Cal. 406 (1896).

(4) 10 M. L. A. 340, see at p. 361 (1865).

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suffer in costs because he had allowed proceedings to be held which he might have prevented if he had exercised his right of appeal at once against the intermediate decree. In my opinion, it would not be right or proper to allow the *argumentum ab inconvenienti* to prevail against the terms of the law as expressed in the sections of the Code of Civil Procedure to which I have referred, and I would add that it would be very injurious to litigants if the practice of the Courts which has recognized this right of appeal were suddenly altered so as to deprive them of a right which they have been led to believe existed and which they intended to exercise.

For these reasons I am of opinion that the case of *Biswa Nath Chaki v. Bani Kant Dutta* (8) is rightly decided and I would answer the question referred to us in the affirmative.

BANERJEE, J.—The question referred to us for determination in this case is, whether in an appeal against the final decree in a partition suit, it is open to the Appellant to question the correctness of the preliminary order or decree for partition, when no appeal was preferred against such order within the time allowed by law.

There is no provision in the Code of Civil Procedure or in any other enactment bearing directly upon this question. It is argued for the Appellant that as the final decree for partition incorporates with it the preliminary order or decree, and is based upon that order in appealing against the final decree, the Appellant is entitled to question the correctness, as well, of the actual allotments made,

as of the determination of shares upon which the allotments are based. It is further argued that the Appellant had this right under the old law, as is clear from the cases of *Moheshur Sing v. The Bengal Government* (3), *Forbes v. Ameeroonissa* (4) and *Shah Makhum Lal v. Sree Kishan Singh* (6), and there being no express provision in the present law taking away that right, it cannot be held to be taken away by any implication arising from the definition of the term decree in sec. 2 of the Code of Civil Procedure, or from the provisions of sec. 591 of the Code. And the case of *Biswa Nath Chaki v. Bani Kant Dutta* (8), which gave effect to considerations like the foregoing, is relied upon in support of the Appellant's argument.

On the other hand, it is argued for the Respondent that, as the preliminary order issuing a commission after ascertaining the several rights of the parties interested in the property to be partitioned as contemplated by sec. 396 of the Code is a decree within the definition of the term in sec. 2, and is appealable as such under sec. 540, as has been held by a Full Bench of this Court in *Dulhin Golab Koer v. Radha Dulari Koer* (1), if it is not appealed against within the time allowed by law, it becomes final and conclusive, and its correctness cannot be questioned in the appeal against the final decree. It is further argued that as secs. 591 and 629 of the Code expressly provide that certain orders may be either appealed against immediately, or taken

(1) I. L. R. 19 Cal. 463 (1892).

(3) 7 M. I. A. 283 (1859).

(4) 10 M. I. A. 340 (1865).

(6) 12 M. I. A. 157 (1868).

(8) I. L. R. 23 Cal. 406 (1896).

(8) I. L. R. 23 Cal. 406 (1896).

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exception to in the appeal against the final decree, the natural inference is, that if the Legislature intended to leave an order coming within the definition of a decree similarly open to question in the appeal against the final decree, it would have expressly said so. Moreover it is urged that the opposite view would lead to most inconvenient results. Thus a preliminary decree for making a partition or for taking accounts may be carried out by an investigation extending over a long time and entailing much expense; and if it be open to any party to question the correctness of the preliminary decree in an appeal against the final decree, the time and trouble taken, and the expense incurred, in carrying out the preliminary decree, will go for nothing. As for the cases cited on the other side, it is said that they were decided under the old law, and that as that law has been altered by the introduction of a more comprehensive definition of the term decree, those cases do not govern any case under the present law, except so far as that law has embodied the principle laid down by them in secs. 591 and 629 of the Code of Civil Procedure. These are reasons which are no doubt entitled to careful consideration; and it is for reasons such as these, that it was held in the case of *Boloram Dey v. Ram Chundra Dey* (7), that the correctness of a preliminary decree for partition, which has not been appealed against within the time allowed by law, cannot be questioned in an appeal from the final decree.

After considering the arguments on both sides, I am of opinion that the view

contended for by the learned vakil for the Appellant is correct.

In appealing against the final decree in a partition suit, the Appellant must be deemed to have the right of appealing on the whole case, notwithstanding that he might have appealed against the preliminary decree dealing with a part of the case, namely, the part relating to the determination of the shares of the parties. That right has not been taken away by any express provision of the Code; nor, in my opinion, has it been taken away by necessary or sufficient implication arising from secs. 591 and 629 of the Code. Nor is it sufficient to say that the cases of *Forbes v. Ameeroonissa* (4) and *Shah Makhun Lal v. Sree Kishan Singh* (6) are distinguishable from the present case by reason of their being decided under the old law, because the order, the correctness of which was held to be open to question in the appeal against the final decree in each of those cases, was held by their Lordships of the Privy Council to be appealable, just as much as the preliminary order or decree in a partition suit is under the present Code. In the last-mentioned case, it was said:—"Their Lordships think that the question as to the interest is open in this appeal though the Plaintiff might have appealed, and did not, from the interlocutory decree on the point." It is true that the orders in question in both the two cases cited above were interlocutory orders or decrees, in the sense that they did not dispose of the cases; but so is the preliminary decree in a partition suit an interlocutory decree as it does not completely dispose

(4) 10 M. I. A. 340 (1865).

(6) 12 M. I. A. 157 (1863).

(7) I. L. R. 23 Cal. 279 (1895).

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of the case. That is clear from sec. 396 of the Code. The principle upon which the Respondent's contention is mainly based, is that where a preliminary order in a case is appealable as a decree, and is not appealed against within the time allowed by law, its correctness cannot be questioned in an appeal from the final decree in the case. But that principle is nowhere affirmed in the Code; and it is expressly denied in the passage quoted above from the judgment of the Privy Council in *Shah Makhun Lal v. Sree Kishan Singh* (6).

The argument based upon considerations of convenience noticed above, is no doubt the strongest argument in favour of the Respondent's view. But when that view is opposed to the decision of the Privy Council in the two cases cited above, which we are bound to follow, I am unable to adopt it as correct.

I should add that the argument based upon considerations of convenience is not altogether without an answer; nor are the considerations of convenience all in favour of the Respondent's view. If by reason of a party successfully impugning the correctness of the preliminary decree for partition in an appeal from the final decree the partition proceedings have to be commenced *de novo*, the Court may compensate all the other parties by making the Appellant bear the costs that are thrown away. On the other hand, if it be held that the law renders it imperative on every party to appeal from a preliminary decree by which he may conceive himself aggrieved, under the penalty, if he does not so appeal, of forfeiting for ever the benefit

of the consideration of the Appellate Court, there will follow many more appeals from preliminary decrees than would otherwise be the case. It is easy, moreover, to imagine cases in which, if a party is under no such imperative necessity of immediately appealing against a preliminary decree and can safely wait to see what the final decree may be, he may, notwithstanding that he might have felt somewhat aggrieved by the preliminary decree, in the end find little reason to complain of the final decree. Thus, against the preliminary decree in a partition suit, a party may have a slight objection as to the extent of the shares; or against a similar decree in a suit for account, he may have a slight objection as to the period over which the account is to extend; but when the final decree is made, he may not have reason to complain, having regard to the nature of the allotments made in the one case, and to the amount decreed in the other; and so eventually no appeal may be preferred against the final decree, and thus time and trouble may be saved.

For the foregoing reasons, I would respectfully dissent from the view taken in the case of *Boloram Dey v. Ram Chundra Dey* (7), and agreeing with the decision in the case of *Biswa Nath Chaki v. Bani Kant Dutta* (8) I would answer the question referred to the Full Bench in the affirmative.

AMEER ALI, J.—I am also of opinion that the case of *Biswa Nath Chaki v. Bani Kant Dutta* (8) was rightly decided and that the question referred to us should be answered in the affirmative.

(7) I. L. R. 23 Cal 279 (1895).

(8) I. L. R. 23 Cal. 406 (1896).

(6) 12 M. I. A. 157 (1668).



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As I agree with the reasons given by Prinsep and Banerjee, JJ., for arriving at this conclusion, I do not think it necessary to go over the same ground. I would only add that although under sec. 2 of the Civil Procedure Code, as interpreted by the Full Bench in the case of *Dulhin Golab Koer v. Radha Dulari Koer* (1), certain orders made in the course of a suit are appealable, there is nothing to show that the Legislature has taken away the right to question, upon an appeal from the main and final decree, the propriety of such orders if they are not appealed against separately within a certain time.

In suits for partition, administration, dissolution of partnership, &c., the declaratory orders are made in the first instance with the object of forming a basis for further proceeding. Such orders are by no means of a definitive character, in practice they are often modified by the Court upon application by the parties. It would be inexpedient in my opinion to embody such orders in formal decrees or to compel parties to appeal therefrom whether they wish or not. In many cases the objection to the declaratory order disappears in the final decree.

RAMPINI, J.—I agree in the judgment of his Lordship the Chief Justice.

It appears to me that if a preliminary order or decree for partition in a partition suit be a decree, as defined in sec. 2 of the Civil Procedure Code, it necessarily follows that it is not open to an Appellant to question the correctness of this decree after he has allowed the period of limitation for appealing against

such a decree to pass without appealing against it.

In the Full Bench case of *Dulhin Golab Koer v. Radha Dulari Koer* (1) it has been decided that a preliminary order or decree in a partition suit declaring the specific rights of the parties in the properties to be partitioned, is a decree, and appealable as such. The question of the correctness of this decision is not before us, and as it is the decision of a Full Bench we are bound to follow it. That being so, it appears to be certain that the present Appellant cannot now be allowed to impugn the correctness of the lower Court's decree of the 23rd July 1898, as he seeks to do.

The cases which have been cited to us by the Appellant, other than the case of *Biswa Nath Chaki v. Bani Kant Dutta* (8), which in my opinion has been wrongly decided, are all cases decided before the passing of the present Civil Procedure Code, and, therefore, do not seem to me to be relevant to the question we have now to decide.

I would therefore answer the question referred to us in the negative.

S. C. S.

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM ORDER

No. 193 of 1900.

NILRATAN KHASNOBISH  
and ors., Judgment-  
debtors, Appellants,  
v.

BANERJEE, J.  
STEVENS, J.

1901.

15, February.

RAM RUTTON CHATTERJI,  
Decree-holder,  
Respondent.

*Civil Procedure Code (Act XIV of 1882)*

(1) I. L. R. 19 Cal. 463 (1892).

(8) I. L. R. 23 Cal. 406 (1876).

(1) I. L. R. 19 Cal. 463 (1892).

**NILRATAN KHASNOBISH v. RAM RUTTON CHATTERJI.**

*secs. 244, 578, 623—Execution proceedings; re-opening of—Mistake in calculating amount due—Jurisdiction.*

Where the Court passed an order in an execution case stating that the case had been disposed of by reason of both sides having represented to the Court that the decree had been satisfied :

Held—That an application to allow the execution proceedings to be re-opened was maintainable under sec. 244, C. P. C., on the ground that the decree-holder had acted under a mistake of calculation in fixing the amount that was due.

**FAKARUDDIN MAHOMED AHSAN v. THE OFFICIAL TRUSTEE OF BENGAL (1)** distinguished.

Where such an application was made by the decree-holder referring to both secs. 244 and 623, C. P. C., and the first Court thought that the latter section was inapplicable and re-opened the proceedings under sec. 244 :

Held—That even if sec. 623 only was applicable, the order of the first Court could not, having regard to sec. 578, C. P. C., be interfered with in appeal.

This was an appeal preferred on the 28th of May 1900, against the order of L. Palit, Esq., District Judge of Zillah Jessore, dated the 29th of March 1900, affirming the order of Babu Debendra Lal Shome, Subordinate Judge of Jessore, dated the 12th of August 1899.

The facts of the case appear from the judgment.

*Babus Ashutose Dhur and Rajendra Nath Bose* for the Appellants.

*Dr. Rash Behari Ghose, Babus Kritanto Kumar Bose and Benode Behary Mookerji* for the Respondent.

(1) I. L. R. 10 Cal. 538 (1884).

The JUDGMENT OF THE COURT was as follows :—

The question raised in this case is whether the Courts below were right in allowing certain execution proceedings to be re-opened after an order had been made to the effect that the case was disposed of upon the decree-holder and the judgment-debtors representing to the Court that the decree had been satisfied; the ground upon which the proceedings were allowed to be re-opened being that in intimating to the Court that the decree had been satisfied the decree-holder had acted under a mistake of calculation in fixing the amount that was due.

The decree-holder asked the first Court to re-open the matter by an application in which he referred to sec. 623 as well as to sec. 244 of the Code of Civil Procedure. The first Court held that the application as an application for review under sec. 623 of the Code could not be allowed, because sec. 623 was inapplicable to the case; but it held that the application ought to be allowed under sec. 244.

On appeal by the judgment-debtor two questions were raised before the lower Appellate Court, *first*, whether the first Court was right in entertaining the application under sec. 244, and, *second*, whether on the merits the decree-holder had made out a case for re-opening the proceedings; and the lower Appellate Court has answered both these questions in the affirmative. It has further held that even if the proceedings could not be re-opened by an order under sec. 244, and the proper procedure was by way of an application under sec. 623,

## NILRATAN KHASNOBISH v. RAM RUTTON CHATTERJI.

as the first Court had granted the application of the decree-holder, and as it was not shown that the irregularity in the procedure of the first Court in granting it under sec. 244 instead of sec. 623, had either affected the merits of the case or the jurisdiction of the Court, the order of the first Court could not be interfered with in appeal, having regard to the provisions of sec. 578 of the Code of Civil Procedure.

In second appeal it is contended on behalf of the judgment-debtors that the lower Appellate Court was wrong in holding that the application of the decree-holder for re-opening the execution proceedings could be granted under sec. 244 of the Code of Civil Procedure.

One or two other points were sought to be raised in the course of the argument by the learned vakil for the Appellant; but as they were not taken in the memorandum of appeal, and as they raised questions of fact upon which the findings arrived at by the Court of Appeal below must be taken to be conclusive we did not think it right to allow those points to be discussed.

With regard to the only question that could be, and was, discussed in the case, we are of opinion that the lower Appellate Court was right in thinking that the decree-holder's application could be entertained under sec. 244 of the Code of Civil Procedure. That view seems to us to be in consonance with reason; and the only authority cited in support of the contention that the view of the lower Appellate Court is wrong, namely, the case of *Fakaruddin Mahomed Ahsan v. The Official Trustee of Bengal* (1) is a

case that is clearly distinguishable from the present. There the order, after the making of which the Court was held to have become *functus officio*, and therefore incompetent to entertain any application under sec. 244, was in the nature of a judicial order made in a contested proceeding. Here, the order, by reason of which we are asked to hold that the Court became *functus officio*, and therefore incompetent to entertain the application under sec. 244, was not in the nature of a judicial order made after the adjudication of any contested point, but was merely an order stating that the case had been disposed of by reason of both sides having represented to the Court that the decree had been satisfied. The case before us therefore being thus distinguishable from the case cited, it becomes unnecessary for us to say anything more on this point.

We think that the additional reason which the lower Appellate Court has given for affirming the order of the first Court, namely, that based upon sec. 578 of the Code of Civil Procedure, is also a good and valid reason. For, according to the case cited for the Appellants, sec. 623 of the Code of Civil Procedure was applicable; and if it was applicable, and the decree-holder asked the first Court to re-open the proceedings both under that section and under sec. 244, the fact of that Court having granted the application under sec. 244 and not under sec. 623, for the simple reason that in its opinion sec. 623 was not applicable, would only make the order an irregular order, this irregularity not affecting the merits of the case or the jurisdiction of the Court.

## NILRATAN KHASNOBISH v. RAM RUTTON CHATTERJI.

For these reasons we think that the order of the lower Appellate Court is right, and ought to be affirmed, and we accordingly dismiss the appeal with costs.

We assess the hearing fee at two gold mohurs.

S. C. S. *Appeal dismissed.*

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 260 OF 1901.

AMEER ALI, J. KRISTA CHANDRA  
PRATT, J. BHADRA, Petitioner,

1901. THE KING-EMPEROR,  
17, April. Opposite Party.

*False evidence, giving of—Criminal Procedure Code (Act V of 1898), sec. 477—Security to appear when called upon to answer charges yet to be framed.*

*There is no warrant in law for an order by a Sessions Judge directing a witness alleged to have given false evidence in a judicial proceeding before him to give security to appear before him when called upon to answer charges yet to be framed under sec. 193 of the Indian Penal Code.*

This was a rule issued on the 26th of March 1901, against the order of the Sessions Judge of Noakhali, dated the 16th of February 1901.

The facts of the case are similar to those in the case of Mohim Chunder Mozumdar reported in 5 C. W. N. 615.

Mr. C. R. Das and Babu Surendra Nath Guha for the Petitioner.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

We think that the order of the Sessions Judge directing the Petitioner to give

security to appear when called upon to answer charges not yet framed under sec. 193 of the Indian Penal Code is not warranted by law.

In setting aside that order we desire to state that it will still be open to the present Sessions Judge either to sanction a prosecution on specific charges or to proceed under sec. 476 of the Criminal Procedure Code if he considers it expedient. We purposely refrain from expressing any opinion on the evidence given by the Petitioner.

H. P. C. *Rule made absolute.*

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 146 OF 1901.

AMEER ALI, J. } In the matter of  
PRATT, J. } UMESH CHANDRA  
1901. } CHAKRAVARTI,  
29, March. } Petitioner.

*Criminal Procedure Code (Act V of 1898), secs. 476, 477—Commitment to Court of Session for giving false evidence—Preliminary enquiry, if necessary—Sessions Judge, jurisdiction, or power of, as a Court of Appeal to order commitment—Difference in procedure between the provisions of secs. 476 and 477—Applicability of the sections—Penal Code (Act XLV of 1860), sec. 193—False evidence, giving of.*

*Sec. 477 of the Code of Criminal Procedure deals with cases which transpire before the Court of Session itself, and in which the Sessions Judge is in a position to declare, without any further enquiry, that the person against whom action is necessary under that section has in fact committed an offence mentioned in sec. 193, C. P. Code.*

THE QUEEN v. NOMAL (1) referred to.

*Where evidence was given by a witness*

(1) 12 W. R. Cr. 69 (1869).

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*before a Deputy Magistrate, which was in conflict with the statements of certain other witnesses, and the Deputy Magistrate did not believe the statements of that witness, and the Sessions Judge, on appeal, was inclined to take the same view, and committed that person to take his trial before the Court of Session on a charge of giving false evidence in a judicial proceeding :*

Held—*That there was no fact before the Sessions Judge upon which he could come to the conclusion that the offence of giving false evidence had been committed either before him or before the Deputy Magistrate.*

*That the only conclusion to which he could come was that the offence of giving false evidence might have been committed before the Deputy Magistrate and that the case could not be ripe for commitment until a further enquiry was made in the matter and an opportunity given to the person to show that his statements were not untrue to his knowledge.*

*That the section applicable to the facts of the present case was sec. 476, and that the commitment of the Petitioner under sec. 477 was illegal.*

This was a rule granted on the 18th of February 1901, against the order of A. P. Pennell, Esq., Sessions Judge of Noakhali, dated the 17th of January 1901, committing the Petitioner to the Court of Session for an offence under sec. 193, I. P. Code.

The facts of the case material to this report were shortly these:—An appeal was preferred to the Sessions Judge of Noakhali from a conviction by a Deputy Magistrate. In the course of his judg-

ment the Sessions Judge came to the conclusion that the Petitioner, Umesh Chandra Chakravarti, who was a police-officer, did not tell the truth while giving his evidence before the Deputy Magistrate. Taking that view he directed proceedings against him for an offence under sec. 193 of the Indian Penal Code.

Thereupon the Petitioner obtained the present rule to shew cause why the commitment should not be set aside or in the alternative, why the case should not be transferred to some other Court of Session or such other order made as to the High Court may seem fit and proper.

Mr. Henderson with Babu Surendra Nath Guha for the Petitioner.

No one appeared to shew cause.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

This rule was issued upon the Magistrate of the district to show cause why the commitment of the Petitioner shall not be set aside, or, in the alternative, why the case should not be transferred to some other Court of Session, or such other order made as to this Court may seem fit and proper.

It appears that an appeal was preferred to the Sessions Judge of Noakhali from a conviction by a Deputy Magistrate. In the course of his judgment the learned Sessions Judge came to the conclusion that the Petitioner before us, who was a police-officer, did not tell the truth whilst giving his evidence before the first Court. Taking that view he directed proceedings against him under sec. 193 of the Indian Penal Code. After giving the statements which

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he considers to be false he proceeds as follows:—"These statements of the Sub-Inspector have not been believed either by the trying Magistrate or by myself. Further, it appears to me, as at present advised, that those statements are intentionally false, that Umesh Chandra Chakravarti committed an offence under sec. 193 of the Indian Penal Code by making them, and that it is desirable that he should be placed upon his trial for that offence. I therefore direct that a warrant do issue for the arrest of Umesh Chandra Chakravarti. He may be released on giving bail of Rs. 500 to appear before this Court on the 17th January when a charge will be framed against him."

On the 17th January the Sessions Judge framed the following charge "that you, Umesh Chandra Chakravarti, on or about the 17th day of October 1900 at Sudharam in the course of the trial of Wahid Ali and others before Moulvie Mahomed Azhar, Deputy Magistrate of Noakhali, stated in evidence that I saw Bibi Jan threatening the accused to give cuts with a *dao*. I had the *dao* snatched from Bibi Jan and *chenis* as she was going to give cuts to these accused. I saw that Eusuf Ali struck his head with the *dao* in his hand. I found the *chokra* (Mahomed Sayed) taking part in the raising of the hut. I questioned then, 'who raises this hut,' and this *chokra* replied, 'we raise the hut.' I had seen this *chokra* struggle with Wahid Ali to save the roofs from the opposite party. I had some offensive weapons snatched from Bibi Jan as she was going to use them. These were three *daos* and two *chenis*, which statements you

either knew or believed to be false or did not believe to be true and thereby committed an offence punishable under sec. 193 of the Indian Penal Code and within the cognizance of the Court of Session;" and he directed the accused, the Petitioner, to be tried by the Sessions Court on the said charge; and in the order-sheet he recorded the following order:—"charge framed and read over to the accused, who under sec. 477 of the Code of Criminal Procedure is committed to take his trial before this Court."

The present rule was applied for and obtained from this Court upon the ground that the order of commitment was bad, inasmuch as the learned Sessions Judge acted without jurisdiction in not holding an inquiry under sec. 476 and in purporting to act under sec. 477 of the Code of Criminal Procedure. It will be noticed from the order-sheet that the Sessions Judge did purport to act under sec. 477; and the question we have to consider is whether he was right in dealing with the matter under that section, or whether he ought not to have proceeded with the case under the provision of sec. 476.

Sec. 477 runs thus:—"Subject to the provisions of sec. 444, a Court of Session may charge a person for any offence referred to in sec. 195 and committed before it, or brought under its notice in the course of a judicial proceeding, and may commit, or admit to bail and try such person upon its own charge" whilst sec. 476 provides that "when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiry into any offence referred to in sec. 195, and committed before it,

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or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial."

As already stated the question is whether the present case falls under sec. 477 or sec. 476. Upon a full consideration of the matter, it appears to us that sec. 477 deals with cases which transpire before the Sessions Court itself, and in which the Sessions Judge is in a position to declare, without any further inquiry, that the person against whom action is necessary under that section has in fact committed an offence mentioned in sec. 195. We are supported in this view by a decision of Mr. Justice Norman which, though under the old Act, seems to us to supply the principle for the consideration of the present question. The case to which we refer is *The Queen v. Nomal* (1) where that learned Judge, after referring to sec. 359, goes on to deal with the provisions of sec. 172. That section, so far as the present question is concerned, is identical with sec. 477 of the present Code. With reference to its scope Mr. Justice Norman says as follows:—"The 172nd section empowers a Court of Session to charge a person for an offence committed before it, or under its own cognizance." The words in sec. 477 are:—"Committed before it or brought under its notice in

a judicial proceeding." Then the learned Judge goes on to say:—"As I understand the expression, under its own cognizance, it is meant to provide for a case where it is brought under the notice of the Court of Session in the course of a judicial proceeding that the crime with which the party is to be charged has been committed by him." Apparently the alteration in sec. 477 was effected in view of the expression made use of by Mr. Justice Norman. That learned Judge proceeds to add:—"If on a trial of a prisoner before a Court of Session, a witness gives evidence which contradicts that given by the same witness before the committing officer, and there is no evidence whatever to show which statement is true, it appears to me that it cannot be said to be within or under the cognizance of the Sessions Judge that the witness has given false evidence before the committing officer. What is brought under the cognizance of the Judge is that the witness may have given false evidence before the committing officer. It appears to me that without further inquiry the case is not ripe for commitment." It appears to us that these words apply with peculiar force to the facts of the case with which we have to deal; here the evidence was given by the Petitioner before the Deputy Magistrate, which evidence was in conflict with the statements of certain other witnesses. The Deputy Magistrate did not rely upon the statements of the Petitioner, and the Sessions Judge was inclined to take the same view, though in his order he qualifies it by saying, "as at present advised." It is evident therefore that there was no fact before

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him upon which he could come to the conclusion that the offence of giving false evidence had been committed either before him or before the Deputy Magistrate. The only conclusion to which he could come was that the offence of giving false evidence may have been committed before the Deputy Magistrate; and therefore to use the words of Mr. Justice Norman, the case could not be "ripe for commitment" until a further inquiry was made in the matter, and an opportunity given to the Petitioner to show that his statements were not untrue to his knowledge.

It is clear, therefore, that the commitment of the Petitioner under sec. 477 was illegal, inasmuch as the Sessions Judge did not proceed under the section which was applicable to the matter.

We accordingly set aside the commitment made by the Sessions Judge on the 17th January last; but in doing so, we desire to say that it will be open to the present Sessions Judge of Nonkhali to take such steps in the matter as he may be advised under sec. 476 of the Code of Criminal Procedure.

H. P. C. *Rule made absolute.*

#### PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE  
PUNJAB.]

THE LORD CHANCELLOR.	) AHMAD YAR KHAN and ors., v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL and another.
LORD MACNAGHTEN.	
LORD DAVEY.	
LORD ROBERTSON.	
LORD LINDLEY.	
1901.	
11, May.	

*Irrigation canals—Sanction of Government to construct canal through its own land—*

*Right of excavators to the land through which canal is constructed—Landlord's encouragement to another to lay out money on his land under an expectation.*

*If a man, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such expectation, with the knowledge of the landlord and without objection by him lays out money upon the land, a Court of Equity will compel the landlord to give effect to such expectation.*

RAMSDEN v. DYSON (1) referred to.

*In 1860 Plaintiffs' grandfather obtained from the Government sanction to construct a canal from the river Sutlej for the irrigation of certain lands belonging to Government, the revenues of which were at that time leased to him. He thereupon commenced to construct the canal at his own expense, and the canal was finally completed by his son. It was constructed partly on Government lands and partly on the land of private owners under arrangements between them and the Plaintiffs' father and grandfather:*

*Held—That the Plaintiffs had acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed.*

This was an appeal from a decision of the Chief Court of the Punjab of 24th January 1898 confirming that of the

(1) 1 F. & I. Ap. 129 at p 170 (1865).



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Divisional Judge of Lahore by which the Plaintiffs-Appellants' claim to proprietary right in the Hajiwah Canal, 50 miles long, in the district of Multan, was rejected.

The canal was excavated by the Plaintiffs' grandfather Ghulam Mustapha Khan and their father Ghulam Kadir Khan by permission obtained from the Commissioner of the district in the year 1861 at a cost of about 9 lakhs of rupees expended by the said ancestors of the Plaintiffs, and remained in their possession until 10th December 1888.

It passed in its course from the Sutlej river through many villages owned by persons not parties to this suit, whose consent Plaintiffs' ancestors had obtained under agreements to supply them with water.

The Government waste lands of over 60,000 acres which were farmed by Plaintiffs and others were incapable of cultivation for want of water. The canal terminated in waste lands cultivated by the Plaintiffs' said grandfather, and it was admitted that Government very largely benefited by such undertaking. Farms of waste lands were limited to the period of the existing settlement. In considering the course to be adopted in the new settlement, proposals were made for a lease to Plaintiffs' father of a large tract. After much correspondence these negotiations ended in the Viceroy sanctioning in proprietary right a grant of 60,000 acres to Plaintiffs' father in December 1879. In the settlement records the canal was entered as the property of Plaintiffs' said father.

A formal deed was executed on 26th March 1886 after suggestions from Plaintiffs' father that certain of its terms

should be amended which was not agreed to. The Chief Secretary to the Punjab Government signed it for the Respondents; Plaintiffs' father signed it on his own behalf.

Upon the death of Plaintiffs' said father disputes arose among his four sons, the Plaintiffs-Appellants being the three younger sons; owing to such quarrel Government officials took over possession and management of the canal, first temporarily, then permanently on 27th February 1890.

Plaintiffs then instituted this suit claiming proprietary right in the canal for an account, injunctions and other reliefs.

Defendants denied the Plaintiffs' right to the canal outside the 60,000 acres grant, and relied on the said agreement. The 8th clause was as follows:—

"The canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee. Provided always that in consideration of the premises the said grantor, his successor and assigns shall at all times hereafter whenever he or they shall think necessary be entitled without the consent of or permission from the said grantee, his heirs, legal representative and assigns, to take into his or their own hands and control the management and distribution of the water of the said canal without payment of any compensation whatsoever, and further to clear the said canal and recover the cost of clearance and management by a canal rate to be levied on the area irrigated."

The main question for determination in this suit were the rights of the Plaintiffs in the canal prior and subsequent

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to the deed of the 20th March 1886, the finding on the latter question involving the legal construction of that deed.

On the 7th June 1895, the Divisional Judge delivered judgment, and found

- I. That prior to the 20th March 1886, Plaintiffs had no legal rights in the Hajiwah Canal; as soon as the lease of the Bar-barini lands terminated any rights they may have had terminated also.
- II. That the proprietary rights were in the hands of the Government, who did not confer them on Ghulam Kadir by the *sanad* of 1886, and that Ghulam Kadir by accepting the *sanad*, after the Financial Commissioner's reply to his petition of the 7th July 1885, "accepted the position, and admitted that there were no further rights beyond those detailed in the *sanad*, and that outside the grant he had no proprietary right," and waived all claims in consideration of the gift of the land.
- III. That on the true construction of paragraph 8 of the *sanad*, the Defendant 1 was "entitled to take into his own hands through his subordinate officers, at his pleasure all the powers which were exercisable by the Plaintiffs in the Hajiwah Canal," and dismissed the suit with costs.

An appeal to the Chief Court of the Punjab was also dismissed on the 21th January 1898. The Judges of that Court held :

- (1) That by the sanction originally given to construct a canal, all that was granted to Ghulam Mustapha

Khan was permission to make a canal for the purposes of his lease, and that in the event of that lease not being renewed on its expiry his rights in the canal would lapse with the lease.

- (2) That the position taken up by Government in the letter of the 17th November 1890, was consistent with the deed of 1886 and with the letter of the Financial Commissioner of the 3rd August 1885, and that Ghulam Kadir Khan's signature of the deed without amendment establishes the intention of the parties to have been as now contended for by the Government.

- (3) That the Plaintiffs were not entitled to any relief even with regard to such rights as they were now admitted by Defendant to possess.

It was submitted that having regard to the enormous expense incurred by the Plaintiffs' grandfather and father in constructing the canal in question, amounting to 9 lakhs of rupees, and to the rights in the land of the canal and the water conveyed in the canal previous to the grant, to the arrangements made with several proprietors of the villages over whose land the canal passes, it was unreasonable to suppose that Plaintiffs could have intended by clause 8 of the deed in question to concede to the Government the power at its will to deprive them of those valuable rights merely in consideration of the grant of waste lands, which might at any time be rendered valueless by the Government assuming the exercise of this power and fixing a water rate which might leave

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the Plaintiffs no margin of profit. The title of the Government was questioned on behalf of the Appellants as regards the canal.

*Mr. Mayne, Mr. C. W. Arathoon, Mr. Degruyther and Mr. A. K. Khan* for the Appellants.

*Mr. Arthur Cohen, K. C., and Mr. Branson* for the Respondent.

The case was argued on 20th, 21st February and on the 6th March.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The substantial question to be determined in this case is what are the respective rights of the Appellants (who were Plaintiffs in the suit) on the one hand and the Government on the other in the Hajiwah Canal—a work constructed many years ago under the sanction of the Government by the grandfather and the father of the Plaintiffs? Is the canal for the greater part of its course now vested absolutely in the Government to the exclusion of the representatives of the original undertakers (as both the Courts below have held) or have the Appellants as such representatives in common with their elder brother, the second Respondent, a proprietary right in whole of the canal subject only to a special privilege conferred upon or reserved to the Government by a *sanad*, dated the 20th of March 1886.

The Hajiwah Canal is an important irrigation work in the district of Multan. It is some 50 miles long about 40 feet wide and more than 10 feet in depth. It is supplied with water from the Sutlej and extends from its intake on that river

to certain lands in Tashil Mailai which were formerly jungle or waste lands belonging to the Government and known as Bar-barini lands from the circumstances that their occasional cultivation depended upon rainfall.

It seems that in 1860 the revenue of these lands which were inhabited mainly by nomad tribes was in lease to one Ghulam Mustapha Khan for the period of the then current settlement. On the 5th of May in that year Mustapha Khan presented a petition to Government stating that "with a view to render the land culturable and facilitate the payment of the lease money and for the benefit of the public" he "at the expense of thousands of rupees from his own pocket" was "willing to dig two water cuts one for the irrigation of the land in Ludan which is occasionally watered from the Sutlej and the other for irrigating the land Khai a Government jungle from the same river." He therefore prayed that he might be granted permission to construct two *nalas*. The order on the petition was that the original should be sent to the Deputy Commissioner of Multan with a request that he would have a plan of the *nalas* in question prepared through the Khan. Under date the 30th of August 1861 there is a memorandum or report among the Government records to the following effect: "A detailed plan of both the *nalas* showing the name and mark of each *nala*, &c., has been prepared. The persons whose lands are to be occupied by the *nalas* are all agreeable to the construction thereof. As regards the compensation (*Hakrasi*) payable to the proprietors of the lands to be occupied

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by the *nalas* the Khan\* has with their consent which has been obtained in a lawful manner come to a settlement that proposals will be made at the time of opening of the *nalas*. Under these circumstances the opening of both the *nalas* should be allowed because a considerable area of land will thus be rendered fit for cultivation, and there is every hope of increase in the Government revenue." Acting on this report the Commissioner sanctioned the project on the 4th of September 1861. There seems to be no other document or record in existence throwing light on the circumstances under\* which the construction of the Hajiwah Canal was authorised or expressing the commands or intentions of the Government with regard to it.

Having thus obtained the sanction of the Government Ghulam Mustapha Khan commenced the construction of the canal. It was completed after his death by his son Ghulam Kadir Khan, the father of the Plaintiffs, and the second Respondent. The canal was constructed partly on Government land and partly on the land of private owners under arrangements with them. The work is said to have cost in all about nine lakhs of rupees. The annual cost of maintenance and clearance appears to be over Rs. 8,000.

The first question is what rights did Mustapha Khan and Kadir Khan acquire from the Government?

It seems to their Lordships that under the circumstances the undertakers acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance and also a right to have the waters of the

Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed.

The principles applicable to such a case are nowhere stated more clearly than by Lord Kingsdown in his judgment in the case of *Ramsden v. Dyson* (1). "If a man," says his Lordship, "under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under an expectation created and encouraged by the landlord that he shall have a certain interest takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (2) and as I conceive is open to no doubt."

Now taking all the circumstances into consideration, having regard to the permanent character of the proposed work, the indefinite amount of the probable expense of construction and the fact that the Government encouraged the undertakers to acquire the necessary land where the line of the canal passed through property in private ownership and also bearing in mind the view of the Government at the time, as appears from Government records, that the work might be constructed and maintained more economically by the Khans than by Government and that it would be better to leave the settlement of the country in the hands of native chiefs, it seems

(1) 1 E. & I. Ap. 129 at p. 170 (1865).

(2) 18 Ves. 323 (1811).

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to be pretty clear that the Government must have intended the Khans to understand and in fact must have led them to expect that all Government land required for the canal would be made over to them in proprietary right. If the Government had intended that, at the termination of the period of the then current settlement, the Government land required and used for the canal should revert to the Government it is difficult to suppose that the Government would have omitted to say so in plain language or that they would have neglected to make provision for securing the transfer to them of the land acquired by the undertakers from private owners.

Upon the expiration of the period of the settlement for which the lease of the Bar-barini lands had been granted to Mustapha Khan, the Government agreed to make a grant to Kadir Khan at a moderate assessment of a tract of land which was irrigated or capable of being irrigated by the canal and at the same time in the interest of the public they stipulated for the right to intervene when necessary in the management and control of the canal.

The *sanad* or deed by which this arrangement was carried out was dated the 20th of March 1886. It contains a grant to Kadir Khan, his heirs and assigns for ever in full proprietary right with retrospective effect from the 29th of December 1879 of a tract of 60,000 acres at a *jama* of Rs. 15,000 per annum for the period of the current settlement. It also contains a grant of an Inam of Rs. 5,000 a year for two lives out of the Government *jama* "in consideration of the general loyalty and good service to

Government of the said grantee and more especially in recognition of his energy and enterprise in digging the Hajiwah Canal." And then there is a provision in the following words:—

8. "The canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee, provided always that in consideration of the premises the said grantor, his successors and assigns shall at all times hereafter, whenever he or they shall think necessary, be entitled, without the consent of, or permission from the said grantee, his heirs, legal representatives and assigns, to take into his or their own hands and control the management and distribution of the water of the said canal without payment of any compensation whatsoever, and further to clear the said canal and recover the cost of clearance and management by a canal rate to be levied on the area irrigated."

Assuming that at the date of the *sanad* Kadir Khan had a proprietary interest in the canal as their Lordships are prepared to hold, the only remaining question is what is the effect of cl. 8?

It seems to their Lordships that this clause means exactly what it says. It does not give the Government a right to seize and confiscate the canal. It merely gives them the right from time to time whenever they think it "necessary," that is necessary in the interest of the public, to take into their own hands the management and distribution of the waters of the canal and to clear the canal and recover the cost in the manner provided by the *sanad* and that "without payment of any compensation whatsoever." It is for the Government to determine when and under what circumstances it is necessary to take possession of the canal and how long it may be necessary to withhold the control and management of the canal from its owners. The canal does not become theirs nor do they

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acquire any proprietary rights in it by assuming its management and control. They are not however in the opinion of their Lordships in the position of receivers or managers or trustees for the owners or accountable to the owners for profits. If the owners are aggrieved by the action of the Government in taking or keeping possession of the canal, it is a case for representation and remonstrance not for the intervention of the Court.

In the present case the Government, it seems, thought it necessary to assume possession and control of the canal in consequence of dissensions which arose on the death of Kadir Khan between the members of his family and they are entitled to hold such possession and control so long as they think it necessary.

The result, therefore, is that in the opinion of their Lordships the Appellants are entitled to a declaration that subject and without prejudice to the privilege conferred upon the Government by cl. 8 of the *sanad* of the 28th of March 1886 they are entitled to a proprietary right in three-fourth shares of the Hajiwah Canal. In other respects the suit fails. Their Lordships are of opinion that there ought to be no costs of the first hearing but that the first Respondent ought to pay the costs of the appeal to the Chief Court of the Punjab.

Their Lordships will humbly advise His Majesty accordingly.

The first Respondent will pay the costs of this appeal.

Solicitors: *Messrs. Watkins & Lampriere* for the Appellants.

Solicitor: *Solicitor, India Office*, for the Secretary of State.

C. W. A. *Appeal allowed with costs.*

# [CIVIL APPELLATE JURISDICTION.]

APPEAL, UNDER SEC. 15 OF THE LETTERS  
PATENT, NO. 1 OF 1900.

MACLEAN, C. J. and others,  
SALE, J. Plaintiffs, Appellants,  
BRETT, J.

1901. GOJAB CHAND,  
26, March. Defendant,  
Respondent.

*Transfer of Property Act (IV of 1882),  
sec. 85—Parties—Hindu Law—Mitakshara  
family—Mortgage by father—Suit by mort-  
gagee against father alone—Decree whether  
binding upon son—Son interested in the  
property.*

*In a suit against a Mitakshara father  
on a mortgage of ancestral property  
executed by him alone, the son is a neces-  
sary party where the mortgagee has notice  
of his interest. The language of sec. 85  
of the Transfer of Property Act is com-  
pulsory and all persons having an interest  
in the property mortgaged or, in other  
words, in the equity of redemption ought  
to be made parties to a suit on the  
mortgage.*

*In a suit by a Mitakshara son for a  
declaration that a mortgage decree obtained  
against the father alone is not binding on  
him on the ground (1) that he was not  
made a party to that suit and (2) that the  
debt was for immoral and illegal purposes,  
where it is found that the debt was not con-  
tracted for immoral and illegal purposes,  
the only remedy the son is entitled to is  
a right to redeem.*

This was an appeal preferred on the  
4th of June 1900, against the decision  
of the Hon'ble Chunder Madhub Ghose  
differing from that of the Hon'ble Richard  
Harington, two of the Judges of this

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Court, dated the 7th May 1900, in Appeal from Original Decree No. 397 of 1898. The judgments of the two learned Judges are reported in 4 C. W. N. 701 where the facts of the case are also stated.

*Dr. Rash Behary Ghose* (with him *Babus Karuna Sindhu Mukerji, Akhoy Kumar Banerjee* and *Surendro Nath Ghosal*) for the Appellant.—The short question upon which the learned Judges of this Court have differed is whether the mortgagee of an ancestral property, under a mortgage by a Mitakshara father, can sell the interest of the sons under a decree obtained against the father alone, the mortgagee being aware of the existence of the sons. The question practically turns upon the true construction of sec. 85 of the Transfer of Property Act. Both the learned Judges agree that the mortgagee had notice of the son's interest, but they have differed about the intention of the Legislature. *Harington, J.*, says that the son should have been joined in the action and that one cannot say in the face of the express provisions of sec. 85 that the mortgagee is entitled to conclude the son by the decree; while *Ghose, J.*, has followed a different line, enquiring what the law was before the Transfer of Property Act, and holding that the son was practically represented in the action by the father. But it is one thing to say that the Mitakshara father is the *kurta* and another thing to say that because he is *kurta*, therefore he can be sued as a representative so as to bind the interests of the sons.

*MACLEAN, C. J.*—We should like to hear the learned Advocate-General now.

*Mr. Advocate-General* (*The Hon. J. T.*

*Woodroffe*, with him *Babus Golap Chunder Sarkar* and *Dwarkanath Mitter*) for the Respondent.—The first question to be enquired into is whether the mortgagee had notice of the son's interest. There was no allegation in the pleadings, and there is no finding in the judgments of any of the Courts as to notice. [*MACLEAN, C. J.*—I take it that the question was argued as to notice with reference to sec. 85, for I find references to the question of notice in the judgments.] That question was not gone into and hence there is a preliminary question of fact to be established before the question of joinder of parties under sec. 85 can arise. [*MACLEAN, C. J.*, referred to the evidence about notice.] There had been a rule well-known and well-recognised long before sec. 85 was enacted about the interests which might be represented by a Mitakshara father. The joint family consisted of the father and the son in the present case. There was no separation of interests between them. No person in a Mitakshara family can predicate that he has any particular share. The rule in sec. 85 was recognised as a rule of procedure in mortgage cases long before the Transfer of Property Act came into operation; and when you find that the rule so understood was considered by the Privy Council as not to be broken by the non-joinder of a Mitakshara son, the inference is that the decisions of the Privy Council, to which *Mr. Justice Ghose* refers, must rest on the principle that the Mitakshara son has not such an interest in the property as to require him to be impleaded and that the suit against the father is to be considered as a suit against all the members of the joint

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family. The rule laid down in *Norendra Nath Sarkar v. Kamalbashini Dassi* (2) applies only where a branch of the law has been wholly codified and not otherwise. The Transfer of Property Act is not a Code in that sense, and it is permissible therefore to enquire into the case law on the subject. See on this point the observations of Chitty, J., in *Re Budgett, Cooper v. Adams* (8). [MACLEAN, C. J.—Do you say the Transfer of Property Act is not a Code?] It is not a Code; it only amends certain portions of the law relating to a particular subject. If no definite intention can be gathered from the Acts of the Legislature, effect ought, I submit, to be given to the rules laid down in the existing decisions of the Courts. See Maxwell on the Interpretation of Statutes, 3rd Ed., p. 143. Looking at the matter from another point of view, it is clear that the son has no grievance whatsoever. The mortgage has been held to be binding upon the son inasmuch as the debt was not contracted for an illegal or immoral purpose. It has been held that it is not open to a son who has not been made a party to object in execution that he is not bound. See *Hiralal Sahu v. Parmeshar Rai* (9). Regard being had, therefore, to the circumstances of the case, it may with confidence be contended that I am out of the operation of sec. 85.

What is the consequence of a suit not complying with the provisions of sec. 85? It only enables a man interested to assert his right to redeem. See *Dewji v. Sambhu and another* (7).

(2) I. L. R. 23 Cal. 571 (1896).

(7) I. L. R. 24 Bom. 135 (1899).

(8) 2 Ch. 557 (1891).

(9) I. L. R. 21 All. 356 (1899).

In *Jogendra Deb Roykut v. Funindro Deb Roykut* (10), it was held that the father represented the son. Sec. 85 is only a statutory recognition of an existing rule. The intention of the Legislature has to be ascertained. Did or did not the Legislature mean to alter the existing rule? It is strange the Legislature has not provided for any penalty—there is no mention whether the suit is to merit dismissal or not. It is submitted that the Mitakshara son had no interest in effect to entitle him to be joined as a party. See the remarks of Banerjee, J., in *Bhowani Prosad v. Kallu and others* (4). The question would always be whether or not the son was represented by the father. See *Suraj Bansi Koer v. Sheo Proshad* (11); *Nanomi v. Modun Mohun* (12). See also *Ramasamayyar v. Virasami Ayyar* (5) and *Palani Goundan v. Ramyya Goundan* (6). But after all has been said and done, what remedy has the Plaintiff in the present suit? The mortgage has been found to be good and the decree is unassailable. It would serve the Appellant no purpose unless he can attack the mortgage debt.

MACLEAN, C. J.—We should like to hear you, Dr. Rash Behary Ghose, only on the question of the relief you want in this suit. Is it not the case that, unless you are in a position to impeach the debt itself, you will be concluded?

Dr. Ghose in reply.—The mortgages cannot proceed to execute the decree for sale. Is the Plaintiff who ought to have

(4) I. L. R. 17 All. 537 at p. 548 (1895).

(5) I. L. R. 21 Mad. 222 (1898).

(6) I. L. R. 22 Mad. 207 (1898).

(10) 14 Moo. I. A. 367 (1871).

(11) L. R. 6 I. A. 88 (1879).

(12) L. R. 13 I. A. 1 (1885).



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been made a party bound to redeem or is he not entitled, as long as the mortgage is not foreclosed in a properly constituted suit, to say that the mortgagee cannot touch his property? See *Nathu Singh and others v. Gumani Singh and others* (13). I say that as long as you don't foreclose me I am entitled to retain possession of the land. I only ask for a declaration that my properties cannot be sold under the decree which the mortgagee has obtained. I say there is no *binding* decree upon me. It is admitted I was a necessary party in the previous suit. That being so, I am entitled to say that my interest is unaffected.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—This is a suit by one Lala Suraj Prosad, who is a minor suing by his next friend and also by his step-mother, against one Golab Chand, and the object of the suit is to have it declared that a certain mortgage bond for Rs. 6,900, dated the 4th of April 1893, executed by Lala Chander Kailas who was the father of the minor Plaintiff and the husband of the co-Plaintiff, is not binding upon, and cannot be enforced against the joint properties mentioned in the bond, and for consequential relief.

The case is governed by the Hindu law of the Mitakshara School; and the facts, so far as they are necessary for the purposes of the questions we have to decide, may be briefly stated. The father of the minor Plaintiff one Lakanji, succeeded his father in 1875 or 1876. At that time he was a minor; he attained

his majority in November 1890, and then took over charge of the joint-family estate left by his father, the joint-family estate of a Hindu family governed by the Mitakshara School of law. Lakanji married during his minority, and the minor Plaintiff is his only son. Lakanji appears to have borrowed money on mortgage bonds of the family property in February 1891, in August 1891, in October 1891, and in May 1892, but the mortgage bond with which we have to deal is one dated the 14th of April 1893 for the amount I have stated.

The sole mortgagor was Lakanji who, at the date of the mortgage, was undoubtedly the *karta* or manager of the property of the joint family. On the 31st of August 1893 the present Defendant, as mortgagee, instituted a suit against Lakanji alone, to enforce the mortgage, and, in that suit, the usual mortgage decree was obtained on the 20th of February 1894. The present minor Plaintiff was not a party to that suit. In November 1893, he, through his grandmother as next friend, instituted a suit against his father for a partition of the joint ancestral property. The present Defendant, the mortgagee Golab Chand, was not a party to that suit, and a decree for partition was obtained on the 12th of March 1894. Lakanji died on the 23rd of July 1894; and when in September 1894, the mortgagee, Golab Chand, applied for execution of his decree against the minor Plaintiff, the objection was taken that the debts contracted by the father were for illegal or immoral purposes, and that the Plaintiff not having been made a party to the mortgage suit, the family

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property could not be sold. This objection was overruled; hence the present suit.

The suit was heard before the Subordinate Judge. He held that the money secured by the mortgage was not borrowed for illegal or immoral purposes, and that the partition decree was not binding upon the mortgagee, and dismissed the suit. There was then an appeal to this Court, and the appeal was heard before Mr. Justice Ghose and Mr. Justice Harington, who agreed with the Subordinate Judge that the money was not borrowed for immoral or illegal purposes, but differed upon the question as to whether, or not, the present minor Plaintiff, not having been a party to the mortgage suit, was bound by the decree in that suit. Mr. Justice Ghose has held that it was not necessary to make the minor Plaintiff a party to that suit, and that, in effect, he was represented by his father, who was the *kurta* of the family, and consequently he confirmed the decree of the Subordinate Judge and dismissed the suit. Mr. Justice Harington, on the other hand, took the opposite view, and held that the minor Plaintiff was a necessary party to the suit, and was in favour of reversing the decree of the Subordinate Judge, holding that the decree was not binding upon the minor. In this conflict of opinion, an appeal has been preferred under sec. 15 of the Letters Patent.

In this state of circumstances, the following questions appear to me to arise for our determination: *first*, whether the mortgage debt in question was contracted by Lakanji for illegal or immoral purposes; *secondly*, assuming that

it was not whether the minor Plaintiff not having been made a party to the mortgage suit is bound by the decree made in that suit; and, *thirdly*, if that decree is not binding upon him, what relief is he entitled to in the present suit?

The first question may be readily disposed of. The Subordinate Judge, and both the Judges in this Court, confirming the Subordinate Judge, have held that the mortgage debt was not contracted for illegal or immoral purposes, and the learned *vakil* for the Appellant has not argued that point before us. It must, therefore, be taken as concluded that, as between the minor Plaintiff and the Defendant in this suit, the mortgage debt was not contracted for illegal or immoral purposes, and that the mortgage is a good and valid mortgage, no other ground having been even suggested for impeaching its validity. So much then for the first point.

The second point, to my mind, depends upon the true construction of sec. 85 of the Transfer of Property Act, which runs as follows:—"Subject to the provisions of the Civil Procedure Code, sec. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter (*vis.*, Chapter IV) relating to such mortgage; provided the Plaintiff has notice of such interest."

In connection with this section, the first point we have to decide is, whether the Plaintiff, the mortgagee, had notice of the minor's interest; for it cannot be successfully disputed, nor has such a contention been seriously urged, that minor Plaintiff was not a person

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an interest in the property comprised in the mortgage.

It has been urged for the Respondent that this point has not been pleaded with sufficient precision, and that the Plaintiff ought to have specifically pleaded that at the date of the institution of the suit, the mortgagee had notice of the minor's interest. The pleading, no doubt, is not so precise as it might have been, but looking at paragraph 7 of the plaint and at paragraph 11, and at issue No. 6, it would, I think, be difficult to say that the point had not been raised. It is true that the Subordinate Judge has virtually not dealt with this question, and that there is no finding by him upon the question of notice or otherwise, but the point was argued before Mr. Justice Ghose and Mr. Justice Harington, and both Judges have found,\* upon the evidence, that the Respondent had notice of the interest of the son, the minor plaintiff. I think we must, therefore, deal with this point which, in fact, is the foundation for the appeal under the Latters Patent. I am disposed to agree with the Respondent that the evidence is not very precise upon the point, but, looking at the admission by the Defendant's witnesses, it is difficult to say upon this question of fact that the view taken by the learned Judges is wrong. I therefore proceed upon the footing that when the suit was instituted, the mortgagee had notice of the minor Plaintiff's interest. That being so, ought he not to have been made a party to the mortgage suit? Sec. 85 of the Transfer of Property Act is compulsory. The words are "must be joined" as a party to any suit under this chapter relating

to such mortgage. If then the minor had an interest, as he obviously had, in the property comprised in the mortgage, if the plaintiff had notice of such interest, as we hold he had, how can we say in the face of this section that he ought not to have been joined as a party?

It is urged that the minor Plaintiff was, through his father, a party to the mortgage suit, that his father as the *karta* or manager of the property of the joint family represented him in that suit; and that he was, in fact and in law, a party to that suit within the meaning of sec. 85, and in taking this view and in arriving at this conclusion, Mr. Justice Ghose has enquired into the law and relied upon the law, as it existed before the passing of sec. 85 of the Transfer of Property Act, and has referred to and relied upon a number of cases to show what the law was when the statute was framed. But what we have to do is to look at the section which by reference to sec. 437 of the Code of Civil Procedure indicates, in very clear terms, who are to be regarded as representative persons, and they are trustees, executors and administrators. The father in the present case did not answer any of these descriptions.

In arriving at my conclusion in the case before us, I have no desire to impugn, nor could I judicially impugn, the various decisions of the Judicial Committee of the Privy Council, upon which Mr. Justice Ghose relies, as showing what is the true position of a father in a joint Hindu family governed by the Mitakshara School of law. Those decisions are binding upon me. But

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what we have to consider is not what the law was before the passing of the Transfer of Property Act, but what the Legislature has said is to be the law after the passing of the Act. The Transfer of Property Act was clearly an Act to codify a particular branch of the law, and in approaching and dealing with the case Mr. Justice Ghose appears to me to have adopted the very course which has been so much deprecated by Lord Herschell when advising the House of Lords in the case of the *Bank of England v. Vagliano* (1). "I think," said Lord Herschell, "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code of particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that, on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

That view has been adopted by the

Judicial Committee of the Privy Council in dealing with a case, under the Indian Succession Act, equally with the Transfer of Property Act, a statute codifying the law, in the case of *Norendra Nath Sircar v. Kamalbashini Dassi* (2), and I have myself taken the same view in the case of *Raj Narain Bhadury v. Ashutosh Chuckerbutty* (3). That Mr. Justice Ghose has adopted the course deprecated by the judgments to which I have referred is reasonably clear from the following passages, as in other passages, in his judgment: "With a view to determine this question it may be useful to consider, in the first instance, what was the state of the law, at the time when the Transfer of Property Act was passed, as to the true position of the father in a Mitakshara joint family and the rights and liabilities of a son, especially of a minor son, jointly interested with his father in ancestral property, when such property is charged by the father for a loan contracted by him, or when it is sold or is sought to be sold in execution of a decree obtained against him alone." And, in passing, I may observe that the cases in the Privy Council upon which Mr. Justice Ghose relies point only to a limited representation on the part of the father, for, if the father absolutely represented the son, it would not have been open to the son to bring a suit to impeach the mortgage on the ground that the advance was for an illegal and immoral purpose as clearly he could do. At the time the Transfer of Property Act was passed, the position of the

(2) I. L. R. 23 Cal. 571 (1896).

(3) 4 C. W. N. 337; s. c. I. L. R. 27 Cal. 649 (1900).

(1) L. R. App. Cas. 107 (1891).

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father in a Hindu joint family as *karta* or manager, whether under the Daya-bhaga or Mitakshara Schools of law, was perfectly well-known and recognized, and yet the Legislature did not think fit to place him in the same category as a trustee, executor or administrator, or in other words as one who, in a suit to enforce a mortgage, might be sued as representing the interests of all the members of the joint family. If one were at liberty to speculate as to the motives of the Legislature in framing the section in question, I should have been disposed to say that it was so framed in order to get rid of the questions on this head which were raised in the cases relied upon by Mr. Justice Ghose, and to discourage and avoid multiplicity of suits by making it obligatory upon the mortgagee to bring all persons before the Court who had an interest in the property, and of whose interest he had notice. But I have no desire to speculate upon the motives which may have led to the language of this section: I prefer to rely upon the plain and unequivocal language of the section itself, which to my mind is absolutely clear upon the point, nor do I see why we should try to, or how we properly can get out of this plain and unequivocal language. I need scarcely add that all the cases to which I have referred were decided before the passing of the Transfer of Property Act.

In my opinion the minor Plaintiff ought to have been made a party to the mortgage suit, and, for the purposes of that suit, he was not represented by his father, the mortgagor.

The only other question is what are

the present rights and remedies of the minor Plaintiff? It is urged for the Appellant that, inasmuch as the decree in the mortgage suit, by reason of his not having been a party to that suit is not binding upon him, he is entitled to a declaration to that effect; and we have been told, with an almost cynical frankness, that the advisers of the minor propose to leave the mortgagee to bring another suit to enforce his mortgage, and in that suit the minor will again set up that the debt was incurred for illegal and immoral purposes. It has not been suggested that there is any other possible defence open to the minor except the defence that the money was borrowed for illegal or impious purposes. But that very issue has been raised and tried in the present suit and has been decided adversely to the minor Plaintiff, and must now be taken as between him and the mortgagee to have been finally and conclusively determined.

If the minor had been a party to the original mortgage suit and it had been found in that suit, that the mortgage debt was not contracted for immoral or illegal purposes, as has now been found, and there were no other defence to the mortgagee's claim, what would have been the rights of the minor in that suit? Taking the mortgage to be valid, as it has been found in this suit to be, his only right, so far as I can see, would have been a right to redeem. That right has been offered him in this suit, and we are prepared to give him a decree to that effect, but the offer has been refused on the minor's behalf.

The whole matter is now before us, the minor Plaintiff has raised in this suit

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all the objections he can to the validity of the mortgage, and I can see nothing to prevent us from finally dealing with the matter, and placing the minor in the same position in which he would have been, had he been a party to the original mortgage suit; and I do not see that he can successfully claim more than this. No doubt in the case of *Bhowani Prasad v. Kallu and others* (4), the majority of the Judges held that the mortgagee decree-holder was not entitled to sell in execution of his decree for sale, the interest of the sons in the property comprised in the mortgage by the father. But there is material difference between the frame of the suit in that case, and the frame of the present. There the Plaintiff asked for a declaration that their interests were not bound by the decree in the suit to which they were not parties, upon the sole ground that they were not parties, and did not go into the merits of the validity of the mortgage; and that being so, the Court held that they were entitled to such a decree. But here the Plaintiff has gone into the merits, and upon the question of the validity of the mortgage the issue has been found against him, and I do not think he ought to be allowed to contest those merits again. He is in the same position in which he would have been had he been a party to the mortgage suit, and in that suit the validity of the mortgage had been decided against him. It seems to me that now the only right of the minor is to redeem; and that, as we now have all the parties before the Court, we can give him that right, if he asks for it; and that we ought

not to make a decree in his favour merely on the footing that he was not a party to the mortgage suit, when he has invited a decision on the merits, and the decision is against him. It would have been different had he only sought a decree on the ground that he was not a party to the mortgage suit, in which case the validity of the mortgage would, if contested, have to be decided in another suit. But that question has now been decided in this suit. This view is not inconsistent with that taken by the High Court at Madras in two cases, one of *Ramasamayyar v. Virasami Ayyar* (5) which was followed in the case of *Palani Goundan v. Ramyya Goundan* (6) or with the principle laid down by the Bombay High Court in the case of *Denji v. Sambhu* (7).

Under these circumstances, seeing that the minor Plaintiff does not ask for liberty to redeem the mortgage, a right which I understand the mortgagee is not prepared to contest, and it having been found against the minor Plaintiff that the debt was not contracted for immoral or illegal purposes, and no other defence to the mortgagee's claim having been raised or even suggested, it seems to me that his suit and his appeal must fail and that both must be dismissed with costs.

SALE, J.—I agree.

BRETT, J.—I agree.

C. C. G.

(5) I. L. R. 21 Mad. 222 (1898).

(6) I. L. R. 22 Mad. 207 (1898).

(7) I. L. R. 24 Bom. 135 (1899).

(4) I. L. R. 17 All. 537 at p. 548 (1895).

## PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR R. COUCH.

SIR FORD NORTH.

1901.

16, May.

SHANKAR SARUP,

Plaintiff, Appellant,

v.

LALA PHUL CHAND,

Defendant,

Respondent.

*Mortgage—Priority, relinquishment of—Civil Procedure Code (Act X of 1877), sec. 295—Distribution of sale-proceeds—Suit for refund of money so distributed—Order in a suit—Limitation Act (XV of 1877), Sch. II, Art. 13.*

*An order for distribution under sec. 295, Civil Procedure Code, is an order in a suit and as such excluded from the operation of Art. 13 of Sch. II of the Limitation Act.*

*The scheme of sec. 295, Civil Procedure Code, is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the right of the parties, and does not import a conclusive adjudication on those rights, which may be re-adjusted subsequently by a suit.*

*A suit for refund of money paid to the Defendant under an order of Court made under sec. 295, Civil Procedure Code, on the ground that the Plaintiff was entitled to it in preference to the Defendant, is not a suit to set aside the order of distribution and does not come within the Limitation Act, Art. 13.*

VISHNU BHIKAJI PHADKE • v. ACHUT JAGANNATH GHATE (1) approved.

*On 4th May 1883 certain villages were mortgaged to S. for Rs. 15,000. On 30th June 1883, the same were mortgaged to*

*P. for Rs. 7,000. On the 3rd November 1883 a fresh bond executed in favour of S. for Rs. 20,000 which, by its terms, kept alive the bond of 4th May 1883. S. sued on the bond of November 1883 only and not on the bond of May 1883, and obtained a decree on the bond of November. P. also brought a suit on his bond of June 1883 and obtained a decree.*

•• Held—That the mere suing on the bond of November did not amount to a relinquishment by S. of his rights under the bond of 4th May 1883. There was no necessity for S. to sue on the bond of May in order to obtain a sale for the whole of their debt.

This was an appeal from a decision of the Allahabad High Court, dated the 9th of July 1897, reversing a decision of the Subordinate Judge of Meerut, dated the 16th April 1895.

The facts relevant to this report are shortly as follows:—On the 4th May 1883 certain shares in certain villages were mortgaged in favour of the Plaintiff-Appellant for Rs. 15,000. On the 30th June 1883 the same shares were mortgaged in favour of the Defendant-Respondent for Rs. 7,000. On the 3rd November 1883 a fresh mortgage was executed in favour of the Plaintiff of the same shares in addition to certain other shares in the same villages. This mortgage recited that Rs. 15,500 were due on account of the mortgage of the 1st May, that interest was due on the same, and that certain other debts had been incurred which brought up the total amount to Rs. 20,000 and to secure the repayment of this amount the fresh mortgage was executed. The interest payable under this new mortgage was 14 annas per cent. per mensem, where-

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as under the bond of 4th May it was 12 annas.

In 1885 the Plaintiff brought a suit on the mortgage of November 1883 only and not on the mortgage of May and obtained a decree for the amount of the debt under that bond. The Defendant also brought a suit on his bond of June 1883 and obtained a decree. Subsequently an order for sale of the properties was made under both the decrees. On the 7th February 1888 an order for distribution of the sale-proceeds under sec. 295 of the Code of 1877 was made by the Subordinate Judge of Meerut; by that order the Judge held that the Defendant was entitled to be paid in preference to the Plaintiff on the ground that in his decree the Plaintiff's right was solely based on the mortgage of November 1883 and not to any extent on the bond of May. The money was accordingly paid over to the Defendant.

The present suit was thereupon instituted on the 4th February 1891 for an order upon the Defendant to return to him the proceeds of the sale on the ground of the priority of their mortgage of May 1883. The Defendant contended that the suit was barred under Art. 13 of the Limitation Act, the suit not having been brought within one year of the order for distribution and that Plaintiff had lost his right to priority under the mortgage of May 1883. The High Court on appeal from the Subordinate Judge of Meerut decided that the suit was not barred by limitation, but that the Plaintiff had lost his priority under the mortgage of May 1883.

*Mr. Mayne* for the Appellant.

*Mr. Ross* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—The competition between the Appellants and the present Respondents who are the legal representatives of the original Respondent, Lala Phul Chand, deceased, is for moneys realised by the judicial sale of certain villages and paid over under judicial warrant to Lala Phul Chand. The villages were ordered to be sold in execution of certain decrees of which one was held by Lala Phul Chand and two by the Appellants. Those decrees proceeded upon mortgages, and the question on the merits of the suit is which of the parties had the preferable security.

The three bonds giving rise to the dispute were all validly granted and will now be stated in chronological order, without reference to any distinctive particulars irrelevant to the present controversy. On 4th May 1883 the villages (to the extent of certain shares also dealt with in the other two bonds) were hypothecated in favour of the Appellants for Rs. 15,500. On 30th June 1883 a bond of hypothecation of the same property was executed in favour of Lala Phul Chand for Rs. 7,000. On 3rd November 1883 a bond of hypothecation of the same property was executed in favour of persons now represented in interest by the Appellants for Rs. 20,000. The terms of this bond require further statement. It begins by declaring that Rs. 15,500 are due on account of the bond of 4th May 1883 in which the mortgagor's right was hypothecated. Then it sets out that interest is due and that other debts have been incurred, bringing out a total indebtedness of



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Rs. 20,000; and until repayment of all this money the borrower hypothecates what had been hypothecated in the bond for Rs. 15,500. In addition to the above he hypothecated certain other shares in the same villages. The interest under this new bond was to be 14 annas per cent. per mensem (the interest under the bond of May having been 12 annas).

In 1885 the Appellants obtained decrees for the amount of the debt under the bond of November 1883 and for enforcement of the hypothecation by sale. (Two decrees were taken, and not one only, merely because the amount of the bond was payable in moieties, but the Appellants having come to be in right of both moieties this introduces none but an apparent complication.) As the Respondents' contention on the merits depends mainly on these proceedings it is necessary to point out that in their plaints the Appellants sued on the bond of November 1883 alone, and not on the bond of May 1883; and this was the tenor of the decrees obtained on those plaints and also of the orders for execution which followed in due course. Meantime Lala Phul Chand had sued on his bond; and the claims of both parties as well as those of other creditors having matured, an order was made for sale and the sale took place. The sequel of those judicial proceedings was the distribution of the price; and in carrying this out as well as what had preceded the Subordinate Judge of Meerut was acting under the Civil Procedure Code, 1877, and particularly sec. 295. On 7th February 1888 an order was made for distribution of the price, and in it the Judge held that Lala Phul

Chand was entitled to be paid in preference to the Appellants, on the ground that in their decrees the Appellants' rights were rested solely on the bond of November 1883 and not to any extent on the bond of May 1883 and accordingly that their rights were inferior to that of Lala Phul Chand under his bond of June 1883. The money was accordingly paid over to Lala Phul Chand.

The Appellants thereafter on 4th February 1891 filed the present petition of plaint, the remedy sought being that Lala Phul Chand should be ordered to return to the Appellants the proceeds of the sale on the ground of the priority of the hypothecation in their favour made in May 1883. The answer of the Respondents is, *first*, that the suit is time-barred under Art. 13 of the Limitation Act, the suit not having been brought within one year of the order for distribution made by the Subordinate Judge on 7th February 1888; and, *second*, that the Appellants had lost their right to found on the bond of May 1883 as conferring on them a priority over Lala Phul Chand's bond of June 1883. The Subordinate Judge of Meerut held the suit to be barred and by decree sealed on 3rd August 1891 he dismissed it. On 27th June 1893, this decree was set aside by the High Court of the North-West Provinces and the case was remanded. The Subordinate Judge on 16th April 1895 gave to the Appellants the decree sought for; but this decree was on 9th July 1897 set aside by the High Court who dismissed the suit with costs in all Courts. Against this decision the present appeal has been brought.

The theory of the Respondents' plea

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that the suit is time-barred is that it is truly a suit to set aside the order of 7th February 1888 by which the Subordinate Judge ordered payment to Lala Phul Chand of the proceeds of the sale. That the money now sued for is the money so authorised to be paid over is certain. But it is to be observed that the same section of the Civil Procedure Code which authorised the order for payment to Lala Phul Chand authorises also the present suit by the Appellants. The 295th section while providing that the Judge under whose authority the sale takes place shall distribute the proceeds provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. It seems to their Lordships therefore that the present suit is in no sense an action to set aside the order of distribution of 7th February 1888 and that that order does not stand in the way of the present suit. The scheme of sec. 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties, without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke v. Achut Jagannath Ghate* (1) and they concur in the further observation made by the learned Judge in that case that the application of the 13th Article is also precluded by the fact that the order for distribution was a step in

an execution proceeding and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit.

On the merits, their Lordships hold that the Appellants are entitled to prevail. If the bond of November 1883 be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the Respondents was rather that the Appellants by their suing on the bond of November and not on the bond of May had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The Appellants did not need to sue on the bond of May in order to obtain a sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply or to lead others to believe that they abandoned what apart from abandonment was a subsisting hypothecation; and in point of fact Lala Phul Chand in the suit on his own bond expressly recognised the bond of May as a subsisting and prior hypothecation.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be reversed, and the appeal to it ordered to be dismissed with costs, and the decree of the Subordinate Judge of 16th April 1895 be restored. The Respondents will pay the costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondents.

C. W. A. *Appeal allowed with costs.*

(1) I. L. R. 15 Bom. 438 (1890).

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 355 OF 1900.

RAMPINI, J.	{	MANOQ LAL,
GUPTA, J.		Decree-holder,
1901.		Appellant,
16, May.		<i>v.</i>
		DURGA PRASAD SINGH
		and others,
		Judgment-debtors,
		Respondents. **

*Mortgage decree, construction of—Interest—Date of payment, meaning of.*

*There is nothing in the law to prevent interest at the rate stipulated on a bond being decreed up to the date of actual payment.*

*Where a mortgage decree provided for interest to be recovered from the date of the decree till the date of payment :*

*Held—That the words “date of payment” meant the date of actual payment and not the last day fixed for payment in the decree.*

This was an appeal preferred on the 30th of August 1900, against the order of H. Holmwood, Esq., District Judge of Zillah Gya, dated the 12th of May 1900, reversing the order of Babu Jadu Nath Dass, Subordinate Judge of that District, dated the 10th April 1900.

This appeal arose out of an application for execution of a mortgage decree. The question was what was the meaning of the words ‘date of payment,’ as to whether they meant ‘the date of actual payment,’ or ‘the last day fixed for the payment’ in the decree. The portion of the decree material to this report was in the following words:—“ . . . It is ordered and decreed that this suit be decreed with costs; the Plaintiff do recover the sum of Rs. 1,118 principal

with interest at the rate mentioned in the bond at Rs. 2 per cent. per mensem from the date of the suit, till the date of payment and the interest claimed by him, and costs with interest at Rs. 6 per cent. per annum; and it is further ordered and decreed that if all the Defendants or any one of them pay the said amount of decretal money and interest and costs within six months from this date, then the Plaintiff shall give back to the Defendant or Defendants the mortgage bond. . . .” The decree was passed on the 16th July 1896.

The first Court held that the words ‘date of payment’ meant the ‘date of realization,’ and therefore interest should run up to the date of realization.

The District Judge, on appeal, took a contrary view and held that interest should run up to the date of the order making the decree absolute up to the 16th January 1897.

Babu Mahendra Nath Roy for the Appellant.

Babu Suligram Singh for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal against an order of the District Judge of Gaya, dated the 12th of May 1900, passed in an execution case.

The question raised before the District Judge, and now to be determined by us, is, what is the meaning of the words “date of payment” in the decree given by the Subordinate Judge upon a mortgage bond. From the judgment and decree it appears that the Court which passed that decree directed that the decree-holder was entitled to recover the principal sum due upon the mort-

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gage, with interest at the stipulated rate at 2 per cent. per mensem, from the date of the suit down to the date of payment, and so on.

Now the Subordinate Judge, before whom the case first came, held that the "date of payment" referred to in the judgment and decree was the date of realization. But this order of the Subordinate Judge was set aside by the District Judge on appeal. He held that the "date of payment" did not mean, and could not mean, the date of realization, but the date of the order absolute, fixed under the provisions of sec. 86 of the Transfer of Property Act.

The decree-holder now appeals; and after considering the judgment and decree of the Subordinate Judge, who passed the decree upon the mortgage bond, we think that the words "date of payment" in that judgment and decree mean date of realization. We think they cannot possibly mean anything else.

No question of law really arises in this case; because the law on the point appears to be settled by the Privy Council in the case of *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (1), and we may further in support of this view cite the judgment of a Full Bench of the Allahabad High Court, namely, the case of *Bakar Sajjad v. Udit Narain Singh* (2). These two cases, we think, unquestionably settle the law of the matter, with regard to which the District Judge seems to have taken an erroneous view. Further, it is not necessary for us to enter into the facts of the case at length.

(1) 2 C. W. N. 633: s. c. I. L. R. 26 Cal. 39 (1898).

(2) I. L. R. 21 All. 361 (1899).

It is sufficient to say that we do not agree with the interpretation of the Subordinate Judge's decree which has been adopted by the District Judge. As we have already said, we think that the date of payment in the judgment and decree of the Subordinate Judge means the date of actual realization.

For these reasons we set aside the decree of the District Judge and restore that of the Subordinate Judge.

This order will carry costs, the hearing fee being assessed at three gold mohurs.

S. C. S.

*Appeal allowed.*

**[CIVIL APPELLATE JURISDICTION.]**

APPEAL FROM ORIGINAL DECREE  
No. 256 OF 1899.

H. MATHEWSON,  
Defendant No. 1,  
Appellant,  
v.

GHOSE, J.  
PRATT, J.

1900.

20, December.

GOBARDHAN TRIBEDI  
and another,  
Plaintiffs,  
Respondents.

*Civil Procedure Code (Act XIV of 1882), sec. 244—Ijaradar of judgment-debtor, whether a legal representative—Right of suit.*

*An ijaradar of a property of the judgment-debtor is a representative of the judgment-debtor within the meaning of sec. 244, C. P. C.*

*A suit brought by a decree-holder against the judgment-debtor and his ijaradar to have it declared that the ijara was null and void is not maintainable as that is a question which should be decided by the Court executing the decree.*

LALJI MAL v. NAND KISHORE. (1),

(1) I. L. R. 19 All. 332 (1897).

H. MATHEWSON v. GOBARDHAN TRIBEDI.

MADHO DAS v. RAMJI PATAK (2), GUR PRASAD v. RAM LAL (3), and ISHAN CHUNDER SIKKAR v. BENI MADHUB SIKKAR (4) referred to.

This was an appeal preferred on the 3rd of August 1899, against the decree of Babu Saroda Prosad Chatterjee, Subordinate Judge of Zillah Manbhoom, dated the 18th of April 1899.

This was a suit by the Plaintiff-Respondent, who was a decree-holder, against his judgment-debtor and a person to whom the judgment-debtor had granted an *ijara* of the property which the Plaintiff had caused to be attached in execution of his decree, for a declaration that the said *ijara* was null and void as against him. It appears that in execution of his decree the Plaintiff had attached the property on the 29th September 1891, and a Receiver was appointed at his instance to take charge thereof and to make over the proceeds of the property to the Plaintiff and other attaching creditors. While the Receiver was in possession of the property, the Defendant No. 1 presented to him an *ijara pattah*, said to have been executed by the judgment-debtor in his favour on the 7th November 1896, and asked the Receiver to accept rent from him. Hence the present suit.

Babu Jogesh Chandra Roy for Babu Bhowani Charan Dutt for the Appellant.

Babus Saroda Charan Mitra and Munindra Nath Bhattacharjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit insti-

(2) I. L. R. 16 All. 286 (1894).

(3) I. L. R. 21 All. 20 (1898).

(4) I. L. R. 21 Cal. 62 (1896).

tuted by a decree-holder against his judgment-debtor and a person to whom the judgment-debtor had granted an *ijara* of the property which he (the decree-holder) had caused to be attached in execution of his decree. The attachment is said to have taken place on the 29th September 1891, and the *ijara* was executed on the 7th November 1896.

The facts, as set out in the plaint, are that, after the property was attached at the instance of the decree-holder a Receiver was appointed by the Court to take charge thereof, and to make over the proceeds of the property to the Plaintiffs and the other attaching creditors, and that subsequently, while the Receiver was in possession of the property, the Defendant No. 1, the *ijaradar*, presented before the Receiver the *ijara pattah*, and asked that the rent payable by him under the *ijara* might be received. But what took place upon that application being made is not stated. It is, however, alleged that this *ijara* was granted at a very low rent with the object of throwing difficulties in the way of recovery of the money due to the Plaintiffs and the other decree-holders. The Plaintiffs upon these allegations asked that it might be declared that the said *ijara* of the 7th November 1896 was null and void as against them.

The suit was contested by the *ijaradar* upon the ground that the question raised by the decree-holders should be decided by the Court executing the decree under sec. 244 of the Code of Civil Procedure, that there was no attachment properly so called upon the property, and that the property in question, being only a maintenance grant for the lifetime of the

## H. MATHEWSON v. GOBARDHAN TRIBEDI.

judgment-debtor, could not be attached and sold. A further question was raised, namely, whether the Plaintiffs had any cause of action.

The Subordinate Judge has negatived all the objections of the Defendant, and given the Plaintiffs the declaration that they asked for.

The Defendant, the *ijaradar*, has appealed against this decree.

Two main points have been discussed before us by the learned vakil for the Appellant, *first*, whether the Plaintiffs have any cause of action, and, *secondly*, whether the suit is barred by the provisions of sec. 244 of the Code of Civil Procedure. It would seem that these two questions are intimately connected with each other. Taking the first question, however, by itself, we should not be prepared to say that the Plaintiffs have no cause of action. The terms of sec. 42 of the Specific Relief Act are such as would favour a case like this. We need only refer in this connection to two of the illustrations given in that section. The first of these two illustrations, namely (d), is "A alienates to B property in which A has merely a life interest. The alienation is invalid as against C who is entitled as reversioner. The Court may in a suit by C against A and B declare that C is so entitled." The other illustration, (g), is "A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property." It is, we think, impossible to say that if the *ijara pattah* was set up by the Defendant, the *ijaradar*, before the Receiver, in respect of a pro-

perty which had been attached at the instance of the Plaintiffs, and from which property they (the Plaintiffs) were entitled to have their decree satisfied, upon such a claim being preferred by the *ijaradar*, the Plaintiffs would not be entitled to come to Court and ask for a declaration that the *ijara* set up by the Defendant is invalid and inoperative as against themselves. But however that may be, if the Plaintiffs or the Receiver had brought the matter to the notice of the Court, the Court would have, as we take it, made some order or other upon the matter, *viz.*, whether the Receiver was bound to receive from the *ijaradar* the rent payable under the *ijara pattah*, or should he, in accordance with the orders of the Court, which had been made, receive the whole of the collections from the property in question. Here comes the consideration of the question, whether this matter could have been dealt with under sec. 244 of the Code of Civil Procedure. The words of that section are:—

"The following questions shall be determined by order of the Court executing a decree and not by separate suit, namely (c), (omitting (a) and (b) which are not material for the purpose of the present question) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree."

There can be no doubt that the matter that was raised upon the application of the *ijaradar* was a matter relating to the discharge or satisfaction of the decree which was then being executed, as we take it; because the action of

\* H. MATHEWSON v. GOBARDEAN TRIBEDI.

the Receiver in receiving the rents and profits of the property under orders of the Court, and applying the same towards satisfaction of the claims\* of the various decree-holders was a part of the execution of decrees. That being so, the only question which demands consideration is whether the *ijaradar* could be regarded as a representative within the meaning of the section. For if he might be so regarded, there could be no doubt that the question now raised by the Plaintiffs might well have been dealt with by the Court executing the decree. Whether the Defendant No. 1, who, subsequent to the alleged attachment, took a lease of the property, and is bound under the lease to pay only a portion of the usufruct of the property as rent thereof for a term of years, is a representative of the judgment-debtor, is a question which is not altogether free from difficulty. But having regard to some of the cases to which our attention has been called by the learned vakil for the Appellant, we are not prepared to say that he is not a representative within the meaning of sec. 244 of the Code. In the case of *Lalji Mal v. Nand Kishore* (1) where a decree-holder brought a suit for a declaration that in execution of his decree a certain property which had been attached at his instance, but which had, subsequent to the said attachment, been sold to another party, was liable to be brought to sale in execution of his decree, it was held that the purchaser was a representative within the meaning of sec. 244 of the Code. The learned Judges, in the course of their judg-

ment, made amongst others the following observations :—

“Convenience, which is not always a good reason for laying down a provision of law, would suggest that a sale which was contrary to the provisions of sec. 276 of the Code of Civil Procedure, should, if challenged\* by the decree-holder, be a matter to be adjudicated upon under sec. 244. In our opinion; as the property in question was under attachment at the time\* the sale took place, the purchaser must be treated as a representative of the judgment-debtor; on the same principle as he would have been a representative of the judgment-debtor by reason of his purchase, if the decree had been one for sale of a particular property. The position of a purchaser of a property affected by a decree for sale was discussed\* by this Court in *Madho Das v. Ranji Patak* (2).” And they accordingly dismissed the suit upon that single ground.

In a later case, before the same Court, of *Gur. Prasad v. Ram Lal* (3) the same view was accepted. In that case the Plaintiff was the purchaser, and it was determined that the suit brought by him was not maintainable, it being held that he was a representative of the judgment-debtor within the meaning of sec. 244 of the Code of Civil Procedure.

Then in the case of *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (4), decided by a Full Bench of this Court, the question was raised what was the exact significance of the word “representative” as mentioned in sec. 244 of

(2) I. L. R. 16 All. 286 (1894).

(3) I. L. R. 21 All. 20 (1898)

(4) I. L. R. 24 Cal. 62 (1896).

(1) I. L. R. 10 All. 332 (1897).

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the Code. The facts of that case were that after a mortgage decree was passed, the equity of redemption subsisting in the mortgagor was sold in execution of a money decree at the instance of a third party, and the question was raised, whether, in the course of the execution of the mortgage decree he (the purchaser) could be allowed to come in under sec. 244 as a representative of the judgment-debtor. It was held that he could come in; and it seems to us that, "though the observations that were made by the then learned Chief Justice, who delivered the judgment of the Court, had reference to the facts of the particular case before them, yet they were such as to indicate that the word "representative" occurring in sec. 244 had a wider significance than "legal representative," namely, that it includes a person who is a representative in interest of the judgment-debtor; and this is the view which was substantially accepted by the Allahabad High Court in the case of *Gur Prasad v. Ram Lal* (3) to which we have already referred.

Having regard to the principle that underlies these cases, we think we ought to hold that the *ijaradar* in this case is a representative of the judgment-debtor, and it does not, to our minds, make any substantial difference in that principle that he has not acquired the whole interest of the judgment-debtor. Suppose the latter sold a fifteen-sixteenth share of the property which had been attached in execution of decree, could it be rightly said that because he retained in his hands a one-sixteenth share, therefore the assignee of the fifteen-sixteenth share of the property was not his representa-

tive *quoad* that share? The *ijaradar*, in this case, has under his *ijara* acquired a substantial interest in the property: he is bound under the terms of his *ijara* to pay, as it is alleged, a small share of the proceeds of the property, he being entitled to appropriate to himself the rest; and so far as regards the share of the proceeds which has thus been transferred to him, though for a term of years, he might well be regarded as a representative of the judgment-debtor.

Upon these grounds we are of opinion that the contention raised by the learned vakil for the Appellant that the present suit is not maintainable, having regard to sec. 244 of the Code ought to prevail.

In this view of the matter it is not necessary to discuss the other questions raised before us.

The result is that this appeal will be allowed, and the suit dismissed; but having regard to the fact that the objection which has been raised by the Defendant and upon which he has succeeded is an objection as to the form of action, and does not really go to the merits of the case, and inasmuch as the merits were in the Court below found entirely against him and in favour of the Plaintiffs, we think that each party should bear his own costs in both Courts.

*Appeal allowed.*

S. C. S.



[ORDINARY ORIGINAL CIVIL  
JURISDICTION.]

SUIT No. 320 OF 1898.

HARINGTON, J.	}	SM. BHOONI MONEY
1901.		DASSEE
1, May.		v. •
		NOTORAR BISWAS.

*Slander—Defamation—Unchastity, imputation of—Special damage—Common law of England, application of, in Calcutta—Charter of the Supreme Court, 1726*

*No damages are recoverable for the mental distress caused by an insult.*

GIRISH CHANDRA MITTER v. JATADHARI SADUKHAN (1) followed.

WILKINSON v. DOWNTON (2) and LYNCH v. KNIGHT (3) referred to.

*Defamatory words imputing unchastity to a woman are not actionable within the limits of Calcutta without proof of special damage.*

*The common law of England, as it prevailed in 1726, applies to natives of India within the limits of Calcutta except in so far as it has been modified by the Legislature or where it is shewn to be unsuitable to this country.*

ADVOCATE-GENERAL OF BENGAL v. RANEE SURNOMOYE DOSSEE (4) referred to.

*That an action for slander is only maintainable in Calcutta by virtue of the common law of England introduced by the charter of 1726.*

This was a suit for damages for slander. The words which were said to have been uttered by the Defendant were these

"You are a prostitute; I will publish before all the caste people that you are a prostitute. I took you to the garden-house and to Kalighat and had sexual intercourse with you." The plaintiff did not however set out any special damage which had been suffered by her save and except loss of reputation and pain of mind. The Defendant took a preliminary objection at the hearing that the suit was not maintainable.

Mr. Garth and Mr. J. G. Woodroffe for the Plaintiff.

Mr. Sinha and Mr. S. R. Das for the Defendant.

The following cases were cited in the course of the argument:—

*Girish Chandra Mitter v. Jatadhari Sadhukhan* (1), *Roberts v. Roberts* (10), *Lynch v. Knight* (3), *Chamberlain v. Boyd* (11), *Komul Chunder Bose v. Nobin Chunder Ghose* (12), *Mahomed Ismail Khan v. Mahomed Tahir* (13), *Dwyer v. Meehan* (14), *Knight v. Gibbs* (15), *Moore v. Meagher* (16), *Davis v. Solomon* (17), *Evans v. Harries* (18), *Nilmadhub Mookerjee v. Dookeram Khottak* (19), *Rutherford v. Evans* (20), *Clarke v. Morgan* (21), *Tunncliffe v. Moss* (22), *Dixon v. Smith* (23), *Advocate-General*

(1) 3 C. W. N. 551 : s. c. I. L. R. 26 Cal. 653 (1899).

(10) 33 L. J. Q. B. 249 (1804).

(11) 11 Q. B. D. 407 (1883).

(12) 10 W. R. 184 (1808).

(13) 6 N. W. P. 38 (1873).

(14) 18 L. R. Ir. 138.

(15) 1 A. & E. 43 (1834).

(16) 1 Taunt. 39 (1807).

(17) 41 L. J. Q. B. 10 (1871).

(18) 1 H. & N. 251 (1856).

(19) 15 B. L. R. 161 (1875).

(20) 4 Car. & P. 74.

(21) 38 L. T. 354 (1878).

(22) 3 Carr. & K. 83 (1850).

(23) 5 H. & N. 450 (1860).

(1) 3 C. W. N. 551 : s. c. I. L. R. 26 Cal. 653 (1899).

(2) L. R. (1892) 2 Q. B. 57.

(3) 9 H. L. C. 594 (1861).

(4) 9 Moo. I. A. 387 (1863).

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v. *Ranee Surnomoye* (4), *Parvathi v. Mannar* (6), *Kasiram v. Bhadu* (7), *Jogeshwar v. Dinaram* (8), *Dewan Singh v. Mahip Singh* (9); the following authorities were also referred to in the course of the argument:—Handbook of Indian Law, p. xiv; Cowell's Tagore Lectures (1872), pp. 58, 59; Morley's Digest, p. xxii; Odgers on Libel and Slander. Reference was also made to the Limitation Act, Art. 25.

The JUDGMENT OF THE COURT was as follows:—

HARINGTON, J.—The Plaintiff in this case sues the Defendant for slanders imputing unchastity to the Plaintiff.

The Defendant denies that he uttered the words in question, alleges that if spoken they are mere vulgar abuse: and that in any case they are not actionable without proof of special damage, and no special damage is alleged in the plaint.

The parties reside in adjoining houses: a quarrel broke out between their respective families; in the course of that quarrel the Defendant said something which caused the Plaintiff to prosecute him before the Magistrate under secs. 500 and 504 of the Penal Code, on the ground that he had made imputations on her chastity. The Defendant appeared to the summons, apologized and expressed his regret whereupon the charges were withdrawn.

It is alleged by the Plaintiff that on the following day this dispute broke out again, and that the Defendant not only

uttered slanderous words about her in the presence of Sarat Chandra Shaw, Sada Nundo Shaw and Behary Lal Shaw: but also requested Sarat Chandra Shaw to warn his father not to accept from, or extend hospitality to her on the ground that she was an unchaste woman.

The slanderous words alleged to have been spoken in the presence of the Shaws were addressed to the Plaintiff in Bengali: translated into English they are "you are a prostitute; I will publish before all the caste people that you are a prostitute. I took you to the garden-house and to Kalighat, and had sexual intercourse with you." Sarat Chandra Shaw and Behary Lal Shaw depose that they heard the Defendant speak these words to the Plaintiff: the Defendant on the other hand denies that he ever spoke the words: and says that if the imputation were true he himself would be liable to be excommunicated.

In my opinion the evidence for the Plaintiff is to be believed. In the first place it is very unlikely that the Plaintiff who had just accepted an apology from the Defendant would reopen the matter without a fresh cause of offence, and moreover when tested by cross-examination she and the witnesses who were called on her behalf appeared to be telling a truthful story. The Defendant, on the other hand, says he never abused the Plaintiff on any occasion, and suggests that the Magistrate was responsible for the apology he is said to have made in the Police Court. That I do not believe: I have no doubt that he did abuse the Plaintiff, and that when brought up in the Police Court he did apologize and withdraw what he had said. In view

(4) 9 Moo. I. A. 387 (1863).

(6) I. L. R. 8 Mad. 175 (1884).

(7) 7 Bom. H. C. R. (A. C.) 17 (1870).

(8) 2 C. W. N. cxxiii (1898).

(9) I. L. R. 10 All. 456 (1888).

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of the way he has given his evidence as to the first quarrel I am not disposed to give credit to his account, rather than to the Plaintiff's account of the second quarrel.

The speaking of the other slander complained of is deposed to by Sarat Chandra Shaw: I think words of the purport alleged were spoken, for the Defendant admits in cross-examination that he used to go about saying he would have nothing to do with the Plaintiff. On the evidence therefore I find as a fact that the slanders complained of were spoken and published concerning the Plaintiff.

It is asserted that they are mere vulgar abuse. In my opinion they are not. They convey a distinct imputation of unchastity and allege a specific charge of an act of immorality.

The next question is, has any special damage been alleged or proved by the Plaintiff?

In the plaint no special damage is alleged: the 8th paragraph only alleges such general damages as would not support an action for slanderous words not actionable *per se* if brought in England.

The evidence which has been given is not such as would have supported any statement of special damage which could have been framed. The Plaintiff herself stated in examination-in-chief that Sarat Chandra Shaw to whom the slander was published had accepted her hospitality since the slander, and that she herself had been invited out just as before. She did indeed state that Jibon Kristo Shaw, Hubbo Churn Shaw and some other person had not been to her house but she did not connect them with

the slanders in any way. As the case stood at the close of the Plaintiff's examination-in-chief there was no sort of evidence of any actual damage of any kind whatever. But the Defendant cross-examined on this point, and did elicit that a statement had been made in her hearing as to why those persons would not come to her house, and when asked in re-examination what the statement was, the Plaintiff said that this was that they had refused to come in response to an invitation because of the imputations cast on her!

Sarat Chandra Shaw is the only person who is called who professes to have ceased going to the Plaintiff's house because of the slanders uttered by the Defendant. But I disbelieve him on this point. *First*, because he is flatly contradicted by the Plaintiff; *secondly*, because he did not warn his father as the Defendant desired him to, and as I believe he would have done if he had seen any reason for avoiding the Plaintiff's house; *thirdly*, because he admits he did not believe the slanders, and if he did not believe them he had no reason for avoiding the Plaintiff's house. There is nothing to shew that it was any words spoken by the Defendant which induced Jibon and Hubbo and the other man to refuse the Plaintiff's hospitality: my conclusion on this part of the case is that no actual damage has been proved to have occurred to the Plaintiff and no evidence moreover has been given to shew that conduct such as that imputed to the Plaintiff would have subjected her to any penal, or quasi penal consequences at the hands of the members of her caste. On the facts, therefore, I find that the Defendant

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poke and published the words complained of by the Plaintiff: that these words conveyed the imputation that the Plaintiff was unchaste: that they were spoken falsely and maliciously: but that they caused the Plaintiff no actual damage whatever.

On these facts two contentions are raised by the Plaintiff (i) that the words convey an insult and that for the mental distress caused by such insult damages are recoverable and (ii) that the words are defamatory and are actionable without special damage.

The first of these propositions was unsuccessfully propounded in this Court in the Full Bench case of *Grish Chandra Mitter v. Jatadhari Sadukhan* (1). I am bound by the decision of the majority of the Court in that case: and with that decision I thoroughly agree.

There is no instance in English law in which an action on the case for mental distress caused by criminal or tortious act will lie. A wrongful act causing death might subject the wrong-doer to punishment for manslaughter; it might cause the acutest mental distress to a parent or child of the deceased: but it gave no right of action at common law and even under Lord Campbell's Act the damages recoverable for such a wrong are strictly limited to the actual pecuniary loss sustained, and do not include sentimental damages.

In *Wilkinson v. Downton* (2) the lie told must have caused the Plaintiff the acutest mental distress, but it was the physical suffering consequent on nervous

shock which formed the ground on which damages were claimed.

Although mental distress caused to the Plaintiff may be taken into consideration in aggravation of damages: alone it gives no right to recover damages. The English law on the subject was laid down in the House of Lords by Lord Wensleydale in these words "mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone," *Lynch v. Knight* (3) and that, since the Full Bench decision to which I have referred, expresses what is the law here.

The next question, namely, whether defamatory words imputing unchastity to woman are actionable in this country without proof of special damage was left open by the Full Bench case to which I have referred.

Under the law of England as it stood prior to 1891 such words would not be actionable without proof of special damage: is that law to be applied in this country? It is stated in Morley's Digest, p. xxii, that the common law of England as it prevailed in 1726 is the law administered by the Supreme Court: and that statement is treated as correct by Lord Kingsdown in the case of the *Advocate-General of Bengal v. Ranee Surnomoye Dossee* (4) in which he observes that the English law, civil and criminal, has been usually considered to have been made applicable to natives within the limits of Calcutta in the year 1726, by the Charter of 13 Geo. 1. This must be taken subject to certain limitations; many provisions

(1) 3 C. W. N. 551: s. c. I. L. R. 26 Cal. 653 (1899).

(2) L. R. (1892) 2 Q. B. 57.

(3) 9 H. L. C. 594 (1861).

(4) 9 Moo. I. A. 387 at p. 426 (1863).

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of the English law—as for example that under which bigamy is a felony—were obviously unsuitable to the natives of this country and are therefore not introduced.

But there is nothing unreasonable having regard to the customs of this country in holding that that part of the common law of England which gave a person injured by slanderous words the right to recover damages in an action, has been introduced. In my opinion it is by virtue of the common law of England, introduced into Calcutta by the Charter of 1726 that the action is maintainable.

It may be laid down that under the English law the malicious publication of any falsehood, oral or written, whether defamatory or not, if it is calculated to produce and does produce actual damage gives a right of action to the person damaged by such publication: *Ratcliffe v. Evans* (5).

There are certain conditions under which the false and malicious publication of words gives a right of action notwithstanding that no actual damage is proved to have been produced. These are when they are defamatory and are committed to writing—when they impute that the Plaintiff is guilty of a crime—when they impute that he is suffering from an infectious or contagious disease or when they impute misconduct or incompetence to the Plaintiff in the way of business. These are the exceptions: in all other cases (except those arising under the Slander of Women Act, 1891) the regular rule is followed, namely, that words, to be actionable, must be proved

to have caused actual damage. The existence of the rule and the exceptions appear to have been recognized by the Legislature of this country when they passed the Limitation Act, Schedule 2, Art. 256.

Several cases were cited by the Plaintiff of which the most important is the case of *Parvathi v. Mannar* (6) in which it was held at Madras by Sir Charles Turner, C. J., and Muthesami Ayyar, J., that words imputing unchastity to a woman were actionable without proof of special damage. The learned Judges after pointing out that the cases on the subject are conflicting, condemn the rule of law which enables damages to be recovered for the publication of written defamatory matter without proof of actual injury, while it calls for that proof in the case of oral slander—and in holding that the action will lie say “the true test of the right to maintain the suit should be whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed a reasonable apprehension that his reputation has been injured, and to inflict on him the pain consequent on such a belief,” and further they say that the person who deliberately defames another ought to be made responsible for damages for the mental suffering his wrong doing occasions.

In *Kasiram Krishna v. Bhatu Bapuji* (7) which was cited in support of the Plaintiff's case is expressed to be a suit in the mofussil between Hindus to which English law is not to be applied. *Jogeshwar Sharma v. Dinaram Sharma*

(6) I. L. R. 8 Mad. 175 (1884).

(7) 7 Bom. H. C. R. (A. C.) 17 (1870).

(5) L. R. (1892) 2 Q. B. 524.

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*Bhattarcharji* (8) is only cited from the Short Notes of the C. W. N. and the note is necessarily too much compressed to give the reasons for the judgment.

In *Dewan Singh v. Mahip Singh* (9) the very lengthy judgment which was delivered by Mahmood, J., turned on the question whether abuse was actionable.

Of the cases cited therefore the only one which really supports the Plaintiff's case is that which was decided by the Madras High Court—and when the test laid down in that case is examined, it is found to involve the proposition that damage ought to be recoverable for mental distress alone, and that is a proposition, which has been shewn by the Full Bench decision\* to which I have referred, to be untenable.

But ought this particular class of slander, i.e., that imputing unchastity to a woman to be added to the list of exceptions to the general law and to be held to be actionable where no damage is proved to have been caused?

It is urged that this should be so because English Judges in certain cases notably *Lynch v. Knight* (3) and *Roberts v. Roberts* (10) have made strong comments on the unsatisfactory state of the English law—no doubt the law in England previous to the passing of the Slanders of Women Act was unsatisfactory: the Courts had placed a very narrow construction on what was the special damage necessary to support the action—and unless the slanderous words were reduced into writing the criminal

law afforded no redress. But those reasons do not apply here: the slanderer can be punished criminally whether his slanders are reduced into writing or not: a successful prosecution in the Criminal Courts would clear the character of any slandered lady, as effectually and probably more effectually than it would be cleared if she were entitled to claim pecuniary compensation for damage which she was unable to prove she had suffered.

Where it is proposed to depart from the rules of English law which have been introduced into this country it must be shewn that those rules if adhered to in this country will work an injustice or a hardship. Here no injustice is worked by an adherence to those rules because in cases where the person aggrieved is unable to prove that he has suffered actual damage he can call in the criminal law to punish the wrong-doer. *Prima facie* there is nothing repugnant to justice equity and good conscience in calling on a person who is claiming pecuniary compensation for damage caused by a wrongful act to prove that some damage has been caused to him by the act of which he complains.

In my opinion the Plaintiff has failed to shew that the rules of English law applicable to the present case ought to be departed from—and inasmuch as the words are not *per se* actionable, and no damage in fact has been alleged or proved, the action must be dismissed with costs.

*Suit dismissed.*

J. C.

(3) 9 H. L. C. 594 (1861).

(8) 2 C. W. N. cxxiii (1898).

(9) 1. L. R. 10 All. 456 (1888).

(10) 33 L. J. Q. B. 249 (1864).

## [CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 321 OF 1901.

GHOSE, J.

GHATU PRAMANIK OF

TAYLOR, J.

SHEIK, Appellant,

1901.

v.

1, June.

THE KING-EMPEROR.

*Penal Code (Act XLV of 1860), secs. 84, 302—Murder—Insanity, plea of—Criminal responsibility—Unsoundness of mind—Sullen disposition—Insanity of other members of the family of the accused—Right and wrong, knowledge of—Delusion, mental—Demeanour and conduct of accused at the trial—Medical observation, if necessary.*

*Where the plea of insanity is taken on behalf of an accused person, the question that arises is not whether at the time of the trial the man was of unsound mind but whether he was so at the time of the commission of the deed, and whether by reason of that unsoundness of mind he was incapable of distinguishing between right and wrong.*

*The criminal responsibility of a person suffering from an insane delusion and committing an offence in consequence thereof, depends upon the nature of the delusion; if the man was labouring under a partial delusion only and was not in other respects insane, he must be considered to be in the same situation as to responsibility as if the facts with respect to which the delusion existed were real.*

QUEEN-EMPRESS v. KADER NASYER SHAH  
(1), *In re M'NAGHTEN*, (2) referred to.

*The estimate of the guilt of a person suffering from and acting under the influence of a delusion must be made upon the basis of the actual existence of the facts in regard to which the delusion*

*existed; and whether the person was under a misapprehension in regard to the delusion or not, his culpability would be the same.*

This was an appeal preferred on the 10th of May 1901, against the order of the Sessions Judge of Pubna and Bogra, dated the 20th of April 1901.

The facts of the case appear fully from the judgment of Ghose, J.

No one appeared in this appeal.

The JUDGMENT OF THE COURT was as follows :—

GHOSE, J.—The Appellant Ghatu has been convicted of the offence of murder and sentenced to transportation for life. The Judge and the assessors who sat with him, were agreed as to the guilt of the accused, though one of the assessors was of opinion that he (the accused) was insane.

The person killed was a lad, 8 years old, and was the brother-in-law of the accused.

That he killed the accused, there can be no doubt upon the evidence. The only question is whether he was at the time of unsound mind, and incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law, and therefore excused from responsibility (sec. 84, I. P. C.).

The occurrence took place early at dawn of the 28th October of the last year (12th Kartick). The Appellant came on the preceding day to his father-in-law's house, where his wife (a girl of 11 as stated by the parents, but of 13 as stated by the girl herself before the committing officer) was residing at the time. He slept that night in the same hut with his father-in-law, his deceased

(1) I. L. R. 23 Cal. 604 (1896).

(2) 10 Cl. & F. 200 (1843).

[See 5 C. W. N. cxcix.]

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brother-in-law, and another brother-in-law (a witness for the prosecution), while his wife slept with his mother-in-law in an adjoining hut, and at dawn, while it was still somewhat dark, he struck the deceased, who was sleeping on the same bed with his father, with an axe which was in the hut, and then ran away, throwing the axe in a jungle close by, and went to his own house, at a distance of about 2 miles, and he stayed there, until the next day when he was arrested by a constable, and brought before a Sub-Magistrate, to whom he made a confession saying that on the night of the occurrence there was a *sankirtan* in the house of a neighbour of his father-in-law, where he was invited; to that *sankirtan* his wife did not go, and there he observed his little brother-in-law (the deceased) and his name-sake and friend (Ghatu) having a private conversation, that his name-sake placed a rupee in the hands of the deceased, with which the latter went to the house of his father-in-law, and entered into the hut where his wife then was, and when he came away, his name-sake went into the same hut, and left it after some little time. That he saw all this from a short distance; that in consequence of what he saw he had not a wink of sleep that night, and that he was out of his senses on account of the disgrace he felt and that at the time he killed the deceased he was, out of rage and feeling of disgrace, devoid of his senses. No notice seems then to have been taken by any officer of this last-mentioned statement of the accused.

If the officers concerned had done other duty the accused would have

probably been placed under medical observation in order to find out, if possible, whether he was of unsound mind at the time of occurrence. But nothing seems to have been done. The preliminary enquiry was commenced early in November; the case was postponed several times; and it was not until the 13th March that the accused was called upon to make a statement before the committing officer, when he retracted his confession, and alleged that he did not know what he had said before; that he had been maltreated by the Police; and that what he did say was under compulsion. It cannot but be regretted that the enquiry in the committing officer's Court should have been conducted in this careless and dilatory manner.

It does not, however, appear that anything else was said by the accused, or on his behalf, before the committing officer as to the state of his mind at the time of the occurrence; but the question seems to have been raised before the Sessions Court, as we may well gather, though we do not find any record of the plea raised by or on behalf of the accused (sec. 271 of the Code). The only record that we find is that the charge was explained to the accused.

The learned Judge has accepted the confession of the accused and believed "the essential truth" of the statement made by him as to the motive for the act committed by him, viz., that he saw that his wife was grossly unfaithful and was assisted in her immorality by the deceased. He has disbelieved the statement by the parents that the wife went that night to the *sankirtan*, but



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seems to have accepted the story told by the mother that the accused came with a *dao* at midnight and unfastened the door of the hut in which she and the girl were sleeping, but went back to the other hut when he was discovered; and has held that the defence of insanity was not proved. And further that his demeanour and conduct during the trial were perfectly those of a sane man.

The question, however, was not whether at the time of the trial the man was of unsound mind but whether he was so at the time of the commission of the deed, and whether by reason of that unsoundness of mind he was incapable of distinguishing between right and wrong.

Some evidence has been adduced by the defence to the effect that the father and one of the brothers of the accused were lunatics; that he was of sullen disposition, and became insane for a time; but as stated by his mother this was only up to Ashin last, and that "he recovered and worked regularly in Kartick" (the occurrence being on the 12th Kartick). Assuming it to be true that he was of sullen disposition, and that for some little time before, had a touch of insanity, it does not appear that there was anything like it when he committed the deed; and it seems to me that the conduct of the accused in killing the deceased early at dawn, when his father-in-law was apparently asleep, and his other brother-in-law (Lalu) had gone out to ease himself (as the evidence shows), and then running away, throwing the axe, as he ran away, in a jungle, and remaining quietly in his own house until arrested, indicate that he was not in

such a state of unsound mind as disabled him from distinguishing between right and wrong.

A difficulty no doubt arises upon the question of motive. According to the evidence for the prosecution, there was absolutely none for the crime. As deposed to by the parents of his wife, and the wife herself, she was but a young girl of 11, who had not yet attained at puberty, and that she went to the *sankirtan* party with the accused and others that night, and therefore there could be no criminal intimacy between the other Ghatu and the girl, and that the accused could not have seen anything wrong. The learned Judge, as already stated, has disbelieved the story of the members of the family in this respect. And this he has done relying upon the statements made by the accused before the Sub-Magistrate on the 29th October.

Upon the evidence of the members of the family, the confession made and the motive assigned by the accused, would seem to be not genuine. But there is nothing to show that the confession was made under any compulsion: it was made on the very day that the man was arrested. And it is not improbable that the members of the family having learnt the statements made by the accused before the Sub-Magistrate, thought it prudent, for the reputation of the family to assert that the girl was not in the house, but went to the *sankirtan* and that she had not attained puberty, though as already stated, the girl herself gave her age before the committing officer to be 13.

If there was anything upon this record to indicate that the confession was not

(1) I. L. R. 26 Cal. 49 (1898).

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case not established against the two Appellants, Yasin and Tamiz.

The judgment of the learned Sessions Judge proceeds largely upon "confessions," since retracted, which he has used not only against the makers, but also against the other accused in the case.

It is obvious that a retracted confession should carry practically no weight against a person other than the maker, it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. In the present case the Judge has acted upon these confessions without any indication that he has appreciated this inherent weakness. We will now consider the facts of the case. On the 23rd July 1900, the house of the complainant was broken into under circumstances which amounted to an offence under sec. 457, I. P. C. Property was stolen, and upon information from one Abdul Ali the Appellant and two other persons were arrested. Some time after the occurrence Nazim and Yasin made confessions, and there is the evidence of the wife of Nazim to the effect that Nazim and Arabdi and others went to commit theft and afterwards divided the spoil. There is also evidence that Tamiz gave up some buttons, which were part of the stolen property. As to the propriety of the conviction of Nazim there can be no doubt. This confession of the 11th October was repeated on the 30th. And it was not withdrawn at the trial, it is

marked by the Sessions Judge as put in evidence. It is to be noted that in the second statement he exculpated Yasin, saying he did not go to commit the theft, and the evidence of his wife does not inculpate Yasin. Even, if the statement of Nazim was ever formally put in evidence against Yasin, the latter certainly was not questioned in respect of it. It does appear, however, that on the 11th of October Yasin admitted before a Magistrate that he was one of the party of thieves, and that he got Rs. 15 as his share, but that he had spent it. On the 30th October he alleged that he had made that statement in fear of his life. This was apparently his first opportunity of retracting.

His confession was by no means full of detail. The evidence on record does not show when the arrest was made, or how the Appellant came to make a confession, when no property was found in his possession.

As Nazim contradicts himself in respect of Yasin and as he also tried to minimize his own guilt by saying that he protested against the expedition, the case against Yasin practically rests on his uncorroborated and retracted confession. This is not sufficient under the circumstances of this case to warrant his conviction.

Arabdi made no confession, but he is named by Yarchand, the wife of Nazim, as having advised the theft, and as having joined in it. The accusation by Nazim may be considered against him if that statement was put in evidence against him, but as there is no allusion to it in the examination of this man, it seems doubtful whether it was really put in evidence against him. At any rate its

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evidential value would be of the slightest. The confession of Yasin must be discarded as against Arabdi. There is however the further fact that some of the stolen property was recovered from this man. His explanation of its possession is not satisfactory. He admits that he burnt a sack in which the buttons were kept and that he gave the buttons to Tamiz to dispose of as he was told that the possession might damage him. We do not doubt his knowledge that the property was stolen, and his explanation is not sufficient.

Finally we have Tamiz. He did not confess, and says that the buttons were given to him by Arabdi, and that he hid them in some water, and gave them up to the Police. Putting aside the mention of his name by Nazim and Yasin, it is sufficiently proved that he received the buttons with the knowledge that they were stolen property.

Then as to the punishment, Nazim has been sentenced to ten years' rigorous imprisonment, and the others to three years each. As in the case of the Appellants other than Nazim, it is admittedly a first offence, the sentence in their case is too severe. Cases of this nature are constantly settled by the Court of the Magistrate, and only in exceptional circumstances do they require a heavier sentence than a Magistrate is competent to inflict. While acquitting Yasin altogether, we would reduce the sentences upon Arabdi and Tamiz to two years' rigorous imprisonment each.

But in regard to Nazim, who has admitted in his examination in the lower Court that he has been three times pre-

viously convicted, once in 1889, twice in 1890, and once by the Sessions Court in 1894, when he was sentenced to six years, all the convictions being for theft or receiving stolen property, the case is, on a different footing.

Now there is on the record no copy of any judgment or extract from a judgment, or any other documentary evidence of the fact of such previous convictions as is required by sec. 91 of the Evidence Act or sec. 511, Criminal Procedure Code. There was thus no legal evidence to support the charge in respect of such previous convictions. The examination of the Appellant in the lower Court in respect of those convictions was also without legal warrant or justification, see sec. 342, Criminal Procedure Code, and the case of *Basanta Kumar Ghattak v. Queen-Empress* (1).

But on the Sessions record, pages 39 and 46, we have a record of an admission by the Appellant Nazim of these previous convictions duly recorded. Under sec. 310, Criminal Procedure Code, the Judge was justified in proceeding to pass sentence on him accordingly. The irregularity in the enquiry is to be regretted, and should have been detected and remedied at the trial, but it does not appear that the accused was prejudiced by reason of it.

As for the sentence on Nazim, he appears to be incorrigible, he can only very recently have been released from jail, and is again in his evil ways. I would dismiss his appeal.

*Appeal allowed in part.*

H. P. C.

(1) I. L. R., 26 Cal. 49 (1898).

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 1096 OF 1900.

TEKAIT MON MOHINI  
JOMADAI ailas MOHINI.  
GHOSE, J. DEBI, Defendant,  
STEVENS, J. Appellant,  
1901.

20, March. RAI BASANT KUMAR  
SINGHA, Plaintiff,  
Respondent.

*Hindu law—Suit for enforcement of conjugal rights—Act XII of 1887—Husband contracting out of his rights—Public policy—Marriage under the Hindu law.*

Where, in a suit by a Hindu husband for enforcement of conjugal rights, the wife relied on an agreement, executed at the time of marriage by the guardians of the husband, then a minor, and also by the husband, covenanting that the husband would always live at his mother-in-law's house and that the wife would never be required to leave her parental home and reside elsewhere with her husband :

Held—That the parties being Hindus, the rule of decision in such a case is, in accordance with sec. 37 of Act XII of 1887, the Hindu law except in so far as it has by legislative enactment been altered or abolished.

Under the Hindu law, marriage, besides being a contract is a sacrament, it being more religious than secular in character and it is the bounden duty of the wife to live with her husband wherever the latter may choose to reside and to submit herself obediently to the authority of the husband :

Held also—That the agreement relied on by the wife, if permitted, would defeat a rule of Hindu law and is opposed to public policy.

This was an appeal preferred on the 26th of June 1900, against the decree of E. G. Drake Brockman, Esq., District Judge of Zillah Midnapore, dated the 14th of June 1900, modifying the decree of Babu Baroda Prosunno Shome, Subordinate Judge of that district, dated 7th of April 1900.

The facts of the case are shortly these:—

This appeal arose out of a suit for restitution of conjugal rights instituted by the husband. At the time of the marriage of the Plaintiff, he was a minor and an agreement called *pratijna-patra* was executed by the father and mother of the Plaintiff to the following effect:—

“That we solemnly promise that you having decided to keep my eldest son, Sriman Rai Basanta Kumar Singha, baba-jiban, in your own house, after having married your eldest daughter to him, and having asked for my permission and that of my wife, thereto, we both give our consent thereto and execute this *pratijna-patra* to the effect that neither I nor my wife shall ever propose to take our said son to our own house nor shall we be competent to take him there. He will live for ever at your *ghar* (house) at Kultikari, and will very happily continue to carry on the business of the Raj. To this effect we of our own accord execute this *pratijna-patra* (deed of promise) in the presence of respectable and other men of this place. Finis. Dated the 9th of Falgoun 1292.” To this was added the following lines:—  
“I, Sri Rai Basanta Kumar Singha (i.e., the Plaintiff) being bound by this deed of promise, do promise that I shall not be competent to take my wife from this

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place to my own father's house or to any other place. I shall always carry out your orders, and I shall not be competent to do any act or to go to any place without your permission. Finis."

The Plaintiff lived at the house of his father-in-law for about 15 years, but subsequently disagreement broke out between the Plaintiff and his wife, the Defendant, and her mother. He thereupon left his father-in-law's house and demanded that his wife should come over and reside with him in his own house at Jehanabad. On the Defendant's refusal, the present suit was instituted. By way of defence, the Defendant set up the *pratijna-patra* and pleaded that it was against the custom of her family for a daughter to reside with her husband away from her father's house; that the Plaintiff had been guilty of cruelty towards her and had not the means to maintain her. The Subordinate Judge granted a decree upon certain conditions. On appeal by the Defendant, the District Judge confirmed the judgment of the Sub-Judge but modified some of the conditions. The Defendant now appealed from that judgment and decree.

*The Advocate-General (The Hon'ble J. T. Woodroffe, with him Sir Griffith Evans, Babus Saroda Charan Mitter, Srish Chunder Chaudhuri and Dr. Sarat Chunder Banerjee) for the Appellant.*—I contend that the suit cannot be regarded as one for the restitution of conjugal rights, because here the foundation for such a suit, namely, denial of the right of co-habitation, or withdrawal from co-habitation, is entirely absent. It is a suit to compel the Defendant wife to go to a particular place. Now, the Plain-

tiff and his parents acting as his guardians covenanted in express terms that the Defendant would not be required to leave her parental home and that agreement is a complete answer to the Plaintiff's suit. There is nothing in the argument that the Plaintiff was a minor at the time of the agreement, because such an agreement is capable of ratification after attainment of majority and there has been such ratification. See *Ramasawmi Aiyar and ors. v. Vencataramaiyan* (14). The Indian Contract Act has abrogated all personal laws about contract. Now, is there anything in the agreement relied upon by the Defendant which is against the provision of any law or is calculated to defeat the provisions of any law? Is there, again, anything in the Hindu law which is opposed to the spirit and the letter of the agreement? I submit there is none. The Hindu law nowhere says that a husband cannot contract himself out of the rights which that law gives him as a husband. The rights and duties of spouses, laid down in the Hindu law, are in no way peculiar to that system: the English law requires the same duties and the same amount of obedience to the will of the husband. There is absolutely nothing in this agreement which is contrary to public policy. See Pollock's Contract, pages 297—304 and the cases cited therein. There can be nothing against public policy if a person contracts himself out of a right which the law ordinarily gives him for his own benefit. It has been held in England that there is nothing illegal or contrary to public policy in a covenant not to sue for

(14) L. R. 6 I. A. 196: s. c. I. L. R. 2 Mad. 91 (1879).

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restitution of conjugal rights. See *Wilson v. Wilson* (10). See also *Hunt v. Hunt* (15), *Marshall v. Marshall* (9), *Clark v. Clark* (16). All that the husband does in the present agreement is to renounce his right to choose the place of co-habitation and I submit that beyond that there is nothing in the agreement which amounts to anything like an absolute renunciation of conjugal rights. The Plaintiff resided for years together at his mother-in-law's house and has permitted his wife and children to remain with and be maintained by the mother-in-law for a period of fifteen years and that fact will have to be considered.

*Sir Griffith Evans* who followed on the same side.—I submit there is no precedent for the proposition that the Court would compel a wife, who has never refused to render to the husband his conjugal rights, to go and reside at a particular place. Suits for restitution of conjugal rights are seldom brought for any other object than to enforce a money demand. See the remarks of Hannen, L. J., in *Marshall v. Marshall* (9) and this is a case where these remarks are peculiarly applicable.

*Babu Shama Prosunno Mazoomdar* for the Respondent.—The matter ought to be decided by the Hindu law alone; by that law marriage is a sacrament, and the rights and obligations of the parties are not created by contract but arise out of the status, and cannot be altered by contract. (*Banerjee's Tagore Lectures on Marriage and Stridhan*, 2nd Ed., p. 107). There has clearly been a refusal of the

wife to co-habit, and this is a suit for restitution of conjugal rights. See the remarks of Straight, J., in the case of *Paigi v. Sheo Narain* (8). See also *Hamidun-nessa Bibi v. Zohiruddin Sheikh* (3). The contract relied on by the Defendant is contrary to Hindu law. It is against public policy as it imposes an unreasonable restriction on the Plaintiff's personal liberty and a person cannot contract to become a slave.

*The Advocate-General* in reply.

The JUDGMENTS OF THE COURT were as follows:—

GHOSE, J.—The appeal arises out of a suit for enforcement of conjugal rights.

The Plaintiff and the Defendant were married on the 9th Falgoon, 1292 Amli corresponding to the 18th February 1885, at a time when they were both minors. The Defendant is the daughter of the Rajah of Kultikari in the district of Midnapur. The Rajah was then dead, and the Defendant was given away in marriage by her mother. The Plaintiff's parents agreed that their son should be married to the Defendant; and at the time of the marriage, an agreement described in this suit as *pratijna-patra* was executed by them, and it ran as follows:—

"That we solemnly promise that you having decided to keep my eldest son, Sriman Rai Basanta Kumar Singha, babajiban, in your own house, after having married your eldest daughter to him, and having asked for my permission and that of my wife, thereto, we both give our consent thereto and execute this *pratijna-patra* to the effect

(9) L. R. 5 P. D. 19 (1879).

(10) 1 H. L. C. 538 (1848).

(15) 4 D. F. & J. 221 (1862).

(16) L. R. 10 P. D. 188 (1885).

(8) I. L. R. 8 All. 78 at p. 80 (1885).

(3) I. L. R. 17 Cal. 670 (1890).

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that neither I nor my wife shall ever propose to take our said son to our own house nor shall we be competent to take him there. He will live for ever at your *ghar* (house) at Kultikari, and will very happily continue to carry on the business of the Raj. To this effect we of our own accord execute this *pratigna-patra* (deed of promise) in the presence of respectable and other men of this place. Finis. Dated the 9th of Falgoon 1292."

To this was added the following lines:—

"I, Sri Rai Basanta Kumar Singha (i.e., the Plaintiff) being bound by this deed of promise, do promise that I shall not be competent to take my wife from this place to my own father's house or to any other place. I shall always carry out your orders, and I shall not be competent to do any act or to go to any place without your permission. Finis." This document was signed by the Plaintiff's parents and by the Plaintiff.

The Plaintiff lived at Kultikari in the house of his father-in-law for about 15 years, but subsequently disagreement broke out between the Plaintiff on the one hand, and the Defendant and the Defendant's mother, the Rani, on the other, the result being that the Plaintiff was not agreeable to live with the Defendant in her father's house, and demanded that she should come over and live with him in his own house at Jehanabad in the district of Hughli, which it is alleged she refused to do; and thereupon the present suit was brought for a decree directing the Defendant to live with the Plaintiff at his own house.

The suit was defended by the Defendant upon the ground that it was against the custom of the family for the daughter

of the Rajah to go and live in the house of her husband; that the claim was against the provisions of the *ekramnama* of the 9th Falgoon 1292; that the Plaintiff always lived in the house of her father and was being maintained from the allowance given by the Defendant's mother; that the Plaintiff had been guilty of cruelty to the Defendant; that he had no means of his own to maintain the Defendant, and so forth. And the Defendant further alleged that on account of the violence committed by the Plaintiff and his ill-treatment of the Defendant, a complaint was lodged before the Collector as representing the Court of Wards (in whose hands the Kultikari estate then was) and thereupon the Plaintiff was forbidden to enter the house of the Defendant's father; and also that in a previous suit between the parties, which had for its object the obtaining of possession of the Defendant by the Plaintiff as his wife, there was a compromise between the parties to the effect that the Defendant would forgive the Plaintiff and pay him maintenance allowance at the rate of Rs. 30 to enable him to live separately; and that the suit was therefore barred by *res judicata*.

The Subordinate Judge before whom the suit was instituted laid down, amongst others, the following issues:—

"Is the suit *res judicata*?"

"Whether the Plaintiff is precluded from compelling the Defendant's removal from her father's house either by contract, family custom, or otherwise?"

"Is the Defendant's allegation of ill-treatment true?"

"What relief, if any, is Plaintiff entitled to?"



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That officer held that the suit was not barred by *res judicata*; that the Plaintiff was under age at the time of the contract, and that it was not binding upon him; that the custom pleaded by the Defendant was not proved; that the Plaintiff was entitled under the Hindu law to the enforcement of his marital rights; that the agreement pleaded by the Defendant of the 12th Falgoun 1292 was without any consideration, and was no bar to the maintenance of the suit; but that the Plaintiff had been guilty of rather harsh treatment towards the Defendant and therefore though he (the Plaintiff) was entitled to the decree claimed, it must be subject to certain conditions which he thought ought to be imposed. One of the conditions that he did impose was that the Plaintiff should not be allowed to take his wife to the district of Hughli, but that he must reside with her in the town of Midnapur in a suitable house which he must provide, and that, to ensure the comfort of the Defendant, he must engage a sufficient number of servants.

The Defendant appealed against this decree, and the District Judge on appeal has confirmed the judgment of the Subordinate Judge, but has modified the decree in regard to some of the conditions which that officer imposed. I may here mention that the Judge sets out in his judgment the various points that were urged on behalf of the Defendant before him, and he has dealt in his judgment with all those points.

In second appeal before us by the Defendant, the main point urged by the learned counsel on her behalf is, that, having regard to the terms of the contract

entered into between the parties on the 9th Falgoun 1292, the Plaintiff is not entitled to a decree for the relief claimed in the plaint, and that accepting the findings of the Courts below that the Plaintiff was under age at the time of the agreement, the case should be remanded for a finding upon the point whether the agreement was not ratified by him after arrival at majority. It has also been contended that conjugal rights were never refused to the Plaintiff, and that this suit could not therefore be maintained.

I may dispose of the last point very shortly by stating that the suit is not so much for restitution, properly so called, as for enforcement, of conjugal rights, the Defendant having refused to go and live with the Plaintiff at his own house, and that such suit does certainly lie.

Turning then to the main question raised in this appeal, the first observation that I have to make is that the parties being Hindus, their respective rights, as flowing from the marriage, being in question, we have to guide ourselves by the Hindu law, unless it be that the Plaintiff has entered into a valid and lawful agreement such that it may be said he has contracted himself out of the rights conferred upon him by the said marriage.

CL. (1) of sec. 37, Act XII of 1887, provides :—

“Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan law in cases where the

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parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished." The rest of the section is not material for the purpose of the question arising in this case.

It will be observed that the section speaks of the Hindu law being "the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished." There is no legislative enactment in this country modifying the Hindu law of marriage, and the rights which flow from such marriage; nor does the section apparently contemplate the said "rule of decision" being controlled by any contract between the parties.

In *Munshi Buzloor Ruheem v. Shumsonissa Begum* (1), which was a case between two Mahomedans, but in which the general principle underlying such a case was considered, the Judicial Committee, with reference to the question raised, namely, whether a suit could be brought by a Mahomedan husband in the Civil Courts of India to enforce his marital rights under the Mahomedan law by compelling his wife against her will to return to co-habitation with him, observed, among other matters, as follows:—

"Of authority negating the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of maintenance to the rebellious wife, or, at most, a suit for damages; because a suit to compel the wife to return to her husband though obviously a more complete remedy than

either of them is in the nature of a suit for specific performance, and being founded on the contract of marriage, which the Mahomedan law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them." And later on they observed—"Upon authority, then, as well as principle, their Lordships have no doubt that the Mussalman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to co-habitation, and that that suit must be determined according to the principles of Mahomedan law. The latter proposition follows not merely from the imperative words of Beng. Reg. IV of 1793, sec. 15, (which has been substituted by sec. 37 of Act XII of 1887), but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities, so, specially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties."

I refer to this case for the purpose of simply emphasising what I have already said, that the question raised between the parties in the present case has to be determined by the particular law, that is, the Hindu law, which governs them. And the same view has been expressed by the Bombay High Court in the well-known case of *Dadaji Bhikaji v. Rukma-bai* (2) in the following words:—

(1) 11 M. I. A. 551 (1867).

(2) I. L. R. 10 Bom. 301 (1886).

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"We may, however, remark that although no text may be found in the Hindu law books which provide for the king ordering a husband or wife to return, no text was cited forbidding or deprecating compulsion, and that it was admitted that the duties appertaining to the relationship of husband and wife have always been the subject of caste discipline, and, therefore, that with the establishment of a systematic administration of justice the Civil Courts would properly and almost necessarily assume to themselves the jurisdiction over conjugal rights as determined by Hindu law, and enforce them according to their own modes of procedure."

This brings us to the consideration of the question what is the Hindu law upon this subject. It may be premised that though marriage under the Hindu law is a contract, it is also a sacrament: it is more religious than secular in character: The union is indissoluble, for it is a "union of flesh with flesh, bone with bone:" during the husband's lifetime, he is to be regarded by the wife as a god, and the wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts, and no sacrifice or religious right is allowed to her apart from the husband's. Hence it is that after the husband's death, the widow is regarded as the surviving half of his body. The union is a sacred tie, and subsists even after death of the husband (see Manu, Ch. II, v. 67; Ch. III, v. 43; Ch. v, v. 154, 155, 156, 157, 158, 160, 165; Ch. IX, v. 29; Dyabhaga, Ch. IV, v. 14; Ch. XI, sec. 1, v. 2; and Hindu Law on Marriage by Dr. Banerjee, p. 131).

The marital dominion which a husband under the Hindu law acquires over his wife is due, as I understand it, to two causes, *first*, the gift by the parents of the girl; and, *secondly*, the troth plighted by the husband. And it is owing to these causes, we may take it, that the husband is the lawful guardian of his wife when a minor (see Manu, Ch. v, v. 151, 152; Ch. III, v. 27, 28; *Hamidunnessa Bibi v. Zohiruddin Sheik* (3).

Having made these prefatory remarks, I proceed to refer to some of the texts as bearing upon the question at issue. I shall begin with a text of Manu. "In childhood must a female be dependent on her father; in youth, on her husband; her lord being dead, on her son; . . . a woman must never seek independence. Never let her wish to separate herself from her father, her husband, or her sons; for by a separation from them, she exposes both families to contempt" (see Colebrooke's Digest of Hindu Law, Vol. II, p. 137, Ed. 1874).

The next is a text of Devala:—

"Dependence, attendance on her husband and in his religious ceremonies, respectful behaviour to those who are entitled to veneration from him; hatred to those who bear enmity to him, no ill-will towards him, constant complacency, attention to his business, are the duties of women. (Colebrooke, Vol. II, p. 138). Vishnu:—

"Accompanying of her husband, reverence of his father, of spiritual parents, of deities and guests, great cleanliness in regard to the domestic furniture, and care of the household vessels; avoiding the use of *philters* and charms, attention

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to auspicious customs, austerities after the death of her husband, no frequenting of strange houses, no standing at the door or window, dependence in all affairs, subjection to her father, husband and son, in childhood, youth and age: such are the duties of a woman." (Colebrooke, Vol. II, p. 138, v. 92). Vasiṣṭha:—

"The abode of faithful wives, who are fond of home and truly rigid, and who have subdued their passions, shall be the same with that of their lords; but the mansions of shakals are assigned to disloyal wives." (Colebrooke, Vol. II, p. 148), (Manu, Chap. IX, v, v. 45 and 46).

"The husband is even one person with his wife for all domestic and religious, not for all civil purposes."

"Neither by sale or desertion can a wife be released from her husband."

(Manu, Ch. IX, v, 102).

"Let a man and woman united by marriage, constantly beware, lest, at any time disunited, they violate their mutual fidelity." (Manu, Ch. v, v. 164, 165, 166).

"A married woman who violates the duty, which she owes to her lord, brings infamy on herself in this life, and in the next, shall enter the womb of a shakal, or be afflicted with elephantiasis, and other diseases, which punish crimes; while she, who slights not her lord, but keeps her mind, speech and body, devoted to him, attains his heavenly mansion, and by good men is called *sadhvi* or virtuous."

"Yes by this course of life it is, that a woman whose mind, speech and body are kept in subjection, acquires high renown in this world, and, in the next, the same abode with her husband."

These texts, among other matters, establish that it is the bounden duty of the wife to live with her husband, wherever he may choose to reside, to submit herself to his authority—never to separate from him—and to attend upon him, and in his religious ceremonies; and that the violation of such duty is a great sin, which results in terrible punishment in the next world.

I shall now turn to the views expressed on the subject by some of the modern writers on Hindu law.

Mr. Justice Banerjee in his book on the Hindu law of Marriage and Stridhan, at p. 108, makes the following observations:—

"It follows from the very nature of the matrimonial relation that the husband and the wife must each be entitled to the society of the other. It is one of the express conditions in the nuptial vow of the Hindus that each party is to become the associate of the other. Accordingly Manu declares 'let mutual fidelity continue till the death. Let a man and woman united by marriage, constantly beware, lest at any time disunited they violate the mutual fidelity.' And the sages denounce the desertion or neglect of either party by the other without just cause as an act punishable in this world and in the next." And later on, at page 112, he observes:—

"The duty of attendance on her husband, which is so strongly inculcated obliges her to follow him wherever he chooses to reside. And it is a general principle of law that the domicile of the wife follows that of her husband. She is also bound to refrain from going to any place where her husband forbids her to go."

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Mr. Mayne, in his book on Hindu Law, Ch. XIV, paragraph 414, says :—

“As soon as the wife is mature, her home is necessarily in her husband's house. He is bound to maintain her in it—while she is willing to reside with him, and to perform her duties. If she quits him of her own accord either without cause, or on account of such ordinary quarrels as are incidental to married life in general, she can set up no claim to a separate maintenance. Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there or such continued ill-usage as would be termed cruelty in an English Matrimonial Court.”

Babu Golap Chandra Sarkar, in his book on Hindu Law, p. 67, says as follows :—

“Although the conjugal relation is based upon a contract of either the parties to the marriage or their guardians, the rights and the duties of the married couple do not arise from any implied contract, but are annexed by law to the connubial relation as its incidents. The wife is bound to reside with the husband wherever he may choose to live. The fact of the husband having another wife will not relieve her from that duty: nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere.”

Dr. W. N. Bhattacharji quoting a text of Manu, in his book entitled “Commentaries on Hindu Law,” p. 123, says :—

“Where the wife is *sui juris* and refuses to live with her husband, he can, according to Hindu law, keep her by force under his protection. Under the Indian Penal Code, the husband cannot be

punished for merely keeping his wife under restraint, without using violence or subjecting her to cruel treatment.” Let us now refer to some of the decided cases bearing upon the matter.

In *Kateeram Dokanee v. Musst. Gendhenee* (4), where the suit was for recovery of possession of the person of the wife by a Hindu husband, Markby, J., made the following observations :—

“The marriage of an infant being under the Hindu law a legal and complete marriage, the husband, in my opinion, has the same right as in other cases to demand that his wife shall reside in the same house as himself. I do not think that any Court can deprive the husband of this right except upon some tangible and definite grounds which show that under the special circumstances of the case the wife is absolved from this duty, and her parents or guardians from the duty of surrendering her to her husband: and we cannot, in my opinion, say, without contravening the Hindu law, that the infancy of the wife constitutes such a ground, though it might, I think, be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family.”

In the case of *Surjya Moni Dasi v. Rati Kanta Das* (5), where a Hindu husband brought a suit for restitution of conjugal rights against his minor wife represented by her paternal grandmother, a Division Bench of this Court, after referring to the case of *Kateeram Dokanee*

(4) 23 W. R. 178 (1875).

(5) 5 C. W. N. 195 : s. c. I. L. R. 28 Cal. 37 (1900).

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v. *Musst. Gendhenee* (4) which I have just noticed, made the following observations:—

“If, as legal guardian of the person and property of his minor wife, a Hindu husband is entitled under the law to insist that she shall live with him, it seems useless to argue that he is not entitled to similar relief in a suit for restitution of conjugal rights, if the wife has attained an age at which she is considered fit to discharge her conjugal duties, though in the eye of the law she may still be a minor.”

In the case of *Sita Nath Mukerjee v. Srimati Haimabutty Dabi* (6), which was a suit by a Hindu wife against her husband for maintenance, Sir Richard Garth, in delivering the judgment of the Court, observed as follows (p. 379):—

“Now, what is the Hindu law upon the subject?”

“It is clear that, according to that law, a wife’s first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection; and although it might be very difficult to deduce from the authorities at the present day any definite rule as to the causes which would justify a wife in leaving her husband’s house, it may safely be affirmed that mere unkindness or neglect short of cruelty would not be a sufficient justification.”

And in the case of *Binda v. Kaunsilia* (7), in which Mahmood, J., examined the texts and authorities most carefully and held that the texts of the Hindu law

relating to conjugal co-habitation and imposing restrictions upon the liberty of the wife, and placing her under the control of her husband, are not merely precepts, but rules of law, and that the rights and duties which they create may be enforced by either party against the other.

♥ Having regard to the texts of the sages, and the exposition thereof by different authors and eminent Judges, I think we may safely take it that the duty imposed upon a Hindu wife to reside with her husband, wherever he may choose to reside, is not only a moral duty, but a rule of Hindu law.

Sec. 23 of the Contract Act provides:

“The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent, or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.”

“In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.”

• Now, it seems to me that if it is a rule of Hindu law that for the fulfilment of the duties which the law imposes upon a wife, she must reside with her husband wherever he may choose to reside, an agreement on the part of the husband that he will not be at liberty to remove his wife from her parent’s abode to his own abode would, if permitted, defeat the clear rule of Hindu law on the subject; and I may in this connection refer to some of the observa-

(4) 23 W. R. 178 (1875).

(6) 24 W. R. 874 (1876).

(7) L. L. R. 13 All. 126 at p. 131 (1891)

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tions by Mr. Justice Banerjee, in his book on Hindu Law of Marriage, p. 107.

He says :—

“The Hindu law upon this subject still retains its archaic character. Marriage in that law is not merely a contract but also a sacrament; and the rights and duties of the married parties are determined solely by the law, and are incapable of being varied by their agreement. As Manu emphatically declares neither by sale nor desertion, can a wife be released from her husband.”

I might also here notice the case of *Paigi v. Sheo Narain* (8), where in a suit by a Hindu against his wife for restitution of conjugal rights, the Defendant (the wife) pleaded an agreement similar to that which has been relied upon in this case, the Court held that the plea was unsound and could not be seriously maintained, and therefore need not be any further noticed.

Then, is not the contract in question opposed to public policy also? The Plaintiff is said to have agreed that he would not be competent to take his wife away from her father's house, that he would carry out the orders of the mother of the Defendant, and that he should not be competent to do any act or to go to any place without her permission. This agreement imposes upon the Plaintiff a permanent restriction against removing his wife to any place that he may select for their residence; and it also imposes a permanent restraint upon his own action and movements: he in fact gives himself up absolutely to the disposal of the De-

fendant's mother in all respects. It has been said that the latter part of the agreement may not be binding, as the former is, but it is rather difficult to separate the two portions. The learned counsel for the Appellant has in support of his contention that the agreement in question is valid, called our attention to certain cases in the English Reports, in which it has been held that a deed of separation containing a covenant that either the husband or the wife should not sue for restitution of conjugal rights, has been held to be valid. But let us see upon what principle are these cases based. Looking at *Marshall v. Marshall* (9), I find that Sir James Hannen at page 23 observed :—

“But since the decision of the House of Lords in *Wilson v. Wilson* (10) it can no longer be contended that there is anything illegal or contrary to public policy in an agreement between married persons that no suit for restitution of conjugal rights shall be instituted by either of them. For my own part I must say that the opinion I have formed after several years' experience in the administration of the law in this Court, is that it is in the highest degree desirable, for the preservation of the peace and reputation of families, that such agreements should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a Court of Justice.”

And, referring to the case of *Wilson v. Wilson* (10), I observe that the Lord Chancellor, among other cases, relied upon the judgment in *Westmeath v.*

(9) L. R. 5 P. D. 19 (1879).

(10) 1 H. L. C. 538 (1848).

(8) I. L. R. 8 All. 78 (1885).

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*Westmeath* (11) where Lord Eldon said as follows:—

"I apprehend that any instrument, which provides for a present separation and which prospectively looks to the parties living together again, and then to a future separation, that such a deed so far as it provides for that future separation will never be carried into effect."

Then referring to Addison on Contracts, p. 75, I find it stated, upon the authority of *Merryweather v. Jones* (12) that "contracts providing for the future separation of husband and wife are contrary to public policy. But a contract between the husband and a trustee on behalf of the wife, providing for the terms of present separation will be enforced."

The principle underlying the cases, in which it has been held that contracts providing for present separation are invalid is, as I understand it, the preservation of the peace and reputation of families; while, on the other hand, an agreement for future separation is bad and opposed to public policy.

There is a fundamental difference between a case where an agreement for separate living for a time is entered into during the continuance of marriage and an agreement before or at the time of marriage controlling the rights of the parties, which the law confers upon them after the marriage, and which if enforced, might make the marriage itself nugatory or infructuous. Such an agreement would seem to be opposed to public policy.

The agreement with which we are

concerned is an agreement of the latter character. It permanently controls the rights of the husband, as conferred upon him by the Hindu law, so soon as the marriage is effected; and it is an agreement which, if enforced, might practically lead to the separation of the husband and wife in future. And the mischief of such an agreement is pointed out by the Defendant herself in her written statement; for she says therein, that the Plaintiff has been forbidden by the Collector, upon a complaint made to him, to enter the house of her father,—the result being that he cannot get access to his wife, nor can he, by reason of the agreement, remove her to his own abode.

I am of opinion that the agreement is opposed to public policy.

Upon all these grounds, I hold that the agreement relied upon by the Defendant is no just answer to the Plaintiff's claim in the present case.

I need scarcely say that we are not concerned in this appeal by the Defendant (and there is no cross-objection by the Plaintiff) with the conditions which have been imposed by the District Judge upon the Plaintiff before he can compel his wife to reside with him. I may, however, say, that, in consideration of the welfare, personal safety and health of the wife, it has been held in several cases that such conditions may well be imposed [see *Buzloor Ruheem v. Shums-oonnissa Begum* (1), *Paigi v. Sheo Narain* (8), *Jogendro Nundini Dossee v. Hurry Doss Ghose* (13)].

(11) Jacob, 135 (1821).

(12) 4 Giff. 519 (1868).

(1) 11 M. I. A. 551 (1867).

(8) I. L. R. 8 All. 78 (1885).

(13) I. L. R. 5 Cal. 500 (1879).



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The result is that this appeal is dismissed, and with costs.

STEVENS, J.—After full consideration I concur with my learned colleague in thinking that a pre-nuptial contract such as that which has been set up in this case is not a sufficient answer to a claim like the present where the parties are Hindus. Such a contract seems to be not only inconsistent with the theory of the relation between husband and wife according to the Hindu law, but against public policy.

I may say that a consideration which caused me to hesitate before finally coming to this conclusion is that in fact it is not uncommon among Hindus for a husband to live with his wife in the house of her parents, and I understand that there is nothing in such an arrangement which interferes with the attainment of all the objects of marriage, including the fulfilment of the strictly religious obligations which marriage between Hindus involves. How, it might be asked, can a formal pre-nuptial agreement for a permanent arrangement of that kind, by which all the objects of matrimony as understood by Hindus can be, and in practice are, attained, be properly said to be against Hindu law or against public policy?

The answer, I think, is that the objection to such an agreement lies in its permanent and unconditional character. By the contract before us the husband puts himself, without any reference to conditions which may arise in future, permanently and unreservedly into complete subjection to his mother-in-law; he practically gives up his general marital authority to a considerable ex-

tent and in particular he puts it entirely out of his power to change his residence, however intolerable the situation may become to himself or to his family and however important a change of residence may become, not only in his own interests, but in those of his children, or even of his wife herself. It is not that he merely abandons one particular right incidental to his status as a husband and affecting himself alone; but he places himself in a general position of subordination entirely inconsistent with his status as contemplated by the Hindu law; and, as regards the particular right which he abandons, that of choice of domicile, I think it may fairly be said, looking to the possible interests of the children in respect of their bringing up and education, that it cannot properly be regarded as a mere "*jus pro se introductum*," which a man may give up at his will.

The practical working of such an agreement is seen in the present case on the wife's own representation of the facts in her written statement. Family quarrels arise; the husband is turned out of the house and eventually it is sought to induce him to live apart from his wife on an allowance from her mother. It can scarcely be disputed that such a separation, save for very serious cause, would be wholly incompatible with the Hindu law of marriage, and the District Judge has found upon the evidence that nothing more serious ever took place than occasional quarrels between husband and wife, though her witnesses sought to greatly exaggerate the facts.

The only reported case which seems to me to have a direct bearing on the ques-

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tion is that of *Paigi v. Sheo Navain* (8) which has been referred to by my learned colleague. It was held in that case, which was a suit for restitution of conjugal rights, that a plea that the wife had been married to the husband on condition that he would live with her in the house of her mother after marriage and that having broken that condition by leaving the house, he was not entitled to enforce his marital rights, was so absurd as not to need serious notice. It may be said, as, indeed, it was said by the learned counsel who addressed us for the Defendant-Appellant, that there was apparently this distinction between that case and the present: that there the wife sought to withdraw herself from her husband altogether, whereas in the case before us she is willing to resume cohabitation but insists on residing on her mother's premises. The distinction, however, if it exists, is perhaps not practically very great, if the Plaintiff in this case is liable to be ejected from the house, whenever a family disagreement occurs.

As the parties before us are Hindus, this case has to be dealt with on the principles of Hindu law; but if it be conceded, as the learned counsel for the Defendant-Appellant contended, that the right of the husband to the choice of domicile is common to that and to other systems of law, it must still be said that no cases have been shown to us, nor have I been able to find any, under any system of law which recognise the validity of a pre-nuptial contract giving up the right in question. The English cases which have been cited do not touch the point and do not seem to me to assist the

Appellant's case in any way. Assuming for a moment that a decision on the same point arising in a suit between Mahomedans might be taken as a guide on the question of general principle, the only reported Mahomedan case in which the point seems to have been raised, namely, that of *Hamidun-nessa Bibi v. Zohiruddin Sheik* (3) left it undecided on the ground that whether or not such a stipulation as to residence could be valid in any case, the terms of the *kabinama* and the subsequent conduct of the parties in that particular case prevented it from being a sufficient answer to the claim for restitution of conjugal rights.

There thus appears to be really no authority in support of the contention which has been raised for the Defendant-Appellant in favour of the validity of the pre-nuptial contract set up by her, and I agree with my learned brother that the appeal must be dismissed with costs.

C. C. G.

*Appeal dismissed.*

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 693 OF 1900.

AMEER ALI, J.	}	RAJ MOHAN ROY
PRATT, J.		CHOWDHURY and others,
1901.		2nd Party, Petitioner,
29, January.		v.
		PROSUNNO CHANDRA
		CHATTERJI and another,
		1st Party,
		Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 145, 148, 192, sub-sec. (2), 528, 529 (f), 530 (j)—Transfer of case under sec. 145 by District Magistrate to another Magistrate to try it himself or make it over to another—*

RAJ MOHAN ROY CHOWDHURY v. PROSUNNO CHANDRA CHATTERJI.

*Valid or invalid transfer—Jurisdiction, local—Prejudice—Local inquiry by trying Magistrate.*

*In a proceeding under sec. 145, Cr. P. Code, the second party moved the District Magistrate for the transfer of the case to his own file, and the Magistrate transferred it accordingly to the file of the senior Deputy Magistrate at Sudder with instruction to "try it himself or make it over to another Magistrate at Sudder," and the senior Deputy Magistrate made over the case to a subordinate Magistrate, who tried the case and made an order after holding a local enquiry himself:*

*Held—That the fact that the subject-matter of the dispute was not within the local jurisdiction of the subordinate Magistrate who tried the case would not oust his jurisdiction or render him incompetent to try the case, provided that he was vested with the powers of a proper class: and that the order made by him would not, on that account, be bad.*

*Sec. 530 (j) refers to a case where a Magistrate is not competent, by virtue of the position he holds or powers vested in him, to try a case of the character referred to in sec. 145, Cr. P. Code.*

*Sec. 148, Cr. P. Code, does not necessarily imply that the Magistrate before whom the case is, may not himself hold the local enquiry as is provided for in the section.*

*Any mistake made erroneously and in good faith by one Magistrate in transferring a case under sec. 145, Cr. P. Code, to another under sec. 192, is cured by the provisions of sec. 529 (f).*

*This was a rule issued on the 11th of September 1900, against the order of the*

*Deputy Magistrate of Barisal, dated the 30th June 1900.*

The facts of the case are shortly as follows:—In a proceeding under sec. 145, Cr. P. Code, one of the parties moved the District Magistrate for a transfer of the case to his own file. The District Magistrate accordingly made an order transferring the case to the file of the senior Deputy Magistrate at the Sudder (Head-quarters) to "try it himself or make it over to another Magistrate at the Sudder." The senior Deputy Magistrate, however, made over the case to a subordinate Magistrate who held a local investigation and tried the case and made an order in favour of the 1st party. Against that order the Petitioners, 2nd party, moved the High Court, and the Court (Prinsep and Handley, JJ.) made the following order in issuing the rule:—

The application relates to proceedings taken under sec. 145, C. Cr. P. The District Magistrate, on an application made, removed the case from the Sub-Divisional Office for trial in the head-quarter Sub-Division and, in his order, he transferred the case "to the senior Deputy Magistrate at Sudder to be tried by him or made over for trial by another Magistrate at Sudder."

The case was made over by the senior Deputy Magistrate, so we are told, to Babu Kali Kumar Roy Chowdhuri and it has been tried by him after a local investigation held.

The objections taken on this application are, first, that Babu Kali Kumar Roy Chowdhuri had no local jurisdiction over the subject-matter of dispute. It seems to us, however, that if the case had been transferred to a Magistrate in

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another Sub-Division, that Magistrate would be competent to try such a case provided that he was vested with the powers of a proper class and in this respect we think that the order should not be bad.

But this matter is subject to the point raised on the second objection which is, we think, *prima facie* good. The order of transfer of the case to the senior Deputy Magistrate at the Sudder Station to be tried by him is a valid order but, in so far as it permits him to make over the case for trial by another Magistrate at Sudder, it seems to us to be open to objection, having regard to the terms of sec. 192 (2), C. Cr. P., which if the senior Deputy Magistrate were empowered to act under sub-sec. (2) would seem to empower him to transfer only an enquiry or trial in respect to an offence alleged to have been committed.

The third objection is, we think, untenable. Sec. 148, C. Cr. P., no doubt permits a Magistrate to order a local inquiry to be held by some other Magistrate, but this would not necessarily imply that the Magistrate before whom the case is, may not himself hold the local inquiry.

A rule is, therefore, granted to the District Magistrate and also on the opposite party to show cause why the order under sec. 145, C. Cr. P., should not be set aside as without jurisdiction on the ground that the case was not properly before Babu Kali Kumar Roy Chowdhuri by an order issued by a Magistrate competent to transfer that case to him. The record will be sent for.

The rule was then heard before Ameer Ali and Pratt, JJ.

*The Advocate-General (Mr. J. T. Woodroffe) and Babu Jadunath Kanjilal for the Petitioner.*

*Mr. P. L. Roy and Babu Brojo Lal Chuckerbutty for the Opposite Party.*

The JUDGMENT OF THE COURT was as follows:—

The second party in these proceedings obtained from the Criminal Division Bench of this Court, a rule in the following terms:—"A rule is granted to the District Magistrate and also on the opposite party to show cause why the order under sec. 145, C. Cr. P., should not be set aside as without jurisdiction on the ground that the case was not properly before Babu Kali Kumar Roy Chowdhuri (the Deputy Magistrate who made the order complained against) by an order issued by a Magistrate competent to transfer that case to him."

The circumstances under which the District Magistrate made that order are set forth in the second paragraph of the petition of the second party which runs thus: "The second party then moved the District Magistrate of Barisal apparently under sec. 528, Cr. P. C., for the transfer of the case to his own file for various reasons, and the case was accordingly transferred to the file of the senior Deputy Magistrate with instruction to try it himself or make it over to another Magistrate, and the case was made over by the senior Deputy Magistrate to Babu Kali Kumar Roy Chowdhuri for trial."

The order, therefore, which was made by the District Magistrate was made, judging from the petition itself, at the instance of the second party.

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It is now contended that the senior Deputy Magistrate to whom the case was transferred by the District Magistrate had no power to transfer it to Babu Kali Kumar Roy Chowdhuri, and as that transfer was made under sec. 192 (2) it is urged that the District Magistrate ought to have specified the Magistrate to whom the senior Deputy Magistrate could transfer the case.

Supposing that the present matter falls under sec. 192 (2) it appears to us that any mistake on the part of the senior Deputy Magistrate in transferring the case to another Magistrate, namely, Babu Kali Kumar Roy Chowdhuri, is cured by the provisions of sec. 529 (f) which declares that "if any Magistrate not empowered by law to transfer a case under sec. 192 erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered." Assuming then that the senior Deputy Magistrate had not the power to make the transfer but did so erroneously in good faith, and his good faith is not impugned, the order made by him cannot be set aside merely on the ground that he had no power. But it is contended that the Magistrate who made the order under sec. 145 was not competent to make it inasmuch as the subject-matter of dispute was not within his local jurisdiction and that, therefore, the case came within sec. 530 (j). In our opinion sec. 530 (j) refers to a totally different state of things, namely, where a Magistrate is not competent by virtue of the position he holds or powers vested in him to try a case of the character referred to in sec. 145. From the

materials before us there does not appear that Babu Kali Kumar Roy Chowdhuri was not vested with the jurisdiction or was not a first-class Magistrate competent to try the case under sec. 145.

We therefore think that the provisions of sec. 530 (j) do not apply at all to the case. On the other hand it appears from the petition of motion that the order of transfer was made under sec. 528. The proceedings therefore are not void.

The rule is accordingly discharged.

*Rule discharged.*

H. P. C.

#### PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR R. COUCH.

1901.

18, June.

RADHA KRISHN DAS

"

RAI KRISHN CHAND.

*Civil Procedure Code (Act XIV of 1882),  
secs. 595, 596 and 600—Appeal to Privy  
Council—Certificate where case is "otherwise"  
fit for appeal.*

*In considering under what section of the  
Civil Procedure Code the certificate of  
fitness was given by the Court, it is the  
certificate itself which has to be looked at  
and not the order for the certificate.*

*In granting a certificate under sec. 600,  
Civ. P. C., the Court must exercise its  
judicial discretion upon the matter.*

*Unless the certificate upon which the  
leave to appeal is based is in such a form  
as to justify that leave, the Court must  
find that leave was not properly given  
and the appeal must be dismissed.*

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BANARSI PARSHAD v. KASHI KRISHNA NARAIN (1) referred to.

This was an appeal against the decision of the High Court of Allahabad, which reversed the decision of the Subordinate Judge of Benares.

*Mr. Mayne* for the Appellant.

*Mr. A. J. Wallach* for the Respondent.

*Mr. Wallach* took a preliminary objection on the ground that leave for appeal had been granted under sec. 596 of the Code of Civil Procedure, although the amount in question and the subject-matter was under the value of Rs. 10,000, that is to say, two thousand rupees.

The petition for leave to appeal contains the following paragraph:—

‘That though the valuation of the appeal is below Rs. 10,000, it involves substantial questions of law and fact.’

‘The Petitioner being desirous to appeal to Her Majesty in Council, humbly prays that this Hon. Court may be pleased to grant certificate under sec. 596 of the Code of Civil Procedure, for the following grounds.’

Thereupon two of the Judges of the High Court made the following order:—

“Let certificate issue, that the case is a fit one for appeal to Her Majesty in Council.”

In the certificate for leave to appeal the same Judges certified—

‘That though the valuation of the case is below Rs. 10,000, yet as regards the value and nature of the case, it fulfils the requirements of sec. 596 of Act No. XIV of 1882.’

*Mr. Wallach* submitted that leave to appeal should have been asked for under

sec. 595 (c) and sec. 600 of the Civil Procedure Code.

Sec. 595 (c): “An appeal shall lie to Her Majesty in Council from any decree, when the case as hereinafter provided is certified to be one fit for appeal to Her Majesty in Council.”

Sec. 600: “Every petition under sec. 595 must state the grounds of appeal and pray for a certificate either that as regards amount or value and nature, the case fulfils the requirements of sec. 596 or that it is otherwise a fit one for appeal to Her Majesty in Council.”

The circumstances of this case did not fulfil the requirements of sec. 596, and the certificate granted by the High Court was contradictory in itself. The High Court ought to have granted a certificate under secs. 595 (c) and 600, i.e., that although the amount is under Rs. 10,000 the case is otherwise a fit one for appeal to Her Majesty in Council. *Banarsi Parshad v. Kashi Krishna Narain* (1).

*Mr. Mayne*.—A mistake was made by the Registrar—it is a clerical error and should have been sec. 595 instead of sec. 596. The mistake is not such a one, that the Appellant should be debarred from being heard.

Their LORDSHIPS’ JUDGMENT was delivered by

LORD DAVEY.—In this case their Lordships think that they cannot but give effect to the preliminary objection which has been made. The objection is that there is no proper certificate accompanying the leave to appeal, or forming a proper foundation for the leave to appeal.

(1) L. R. 27 I. A. 11; s. c. 5 C. W. N. 193 (1900).

(1) L. R. 27 I. A. 11; s. c. 5 C. W. N. 193 (1900).

## RADHA KRISHN DAS v. RAI KRISHN CHAND.

The circumstances may be stated very shortly. The Petitioner, the present Appellant, states in his petition that the valuation in the appeal is below Rs. 10,000, but that it involves substantial questions of law and fact. Then he goes on: "The Petitioner being desirous to appeal to Her Majesty in Council, humbly prays that this Honourable Court may be pleased to grant certificate under sec. 596 of the Code of Civil Procedure;" and then he sets out certain grounds. Then an order is said to have been passed in these terms by Mr. Justice Knox and Mr. Justice Banerjee: "Let certificate issue, that the case is a fit one for appeal to Her Majesty in Council." That was on the 20th of January 1898, and apparently on the same day the following certificate is made:—"The Court having had before it an application for leave to appeal to Her Imperial Majesty the Queen in Her Privy Council presented on behalf of the Appellant aforesaid, it is certified that though the valuation of the case is below Rs. 10,000, yet as regards the value and nature of the case it fulfils the requirements of sec. 596 of Act No. XIV of 1882." That is signed by the same two learned Judges—Mr. Justice Knox and Mr. Justice Banerjee.

Their Lordships think that the certificate, and not the order for the certificate, is the document which they are bound to consider and act upon; and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave they ought to hold that leave has not properly been given.

Now the question arises under sec. 596 of the Civil Procedure Code. That

section says:—"In each of the case mentioned in clauses (a) and (b) of sec. 595, the amount or value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum, or upwards. Or the decree must involve, directly or indirectly, some claim, or question to, or respecting property of like amount or value." There is no difficulty in interpreting that, and it does not admit of any qualification. If any less value than Rs. 10,000 is directly, or indirectly, involved, it will not give the Court jurisdiction to grant leave to appeal. In a certain event, as was recently pointed out in the case of *Banarsi Parshad v. Kashi Krishna Narain* (1), which was recently before this Board, there is an additional requirement, namely, that where the decree appealed from affirms the decision of the Court, the appeal must involve some substantial question of law. It is noticed, in the judgment of this Board, in the case to which their Lordships have just referred, that there was a prevailing impression in the High Court that the mere existence of a substantial question of law was sufficient to give the Court jurisdiction to give leave to appeal to Her Majesty in Council. Lord Hobhouse says:—"Their Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of appeal in the ordinary course of procedure under the Code. That is a mistake. Sec. 596 of the Code requires

(1) L. R. 27 I. A. 11; s. c. 5 C. W. N. 193 (1900).

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that in order to give such a right there must be in dispute, either directly or indirectly, an amount of Rs. 10,000. If the decree affirms the Court below another condition is affixed, namely, that the appeal must involve some substantial question of law. The presence of such a question does not give a right when the value is below the mark. The requirement of it restricts the right when the higher decree affirms the lower." It is only upon the assumption that there was such an impression in the minds of the learned Judges that this certificate can have any meaning attached to it at all, because it is difficult to understand how, if valuation is an essential part of the requirement under sec. 596, it can be said that though the valuation of the case is below the amount yet it fulfils the requirement. It would be a contradiction in terms.

There is this further: Mr. Mayne pressed us to disregard the language of the certificate, and to look at the order directing the certificate to be made. Their Lordships do not feel satisfied that they are entitled to take that liberty, but assuming that they may do so, they would at least require to be satisfied that the Judges had exercised their judicial discretion upon the matter in deciding whether, in order to comply with sec. 595 (c) and sec. 600, the case was a fit one for appeal to Her Majesty in Council. Now their Lordships are not by any means satisfied that the learned Judges were either asked, or did direct their minds judicially to that question. The petition asks, as has already been read, that the Court should grant the certificate under sec. 596, treating it as part

of the ordinary ministerial jurisdiction of the Court; and no reasons are given, and no grounds are stated by the learned Judges, for holding that, although it did not comply with sec. 596, it was still a fit case to appeal to Her Majesty in Council.

Their Lordships, therefore, are not satisfied that the judicial mind of the Court has ever been applied to that question; still less that the certificate which was signed by the learned Judges does not carry out what they intended to order and direct.

They will only add that, if Mr. Mayne had been in a position, which he very fairly admitted he was not, to say that he could with any hope of success ask for special leave to appeal, their Lordships would not have shut out the Appellant from stating his case to the Board; but, as it is, their Lordships will humbly advise His Majesty that the appeal be dismissed, and they will direct that the Appellant pays the costs of the appeal.

Solicitor: *Mr. T. C. Summerhays* for the Appellant.

Solicitors: *Messrs. Pyke and Parrot* for the Respondent.

*Appeal dismissed with costs.*

C. W. A.

## [APPEAL FROM ORIGINAL JURISDICTION.]

APPEAL No. 8 OF 1900.

MACLEAN, C. J.	}	R. M. S. CHETTY,
PRINSEP, J.		Defendant, Appellant,
HILL, J.		v.
1901.		MAHOMED ESSA SAHEB,
6, March.		Plaintiff, Respondent.

*Civil Procedure Code (Act XIV of 1882), secs. 394, 395—Report of a Commissioner—Order confirming the report, appeal from—*



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*Appeal Court, power of, to deal with findings of fact by the Commissioner.*

Held per PRINSEP and HILL, JJ. (MACLEAN, C. J., dissenting)—*In an appeal from a judgment and order confirming the report of a Commissioner appointed under sec. 394, Civ. P. C., it is open to the Court of Appeal to deal with the report on matters of fact, and its powers are not limited to questions of principle when examining such report.*

AHMED NANU BILAI v. KHARAP KARIM BHAI (4) and KANKATALA v. POLSHETH (5) referred to.

*The Court whether of first instance or of appeal must be satisfied with the proceedings of a Commissioner before it accepts them and the fact that the judgment of the first Court is in affirmance of the report of a Commissioner does not affect the powers of the Court of Appeal.*

MOUNG THA HNYEEN v. MOUNG PAN NYO (2) distinguished.

WATSON v. AGA MEHEDEE SHERAZEE (3) referred to.

Per PRINSEP, J.—*The report of a Commissioner requires affirmance by an order of Court to make it operative and cannot be regarded as a judgment of a Court.*

Per HILL, J.—*Under sec. 395, Civ. P. C., the report of a Commissioner if accepted by the Court is only evidence in the suit of facts found by him, but is not a decision upon it, nor can it be treated on the same footing as the verdict of a jury.*

MACKINTOSH v. GREAT WESTERN RY. Co. (1) and MOUNG THA HNYEEN v. MOUNG PAN NYO (2) distinguished.

(1) 4 Giff. 683 (1887).

(2) 4 C. W. N. 808 (1900).

(3) L. R. 1 I. A. 346 (1874).

(4) 6 Bom. H. C. 149 (1869).

(5) 6 Mad. H. C. 36 (1870).

BARONESS WENLOCK v. RIVER DEE COMPANY (6) referred to.

Per MACLEAN, C. J.—*If there has been a fair investigation of the matter by the Registrar and his finding has been confirmed by the Judge of first instance, the Court of Appeal ought not to interfere except on the strong ground of manifest error or manifest abuse. It should not interfere merely on the ground that if the matter was res integra it would have been disposed to attach more weight to this or that particular piece of evidence.*

MACKINTOSH v. GREAT WESTERN RY. Co. (1) and MOUNG THA HNYEEN v. MOUNG PAN NYO (2) referred to.

This was a suit instituted by the Plaintiff for the recovery of a sum of Rs. 1,589-13-6 "for the use and hire of the Plaintiff's cargo boats at Calcutta between the 3rd July 1895 and the 25th November 1896 and for damages sustained by the Plaintiff by reason of the Defendant detaining the said boats beyond his time," after giving credit to the Defendant for moneys already paid by him. The Plaintiff alleged that 115 cargo boats had been hired by the Defendant. The Defendant, on the other hand, alleged that only 70 boats had been hired by him, and they had been hired by the job and not by the day and the Plaintiff was therefore not entitled to charge demurrage.

It appears that the Plaintiff had dealings simultaneously with two firms, both of which were to his knowledge represented by the same person, one Palia-nappa. The books kept by Palia-nappa

(1) 4 Giff. 683 (1887).

(6) 19 Q. B. D. 155 (1887).

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showed that the Defendant had hired only 70 boats and that the other firm which Palianappa represented had hired 64. The Plaintiff, however, asserted that only 22 were hired by the latter firm and 115 by the Defendant.

The suit was heard for about three days before P. O'Kinealy, J., who reserved judgment, but before judgment was delivered by him the parties came to terms and consented to refer certain inquiries to the 2nd Assistant Registrar of the Court, and on the 13th June 1898 the following consent order was made by the Court:—

"This cause coming on, etc. . . . .  
It is ordered and decreed with the consent of both the parties by their respective counsel that the further hearing of this suit be adjourned and that it be referred to the 2nd Assistant Registrar of this Court as an urgent reference to make the following inquiries, that is to say:—

1. What was the number of boats hired by the Defendant from the Plaintiff and on what date was each boat hired.

2. What was the rate agreed upon on each occasion for the hire of each boat and what was the ghat rate on each occasion.

3. Assuming that the Plaintiff is entitled to demurrage after 48 hours at  $\frac{2}{3}$ ds of the rate of hiring and that it is the custom of the trade to charge half demurrage under eight hours and full demurrage for eight hours or over, what, if any, is the amount of demurrage due to the Plaintiff on each occasion in respect of which it is claimed.

4. What payments of canal toll were made to the Plaintiff by the Defendant and when and on what occasion was each payment made.

And this Court doth reserve the consideration of all further directions and of the question of the costs of this suit until after the 2nd Assistant Registrar shall have made his report, and in the meantime the parties are to be at liberty to apply to this Court from time to time as they may be advised."

On the 21st September 1899 the 2nd

Assistant Registrar made his report whereby he found:—

1. That the number of boats hired by the Defendant from the Plaintiff was 116 and the date on which each boat was hired is set forth in the first column of the schedule hereunto annexed and marked A.

2. That the rate agreed upon on each occasion for the hire of each boat is set forth in the 3rd column of the schedule being for the period of 48 hours which hire is nearly in all instances double the ghat rate plus the canal toll on such boats as carried canal toll and that the ghat rate on each occasion is set forth in the 4th column of the said schedule.

3. Assuming that the Plaintiff is entitled to charge demurrage after 48 hours at  $\frac{2}{3}$ ds of the rate of hiring and that it is the custom of the trade to charge half demurrage under 8 hours and full demurrage for 8 hours or over, what, if any, is the amount of demurrage due to the Plaintiff on each occasion in respect of which it is claimed. I find that the amount of demurrage due to the Plaintiff on each occasion in respect of which it is claimed is set forth in the 5th column of the said schedule calculating the sum on the ghat rate after 48 hours plus the canal toll where such toll has been paid for and charged.

4. That the payments of canal toll made to the Plaintiff by the Defendant and when and on what occasion was such payment made are set forth in the 1st and 5th column of the said schedule. All which I humbly submit and report to this Honourable Court. Dated the 21st day of September 1899.

Neither party was satisfied with those findings, and both the Plaintiff and the Defendant filed exceptions to the report. The matter came on before Ameer Ali, J., on the 1st March 1900, who overruled the exceptions and confirmed the report. The following judgment was delivered by him:—

This suit was instituted by the Plaintiff in the Small Cause Court and was brought up here at the instance of the Defendant under the provisions of sec. 39 of the Small Cause Court Act.

It was referred by Mr. Justice O'Kinealy on the 13th of June 1898 to Babu Grees Chunder

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Bonnerjee, the 2nd Assistant Registrar, for enquiry into the matters set forth in the order of that date.

The witnesses on both sides were examined at considerable length before Babu Grees Chunder. And upon the evidence he came to certain distinct findings. He has embodied the result of his findings in a report which now comes up for argument on exceptions and final disposal.

Both sides have taken exceptions to the report, and a great deal of time has been spent over their discussion.

In my opinion the exceptions on both sides must fail. Babu Grees Chunder Bonnerjee has considered the evidence adduced by the parties with great care, I do not see that any of his findings are unwarranted by the facts placed before him.

He disbelieves the Defendant's evidence and considers that the Plaintiff's case is fully borne out by their evidence.

I am of opinion that the exceptions on both sides must fail. The result is that the report must be confirmed. There will be a decree for the Plaintiff for Rs. 1,149-5-1.

The Plaintiff will also get his costs of the suit and reference on scale 2.

As to the costs of the exceptions and of to-day's hearing each party pays his own.

The Defendant now appealed from the said judgment and order.

*Mr. Garth* and *Mr. B. Chuckerbutty* for the Appellant.

*Mr. Pugh* and *Mr. Caspersz* for the Respondent.

The JUDGMENTS OF THE COURT were as follows :—

**MACLEAN, C. J.**—This is a suit to recover a sum of about 1,600 rupees for the hire of certain boats and for demurrage. It was originally brought in the Small Cause Court, and at the instance of the Defendant transferred to the High Court. It was heard for some three days or more before Mr. Justice O'Kinealy, who reserved judgment. Before judgment was delivered the parties so far

came to terms as to consent to certain enquiries being referred to the 2nd Assistant Registrar of the Court, and this was done by the consent order of the 13th June 1898, set out at page 9 of the Paper-book. It is obvious from the terms of the reference that the matters referred were matters of detail. The enquiry before the 2nd Assistant Registrar occupied many sittings, thirteen I believe in all, and the 2nd Assistant Registrar appears to me to have fairly and carefully investigated the matter. He made his report, which will be found at page 132 of the Paper-book. Neither party was satisfied with that finding, and both the Plaintiff and the Defendant took exceptions to it. The Defendant said he was ordered to pay too much; the Plaintiff complained that he was entitled to more. The matter came before Mr. Justice Ameer Ali on the 1st March 1900, who, after stating in his judgment "that a great deal of time had been spent over the discussion of the exceptions," overruled the exceptions of both parties, confirmed the report, and gave a decree for the Plaintiff for the amount found in the report.

The Defendant now appeals to this Court, and his first ground of appeal is, that the learned Judge in the Court below did not duly hear and consider the grounds upon which the Appellant based his exceptions. I am not disposed to pay much attention to this ground of complaint in the face of what the Judge has said in his judgment, but be that as it may, the same reproach cannot properly be launched against this Court, for we have listened to this case for the best parts of three days, and it may be

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perhaps a further satisfaction to the Appellant to learn that I have, since the case was argued, gone carefully through the evidence. The matters referred were purely matters of fact, dependent, as to the conclusion to be arrived at, upon points of minute detail, and involving no question of principle.

The 2nd Assistant Registrar has fairly investigated the matter, the Court of first instance has confirmed his report, and we, as a Court of Appeal, are now invited to say that these conclusions, involving no questions of law, but dependent upon mere questions of facts,—facts of a detailed character,—ought now to be disturbed.

I think it would be well, before dealing with the merits of this particular case, to ascertain what are the principles upon which a Court of Appeal should interfere in this and similar cases.

I am not disputing for a moment that the Appellant has every right to come here, and to invite us to hear and to investigate the case, and that he is entitled to our opinion upon the appeal as submitted to us: but, at the same time, I equally say that, in a case of this class, if there has been a fair investigation of the matter by the Registrar, and his finding has been further confirmed by the Judge of first instance, this Court, as a Court of Appeal, ought not to interfere "except,"—to quote the language of the late Vice-Chancellor Stuart in the case of *Mackintosh v. The Great Western Railway Company* (1) "on the strong ground of manifest error or manifest abuse: and never on the ground that a different result might be more satis-

factory to the mind of another tribunal." "Any other principle," to quote the same learned Judge, though his words were not addressed to this particular point, "must lead to an extent of vexatious litigation, perhaps interminable." The present case, one cognizable by the Small Cause Court, and which has now been going on for nearly 4 years, is, perhaps, not an inapposite illustration of the last remark. As regards the principle by which this Court should, in my opinion, be guided, I propose to read the following passage from the judgment in the case I have already cited as applicable to and governing the case now before us.—

"This principle" (*viz.*, the principle expressed in the earlier portion of the judgment) "rests on the plain necessity of accepting as final the first decision on a fair investigation, where the nature of the question is such that, if there must be a new investigation and new decision by a succession of appeals, each decision might be for a different amount, and the decision of the last resort, differing from all the others, would have against it the presumption of error from the number of previous contrary decisions. The result would be to deprive the decision on final appeal of that authority which an ultimate decision should carry.

"It is to prevent such inconvenient consequences that questions of this peculiar kind, when once fairly investigated and decided, are not usually allowed to be opened again, or the decision to be disturbed, except on the strong ground of manifest error or manifest abuse; and never on the ground that a different

(1) 4 Giff. 688 (1867).

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result might be more satisfactory to the mind of another tribunal."

And in this connection I may usefully refer to a very recent judgment of the Privy Council in the case of *Moung Tha Hnyeun v. Moung Pan Nyo* (2), delivered on the 6th July 1900, the principle of which appears to be not inapposite to the case before us. That was a case of interference with concurrent judgments, that is to say, concurrent judgments in the sense of concurrent findings of fact: and in that judgment these passages occur:—"Although acute criticisms have been made upon some points in the case, there has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here, and commonly observed in second Courts of Appeal, that it will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned. In all probability their Lordships would be doing a great deal more harm than good if they were induced to disturb judgments arrived at by the local Judges on such criticisms as have been assigned in this argument."

It is perfectly true that, in the present case, we have not concurrent judgments in the strict sense of the term, but we have concurrent findings on the facts, first by the Commissioner and afterwards these findings confirmed by the Judge.

Now, applying those principles to the present case, and looking to the grounds

of objection to the Court of first instance, and the grounds of the present appeal, it is impossible to avoid the conclusion that, in both cases, the real grounds are in substance that the second Assistant Registrar did not give due weight to this or to that particular portion of the evidence. I am not prepared to say, having read the evidence, that this criticism is well founded; but, even if it were, I should not regard it as warranting us in setting aside the report, for we should not be justified in so acting merely upon the ground that, if the matter had come before us as *res integra*, we might have been disposed to attach more weight to this or that particular piece of evidence, than the 2nd Assistant Registrar did. The Appellant has utterly failed to convince us that there is either manifest error or manifest abuse in the 2nd Assistant Registrar's finding, and it is not sufficient to say, that, owing to his not having attached sufficient weight to the Defendant's evidence, it is doubtful whether his decision is certainly correct or perfectly satisfactory. I will turn to one instance, and the one upon which the Appellant laid most stress, viz., that the second Assistant Registrar regarded certain books put in by the Defendant as spurious. In point of fact he did nothing of the kind: he only doubted their genuineness and that this was so, is apparent from the second objection of the Appellant to the report, which by the way is inconsistent with ground (b) of the present appeal. It is said that he ought not to have felt this doubt, as the Plaintiff's manager and his principal witness had admitted having made certain entries

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in those books. But, taking that to be so,—and a careful examination of the evidence at pages 55 and 56 of the Paper-book, perhaps makes the so-called admission somewhat equivocal,—I am not disposed to say that the expression of a doubt in the mind of the 2nd Assistant Registrar, upon one particular piece of evidence in the case, would warrant us, in a case of this class, in reopening the matter or disturbing his decision.

But, apart from these considerations and having read the evidence, I am not prepared to say that his decision upon the first and second enquiries was not a fair and reasonable one. As regards the question of demurrage I feel more difficulty and I was disposed at first to regard the order of the 13th June 1898, which is not very happily worded, as meaning by the expression “assuming,” that the question of whether the Plaintiff was entitled to demurrage was still an open one, and one to be made the subject of future decision by the Court. Such, no doubt, is the natural and primary sense of the word. But though the language is unfortunate, I think the parties meant that, as between themselves, it was conceded that the Plaintiff was entitled to demurrage, and that the question referred was what was the amount payable, upon the footing stated in para. 3 of the reference.

By his own attitude the Defendant has shown that this was the construction he put upon the terms of that order, for, when the matter came before Mr. Justice Ameer Ali, the Defendant never suggested that the Court should decide, as a preliminary question, whether or not the

Plaintiff was entitled to charge demurrage. Nor, again, in the grounds of appeal to this Court, has he raised the question. I think from this it is reasonably clear what the parties intended, but, any way, it is too late now for the Defendant, when he did not ask for it in the Court below, nor make it one of the grounds of his present appeal, to go into the matter.

There is one small point, in which, if the Defendant so desire, the decree may be varied, *viz.*, by altering the number of boats from 116 to 115 with a consequential alteration as to the amount to be decreed: but this trivial alteration cannot affect the question of costs.

The appeal in my opinion fails, and ought to be dismissed with costs, but as I have the misfortune to differ from my learned colleagues, they will pass such order on the appeal as they think is right and proper.

PRINSEP, J.—This is an unfortunate case. On 3rd March 1897 this suit was brought in the Presidency Small Cause Court for money due on account of the hire of boats with damages representing demurrage for the detention beyond the time of hire.

On 13th March the Defendant obtained an order removing the trial to the original side of this Court.

The case came on for trial on 2nd June 1898, and evidence was taken on that day, and on the following day. The record shows that on the 13th June it was ordered and decreed with the consent of both the parties by their respective counsel that the further hearing of the suit be adjourned and that it be referred to the 2nd Assistant

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Registrar as an urgent reference to make enquiries on certain points set out in the order. It is unnecessary at present to describe the nature of the enquiries so ordered.

Now although this, by the order of the learned Judge holding the trial, was described as "an urgent reference" by his order of 13th June 1898, the proceedings were not commenced by the 2nd Assistant Registrar until 1st February 1899 when he directed the parties to file written statements on 10th idem, and the 13th was fixed for hearing, and it was heard in thirteen days from 16th February to 22nd March, the time so occupied being recorded as 26½ hours. The report of the 2nd Assistant Registrar was made on 21st September 1899 and judgment was pronounced on 1st March 1900. The proceedings have thus extended over three years less two days, and though the reference to the 2nd Assistant Registrar was declared to be an "urgent reference" the proceedings before him from the date of the order of reference to his report extended from 13th June 1898 to 21st September 1899. I can find no reason for this delay as the points for determination were few and not complicated.

The case has been heard by us on appeal for several days and I deem it extremely unfortunate to the parties that as the case now stands we cannot pass final orders in it owing to the manner in which trial has been conducted.

It appears that the Plaintiff has had many dealings connected with the hire of boats with Palianappa Chetty who acted in these transactions for two firms.

Of one firm R. M. M. S. T. Chetty was the principal partner while he acted as agent for the other firm. The Plaintiff has brought separate suits against each of those firms on this account in the Court of Small Causes, one of which is the suit now before us on appeal on behalf of the Defendant representing the firm of R. M. M. S. T. Chetty. The Plaintiff's case is that the Defendant on various dates hired 116 boats from him at the current ghat rates, and that there is a balance due to him on this account as well as on account of demurrage in consequence of the detention of those boats by the Defendant.

The Defendant's case is that he paid at rates higher than the current rates for the whole job in each instance so as to cover all charges, and that he is not liable on account of the number of boats stated by the Plaintiff. There is practically no difference in the total number of boats hired by him on account of his own firm and as agent for the other firm, but he contends that the number which his firm hired has not been correctly stated. The Defendant, Palaniappa, was examined as a witness for the Plaintiff at the trial, but he did not appear in the proceedings before the 2nd Assistant Registrar as he died before those proceedings commenced.

We must, I think, take it that the order of the 13th June 1898 referred the case to the 2nd Assistant Registrar under sec. 394 of the Code of Civil Procedure. The Court provided for a consideration of the report of the Commissioner by adjourning the further hearing of the suit until the enquiries ordered had been made and report submitted.

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On the points referred to him the Commissioner found that as stated by the Plaintiff 116 boats were hired by the Defendants and he accepted the dates of hiring given by the Plaintiff. On the second point the Commissioner found that the rate agreed upon on each occasion for the hire of each boat was as set out in a schedule prepared by him being for the period of 48 hours which is in nearly all instances double the ghat rate plus the canal toll, and that the ghat rates are as set out in the same schedule.

The Commissioner on this calculation found the demurrage on the terms assured by the learned Judge in his order of reference.

And lastly he reported on payments which had in his opinion been made to the Plaintiff by the Defendants.

The schedule, it may be remarked, was not prepared by the 2nd Assistant Registrar, but by a clerk of the Plaintiff at the rate of  $\frac{2}{3}$  of the hiring found by that officer and he by affidavit affirmed the correctness of his calculation. That affidavit was sworn on 19th February 1900, whereas the report of the 2nd Assistant Registrar bears date 21st September 1899, and the exceptions taken by the parties to the report were made on the 22nd idem.

The case came on before Mr. Justice Ameer Ali on 1st March and he disallowed all the exceptions and confirmed the report. He made no other finding in the case.

I am far from satisfied that in this case justice has been done or that a right conclusion has been arrived at on the evidence before us. The learned Judge

has considered merely the report of the Commissioner and the exceptions taken to it. There has been no finding that demurrage was payable to the Plaintiff, and if so, at what rate, nor has there been any finding—what is the custom of the trade in that respect. The learned Judge who made the reference directed the Commissioner to find on a certain assumption in regard to the time after which demurrage was payable and the rate at which it was so payable, and on a similar assumption in regard to the custom of the trade. It was in my opinion the duty of the Court expressly to find on both these points and then to apply, if necessary, the findings of the Commissioner.

The report of the Commissioner proceeds on assumption of such findings, but until a Court had definitely and on evidence before it itself found on these points there were no proper grounds upon which calculations could be made on which judgment could be pronounced and a decree against the Defendants could be made. If, on the other hand, the terms of the Commissioner's report be regarded as containing findings on these points on evidence taken by him, it seems to me that he exceeded his authority. So far therefore in my opinion the order of the Court of first instance confirming the report of the Commissioner does not sufficiently deal with the case.

Before I proceed to consider the case on its merits it becomes necessary to consider our powers as a Court of Appeal in such cases for it has been stated that we are debarred from dealing with it on matters of fact. In my opinion on the



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hearing of this appeal there is no such impediment. We have only to consider the judgment and order of the Court of first instance. The fact that it is in affirmance of the report of a Commissioner, does not in my opinion affect our powers as a Court of Appeal. The report before us is the report of a Commissioner, on a reference made to him on certain points under the Code of Civil Procedure and by the terms of that reference it was in my opinion contemplated not only to consider the report made on the points so referred, but to find generally on the case, that is, on points such as I have indicated which were not so referred. As bearing on this matter I would refer to the case of *Watson v. Aga Mehmedee Sherazee* (3). In that case the report of the Commissioner in a matter referred to him, as in this case, was regarded by their Lordships of the Privy Council as merely evidence in the case, but as there and similarly in this case the reference had been made by consent of the parties, the report was regarded as on an agreement that the Commissioner should decide the questions of fact referred to him reserving any questions of law which might arise to be disposed of by the Court. But in this case the terms of the reference did not, as I have endeavoured to explain, refer to the Commissioner all the questions of fact which arose in the case. The fact whether demurrage was payable, and if so payable on the terms agreed upon or in accordance with the custom of the trade were not referred to him and the Court has come to no finding itself on these points. There is moreover in my opinion an

important distinction in applying to this case the case of *Moung Tha Hnyeen v. Moung Pan Nyo* (2). In that case the Privy Council had before them concurrent findings of fact by two Courts and therefore as their Lordships state it fell "within the valuable principle recognized by the Privy Council and commonly observed in second Courts of Appeal that it will not interfere with concurrent judgments of the Courts below on matters of fact unless very definite and explicit grounds for that interference are assigned."

Here we have the findings of only one Court. The report of the Commissioner cannot be regarded as a judgment of a Court, for, standing by itself, it is inoperative. It requires affirmance by an order of a Court to make it operative, and it is that order which comes before us on appeal. It seems to me that we have to consider this case in all respects as it was presented to the Court of first instance whose judgment and order the law makes appealable to us.

I therefore feel no difficulty in dealing with this case from this point of view. I do not propose to consider the cases before the Courts of England because the system under which they proceed seems to me to be very different from that contained in the Code of Civil Procedure which regulates our proceedings.

On the other points raised it is sufficient for me to say that I agree in the judgment which Mr. Justice Hill proposes to deliver and which I have had the advantage of reading. It seems to me eminently unsatisfactory that this case has been decided solely on the evidence given

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before the Commissioner and without any reference to evidence of an important character given before the learned Judge who made the reference. We have no means of learning how far the parties agreed to the reference or to the terms in which it was expressed and so far we are bound to accept the statement that it was made "with the consent of both parties by their respective counsel" but if the statements made afterwards in these pleadings be correct, there is some reason to doubt whether they actually consented or knew to what they had consented. In this respect however the case must stand on the terms of the reference though I must express doubt whether in this manner the real facts will be brought out or justice completely done. The case is however as I have already stated a very unfortunate one in its results, for after the lapse of nearly four years it has not reached its end, and the parties or at least the Defendants, for it was at their instance that there was a change of Court, must regret that it was not allowed to remain for trial in the Court of Small Causes, the Court of ordinary jurisdiction in which it was brought.

I therefore agree in the order that Mr. Justice Hill proposes should be passed in the case.

HILL, J.—I regret that in this case the conclusions to which I have been led are not, in certain respects, in agreement with those of the learned Chief Justice.

Of the questions raised by the appeal there are three with which I think it necessary to deal. The first relates to the demurrage claimed in the action; the second to the findings of the Com-

missioner as to the number of boats hired and the rates of hiring; and the third to the principles upon which the Court ought to deal with the proceedings of the Commissioner. With respect to the first, the contest was whether when the reference to the Commissioner was made the question of an agreement to pay demurrage was left open for the subsequent decision of the Judge, or had been settled between the parties on the footing assumed as the basis of the third head of enquiry. I find some difficulty in arriving at a satisfactory conclusion upon this question, for counsel were not in a position to give us any material assistance with regard to it, and the language of the referring order which bears upon it is ambiguous. From one point of view it seems consistent with the supposition that the question was left open, but on the other hand from the particularity with which the details of the assumed liability of the Defendant are set forth, it looks as if some settlement involving these terms had been come to. The order is a consent order and must be taken to represent and to give effect to a settlement made by the parties themselves as to the terms in which the reference should be made and it would moreover have been a futile proceeding to refer the matter on a purely hypothetical and unsettled basis, for that would have necessitated, in the event of the Judge afterwards coming to a different decision,—a further reference to the Commissioner, or a decision possibly on the point by the Judge himself. Then, again, when the case came before the learned Judge for confirmation of the report and further con-

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sideration, he was not asked to decide upon the liability of the Defendant to pay demurrage, though, somewhat singularly, he was asked to say that the Commissioner had wrongly found that there was such an agreement, the fact however being that the Commissioner did not find on the question one way or the other. It is the same now in appeal. We are asked to say that the learned Judge ought to have held that the Commissioner was in error in finding that there was an agreement to pay demurrage, but none of the grounds taken in appeal suggests that the question was left open for the decision of the Court, or that the Court ought itself to have decided it. On the whole, therefore, I think that the question of such an agreement is not one upon which we ought now to enter.

With respect to the second question, the matter stands thus: The Plaintiff brought his action for the hire of 115 boats while the Defendant alleged that he had hired only 70. It appears that the Plaintiff had had dealings simultaneously with two "firms," both of which were to his knowledge represented by the same person one Palianappa. The books said to have been kept by Palianappa show that the Defendant had hired only 70 boats, and that the other firm which Palianappa represented had hired 64. It is, however, asserted by the Plaintiff that only 22 boats were hired by the latter firm. The difference in the aggregate is trifling, but, in so far as the present action is concerned, there is the substantial difference of 45 boats. The first question referred to the Commissioner was "what was the number of

boats hired by the Defendant from the Plaintiff and on what date was each boat hired?" Which question with respect to the first branch of it resolved itself virtually into this, namely, whether out of a given number of boats a certain number were to be appropriated to the Defendant's firm, or to the other firm for which also Palianappa acted. In dealing with this question the Commissioner appears to have very properly given his consideration mainly to the evidence afforded by the books, respectively, produced by the parties, but inasmuch as these did not agree, it became necessary for him to decide whether the Plaintiff's book or those produced by the Defendant were entitled to the greater weight. In the result he found in favour of the books produced by the Plaintiff, at the same time characterising those produced by the Defendant as of doubtful genuineness, and his finding on the first question referred was in the Plaintiff's favour. This finding and the reasons given for it have been called in question here.

In dealing with the matter the Commissioner in the first place discussed the probabilities of the case, and came to the conclusion that the Plaintiff's agent was less likely than Palianappa, in the earlier stages of the transactions, to make mistakes with respect to the firm with which the particular dealing was taking place. He next discussed the questions whether the arrangements for the hiring of boats were made between the Plaintiff himself and Palianappa, and whether Palianappa's assistant Sinia Pillay was present on all such occasions, and his conclusion was that "it would

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be absurd to assume that all the three persons [*i.e.*, Palianappa, Sinia Pillay and another assistant of Palianappa] on behalf of the Defendant would be present on every occasion that Palianappa ordered for hire of boats," and lastly—and this is the main point—he referred to certain "significant facts" bearing on the genuineness of the books (Exs. No. 1 and No. 2) produced by the Defendant. Upon this point his opinion is thus expressed. "It seems to me doubtful whether the books (Exs. No. 1 and No. 2) are the original books kept by Palianappa, and the entries there correctly made, or were they not prepared for the purposes of this case," and he then proceeds "I cannot accept the evidence on behalf of the Defendant, in preference to the testimony afforded from the Plaintiff's boat engagement book, and therefore find that 116 of the Plaintiff's boats were hired by the Defendant." On a review of the evidence it appears to me that none of these reasons is satisfactory. The first seems to me to be of little or no cogency for the probabilities are to my mind quite as much (perhaps more) in favour of exactitude on the part of Palianappa, as on the part of the Plaintiff's agent. With respect to the second, its precise bearing on the question at issue is not very apparent, and it seems moreover hardly to be borne out by the evidence referred to in support of it, and with respect to the third the Commissioner would seem to have left entirely out of view, he certainly has not referred to it, certain evidence which to my mind establishes that the Defendant's books, Exs. No. 1 and No. 2, both of which, I may remark, were relevant to the in-

quiry, were not, as the Commissioner suggests, prepared for the purposes of the case.

I refer to the signatures of the Plaintiff's agent affixed to certain of the entries in these books. Mr. Garth called our attention to two, I think, of these signatures in Book No. 1, which he informed us, and his statement was not controverted, had been selected as specimens merely, there being other similar signatures in that book as well as in Book No. 2. Nothing was brought to our notice, either in the evidence taken before the Commissioner, or by way of argument, which to my mind had the effect of displacing or impairing the result of this evidence. It stands uncontradicted, and I must say that in the face of it I should have very great difficulty in coming to any other conclusion than that these Books (putting the question of the accuracy of their contents out of view) are, as they purport to be, contemporaneous records of the transactions to which they refer, and I think accordingly that a conclusion founded (even in part) upon the assumption that they are of questionable genuineness is unsatisfactory. I may add that the evidence referred to may also have a bearing on the accuracy of the entries contained in the books. I am not in a position to say how far the question of the agreed rates of hiring may depend on the genuineness of the books, but I think that if the case should be remitted to a Commissioner this matter ought also, if in fact it is affected by it, to be reconsidered.

Then with regard to the principles upon which the case ought to be dealt

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with, counsel on both sides were agreed at the hearing of this appeal, that the reference to the Commissioner was made in pursuance of and was within the power conferred on the Court by sec. 394 of the Code of Civil Procedure. If this be so, the Act itself, by sec. 395, prescribes the effect to be given to the Commissioner's proceedings. They shall be received in evidence in the suit, it is provided, unless the Court has reason to be dissatisfied with them. If it is dissatisfied with them, then it is to direct such further enquiry as may be requisite. It was sought by Mr. Pugh to place the findings of fact of a Commissioner appointed under sec. 394 virtually on the same footing as the verdict of a jury, his contention being that they ought not to be disturbed on grounds other than those upon which the verdict of a jury would be set aside. But the standard to which the proceedings of the Commissioner are to be referred under the Act appears to me to be a different one. It is in one sense a somewhat indefinite standard, and I think purposely so, and I think also that, having regard to the consideration that the provisions of secs. 394 and 395 of the Code are applicable to Courts of all grades in this country, it would be of doubtful expediency in construing these sections to endeavour to bring the practice under this part of the Code into strict conformity with the rules which obtain in England with regard to the varying or setting aside of a Chief Clerk's certificate, which was the analogy to which Mr. Pugh appealed. The case upon which he placed reliance was *Mackintosh v. The*

*Great Western Railway Company* (1), but apart from what I have just said, I do not think that those portions of the Vice-Chancellor's judgment to which he referred us are in point. Those remarks, though expressed somewhat generally, were intended, I think, to apply more particularly to the class of cases with which the learned Vice-Chancellor was in that part of his judgment dealing. The case itself as a whole was a very exceptional one—and I gather from the judgment that the great mass of items found upon by the Chief Clerk was in respect of compensation by way of damages, and remuneration for work and labour done. With regard to questions of that nature it might reasonably be said that the finding of one tribunal after a fair investigation was as likely to be correct as that of another, and that the findings of the Chief Clerk upon them might therefore properly be placed on a footing similar to that of the verdict of a jury. That the Vice-Chancellor, however, had before his mind cases of this description only when he made the observations relied upon, is, I think, apparent from what he says at page 689 of the report introducing the discussion. He there says:—"The items which have been disputed on the present motion for the most part involve questions of compensation, and estimate upon the *quantum meruit*, on which probably no two men would agree. Even one man, although a competent judge, might, at different times, arrive at different results, according to the force with which particular circumstances might strike his mind, and yet it might not be easy to say that either of the diff-

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erent conclusions was wrong." But he himself draws a sharp distinction between the mass of the items to which his remarks generally were applicable and two specific items which are dealt with at page 693 and the following pages of the report. With regard to the latter he says:—"The questions on these two matters are of a different kind from those which arise on the other items," and the observations already made as to the danger of disturbing the amount once awarded by a competent authority for compensation or damages or remuneration are not applicable." The whole of the circumstances affecting these two items may not be clearly apparent from the report, but with respect to the second, it seems clear enough that the question was whether on the evidence the Plaintiff was entitled to a sum of £17,600, or £16,500 for work and labour done, whether, in fact, a certain tender was for the one amount or the other, and the learned Vice-Chancellor gave his decision in accordance with his view of the evidence. I venture to think that the question now under consideration falls rather under the principle involved in the passage I have last quoted than within the doctrines laid down in the

relier part of the Vice-Chancellor's judgment. There was not, I think, here, either in respect of the number of boats hired, or of the rates of hiring, any question of a fair estimate under all the circumstances, but the Commissioner had in the one case to determine specifically on the evidence how many boats were hired, and in the other what was the actual agreement arrived at between the parties regarding rates. A mere "com-

promise" would not in either case, I think, have sufficed.

I have been unable to find any case in this Court in which this question has come under consideration, but both the Bombay and Madras Courts have decided—in the case of the latter Court, it is true, after more than one decision to the contrary—that a Court is not limited to questions of principle when examining the proceedings of a Commissioner appointed to take accounts, see *Ahmed Nannu Bhai v. Kharap Karim Bhai* (4) and *Kankatala Chellamaiya v. Polsheth Papaiya* (5). These were cases on the construction of sec. 181 of Act VIII of 1859 which is in its essentials the same as the present law, and the former case, it seems to me, puts the matter upon its true footing, namely, that the Court, whether of first instance or of appeal, must be satisfied with the proceedings of the Commissioner before it adopts them. That is the criterion which, in so far as all events as the Court making the reference is concerned, the law in effect lays down. The Court will, no doubt, in all cases, give due weight to the opinion to the Commissioner, and the duty cast upon it of satisfying itself as to the proceedings is in practice modified to this extent, that it is usual to confine the examination to those parts of them to which exception has been taken by the parties, but the duty, it seems to me nevertheless, to that extent at all events, remains, and can only be discharged by such an examination as is sufficient for the purpose of satisfying the Court that the investigation has been

(4) 6 Bom. H. C. 149 (1869).

(5) 6 Mad. H. C. 36 (1870).

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conducted by the Commissioner fairly and in accordance with law. When the case comes before an Appellate Court, the situation is of course somewhat different. What has then to be dealt with is the decree of the Court below, and when this gives effect to the findings of the Commissioner, there is the added weight of the decision of the Judge to be taken into consideration. But if there is to be an appeal at all in such cases, it seems to me that, subject to the consideration I have just mentioned, the duty of the Appellate Court is commensurate with that of the Court of first instance and that, if it is dissatisfied with the proceedings either in whole or in part, it is incumbent upon it to do that which the lower Court ought to have done, namely, to set them aside, either wholly or partially, as the case may be and send the matter back for such further enquiry as may be necessary. In the present case, I would wish to add, the learned Judge has not discussed the evidence and we are consequently in the dark as to the manner in which his mind was influenced, if it was influenced at all, by the evidence bearing on the genuineness of the Defendant's books to which I have referred in the earlier part of my judgment. For the reasons, and to the extent I have stated, I am not satisfied with the proceedings of the Commissioner and that being so, I can see no other alternative than to set aside the decree and direct a further enquiry, as to the number of boats hired and the agreed rates of hiring, if, and in so far as, the latter question is affected by the Defendant's Book No. 1. I think the costs of the appeal ought to abide the result.

When I wrote what I have just read my attention had not been drawn to the case of *Moung Tha Hnyeen v. Moung Pan Nyo* (2) to which the learned Chief Justice has referred in his judgment. That case affords an illustration of a well-recognised principle, but unless the findings of a Commissioner appointed under sec. 394 of the Civil Procedure Code can be placed on the same footing as the findings of a Judge trying a cause, I think it would be difficult to make it applicable in the present case. As I have had occasion, however, to observe above, the proceedings of the Commissioner, which would presumably include his report, when he is required to report, are under sec. 395 to be treated merely as evidence in the cause. If he finds a fact, his finding is, I take it then, only evidence of that fact, but not a decision upon it, and this appears to me to be sufficient to distinguish his position from that of a Judge trying a cause. His proceedings are an enquiry for the information of the Court: not a trial. This distinction was pointed out by Lord Esher with respect to the proceedings of a referee appointed under sec. 56 of the Judicature Act, 1873, in the case, *Baroness Wenlock v. River Dee Company* (6).

I may add with reference to something which fell from Mr. Justice Prinsep that I have not attempted to deal with this case on the principles followed by the Privy Council (assuming them to be applicable) in *Watson v. Aga Mehadee Sherazee* (3) as that view of the case was

(2) 4 C. W. N. 808 (1900).

(3) L. R. 1 I. A. 346 (1874).

(6) 19 Q. B. D. 155 (1887).

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not put before us by the parties at the Bar.

Messrs. Wilson, Chatterjee and Mitra, Attorneys for the Appellant.

Messrs. Pugh & Co., Attorneys for the Respondent.

*Appeal allowed.*

S. R. D.

# [CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 72 OF 1901.

RAMPINI, J.	}	ABALU DAS and others,
GUPTA, J.		Appellants,
1901.		v.
16, April.		THE EMPRESS, Respondent.

*Penal Code (Act XLV of 1860), secs. 300, Excep. (i), 302, 304—Murder—Culpable homicide not amounting to murder—Provocation, grave and sudden—Provocation, continuing to influence feelings.*

*Where the accused found a man entering his house at night at the invitation of his wife with whom that man had criminal intimacy and being enraged, caught hold of him and took him outside the house to some distance and there assaulted him so severely that he subsequently died of the injuries received :*

*Held—That the circumstances under which the deceased was found in the house of the accused on the night of the crime were sufficient to cause grave and sudden provocation to the accused and his relations.*

*That the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period after the deceased was caught in the house in the company of the wife of the accused.*

This was an appeal preferred on the 8th of February 1901, against the conviction and sentence passed upon the

accused by the Session Judge of Rungpur on the 5th of January 1901.

The facts of the case will appear from the judgment.

Babu Jyoti Prasad Sarbadhikari for the Appellant.

Mr. Gordon Leith for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The three accused in this case, Abalu Das, Santiram Das and Sakalu Das, have been tried by the Sessions Judge of Rungpur with the aid of assessors, convicted of murder under sec. 302, I. P. C., and sentenced to transportation for life.

The facts of the case are as follows :—The deceased, Hur Singh, and his mother, Dulai, lived in the bari of the accused Abalu; but it was discovered that Hur Singh had contracted an intimacy with Lakya, the wife of the accused Abalu, and so Hur Singh and his mother were turned out and went and lived elsewhere. Then, on the night of the 21st of May last, Hur Singh, at the invitation of Lakya, went to the bari of the accused and the woman took him inside: whereupon Abalu, Sakalu, his brother, and Santiram, his uncle, seized him, carried him off to some distance, broke both his arms and one of his legs, thrust a stick up his rectum and left him in the open not very far from his bari where he was found next morning. Information was then given to the Police and he was taken to the hospital where he died on the 24th of May in consequence of the injuries he had received.

There is no direct evidence of these facts; but they appear to be well-established by the dying declaration of the



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deceased, who made three statements (i) to the persons who first found him, (ii) to the Inspector of Police, and (iii) to the Fouzdari Ahilkar or Magistrate at Cooch Behar. In the first of these statements he said he had gone to a place to the west of his house to ease himself when he was caught by the accused and treated in the manner above described. But in his subsequent statements he admitted fully that he had gone to the *bari* of the accused at the invitation of Lakya, because he was carrying on an intrigue with her. The night was dark but there was no difficulty as to the identity of the accused, because the deceased had lived in the same *bari* with them and was able to identify them by their voices. We think there is no doubt as to the veracity of the second and third statements of the deceased, and there is ample corroboration of these declarations in the surrounding circumstances, the evidence of previous intimacy between the deceased and Lakya, and the very serious injuries on his body which ultimately caused his death.

The learned Judge, disagreeing with the assessors, has found the accused guilty of murder and there is no doubt ground for coming to this conclusion. We, however, consider that we may take a more lenient view of the case and alter the conviction from one for murder under sec. 302, I. P. C., to one for culpable homicide not amounting to murder under sec. 304, I. P. C. Our reasons are these. There is no doubt that the circumstances under which the deceased was found in the *bari* of the accused on the night of the crime were sufficient to cause grave and sudden provocation to Abalu

and his relatives. In our opinion there is no doubt also that when the deceased entered the *bari* of the accused he did so with an evil purpose; and this must have been the conclusion at which the accused arrived when they found him at night within their *bari* in company with the wife of Abalu.

Learned counsel for the Crown has suggested that the accused laid an ambush for deceased and that the woman was made use of to decoy him into the house. We feel very doubtful, however, whether the woman could have been a party to such a design. It may be that the accused were watching the woman and lying in wait for the deceased, whom they knew to be the lover of Lakya; and that may account for their springing on him as they did. But, however this may be, in our opinion the provocation afforded by the deceased did amount to grave and sudden provocation within the meaning of exception (i) to sec. 300, I. P. C. The learned Judge does not accept this plea, because the accused took the deceased to some little distance before they murdered him. But we think that the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period after the deceased was caught in the *bari* in the company of Lakya; and for these reasons we are inclined to take a merciful view of the case and to alter the conviction from one under sec. 302, I. P. C., to one under sec. 304, I. P. C., which we accordingly do. Further, we reduce the sentences passed upon Santiram Das and Sakalu Das to rigorous imprisonment for ten years in each case, while we reduce the sentence passed

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upon Abalu Das to one of rigorous imprisonment for seven years.

*Convictions altered :*

H. P. C.

*Sentences reduced.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 286 OF 1901.

GHOSE, J.	}	SADAR ALI and others,
TAYLOR, J.		Petitioners,
1901.		<i>v.</i>
31, May.		ABDUL KARIM and others,
		Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 145, 146—“Subject-matter of dispute,” meaning of—Whether refers to whole subject-matter or to component parts—Magistrate, jurisdiction of, to make an order under sec. 145 in regard to some and an order under sec. 146 in regard to the remaining plots—Separate and distinct subject-matter—Divisibility of subject-matter—One proceeding in regard to several plots—Irregularity—Prejudice.*

*The expression “subject-matter of dispute” used in secs. 145 and 146 of the Code of Criminal Procedure refers to the whole or to any component part or parts thereof. If that component part is distinct and separable from the rest, it cannot rightly be held that because a Magistrate cannot find possession of one of the component parts of the subject-matter in dispute with either party, he is bound to attach the whole, although that component part is distinct and separable from the rest.*

*If the subject-matter in dispute is indivisible and must be dealt with as a whole, it must be dealt with in such a way as to make, in regard to it, one order either under sec. 145 or sec. 146 of the Code, as the circumstances may require.*

KATRAS JHERRIAH COAL COMPANY *v.* SIB KRISHTA DAW & Co. (1) *explained and distinguished.*

RAKHAL DASS SINGH AND ANOTHER *v.* SHEO PERSHAD SINGH (2) *referred to.*

(Per TAYLOR, J.)—*That in this case each separate plot may be regarded as a separate subject-matter of dispute and in that case, each separate plot might form a separate, independent proceeding; and the joint trial in one proceeding of several such matters of dispute would at most amount to an irregularity, which in the absence of prejudice shown, would not vitiate the enquiry.*

ISWAR CHUNDER CHOWDHRY *v.* AMBICA CHURN MAJUMDAR (3) *relied upon.*

This was a rule issued on the 28th of March 1901, against the order of Babu Prasanna Kumar Das Gupta, Deputy Magistrate of Chittagong, dated the 8th of December 1900, an application for a reference of which order to the High Court for revision was rejected by H. E. Ransom, Esq., Sessions Judge of Chittagong, on the 9th of February 1901.

The facts of the case material to this report will appear from the judgment of Ghose, J.

Moulvi Syed Shamsul Huda for the Petitioners.

Mr. Caspersz, with him Moulvi Serajul Islam, for the Opposite Party.

THE JUDGMENTS OF THE COURT were as follows :—

GHOSE, J.—The subject-matter of this rule is an order passed by the Deputy Magistrate of Chittagong under sec. 145, as also under sec. 146, C. Cr. P.

(1) I. L. H. 22 Cal. 297 (1894).

(2) 24 W. R. Cr. 78 (1876).

(3) 5 C. W. N. 544 (1901).

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It appears that a proceeding under sec. 145 was instituted in regard to six plots of lauds, four of these plots being paddy lands marked by distinguishable boundaries, while the other two plots were not so distinguishable from the rest. The Deputy Magistrate was of opinion, upon the evidence taken in the case, that one of the two parties before us was in *de facto* possession of the four plots in question; but he was unable to find who was in possession of the other two plots, and he accordingly directed that the first party with whom possession was found in regard to the four plots of land should be confirmed in possession thereof, and an order of attachment under sec. 146 should be made in regard to the other two plots.

The contention of the second party, who are the Petitioners before us, is that being unable to find either party in possession of the whole of the subject-matter, it was the duty of the Deputy Magistrate to make an order under sec. 146, C. Cr. P., attaching the whole of the lands in dispute between the parties. The contention shortly is that in a case like this, if a Magistrate cannot find possession with either of the two parties as regards any, however small, portion of the subject-matter of dispute, though he may find one of them in possession of the rest, he is bound to put the whole of the subject matter under attachment in accordance with the provisions of sec. 146 of the Code. Sec. 145 of the Code uses the expression "subject-matter of dispute," and so does the following sec. 146; that the "subject-matter" mentioned in the latter section must refer to the same subject-matter as is stated in sec. 145.

And, basing his arguments upon the use of the expression "subject-matter" in both the sections, it has been contended by the learned vakil for the Petitioners that the Deputy Magistrate was bound, when he was unable to find possession with either party in regard to two of the plots comprised in the subject-matter of dispute, to have attached the whole of it under sec. 146. In support of this contention, he has relied upon the case of *Katras Jheriah Coal Company v. Sib Krishta Daw & Co.* (1). The facts of that case, however, are substantially different from the facts with which we are concerned in the present case. There the dispute was in regard to certain collieries, and it appeared that the first party were in possession of the buildings which contained the office where the business of the collieries was transacted, and where all the cash books and papers of the business were kept, and that the second party had, during a period of about 14 days prior to the commencement of the proceedings, succeeded in obtaining possession of the pits, wharves, tramways, etc., of the colliery by what the Court considered to be a high-handed and improper scheme. The Magistrate, considering himself bound to find who was in actual possession at the date of the commencement of the proceedings (this was, I may here mention, the 3rd September) passed an order in favour of the second party affirming him in, or rather giving him, possession of the whole of the collieries including the buildings of which the other party was undoubtedly in possession. And it was held by this Court that such an order was bad and

(1) I. L. R. 28 Cal. 297 (1894).

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that, as the second party was undoubtedly not in possession of the whole of the property in dispute and the effect of the order was to place that party in possession of the portion that was in the possession of the first party, the proper order to make under such circumstances was one under sec. 146 attaching the whole of the property. In the course of the judgment Sir Comer Petheram, the then Chief Justice of this Court, made the following observations upon which the whole of the argument of the Petitioners seems to be founded. After referring to the circumstances of the case, he said :—

“But however this may be, we think it is clear upon the evidence of the second party themselves that they were not in possession of the subject-matter in dispute on the 3rd of September, and that they never in fact got into possession of an important part of it until they were actually put in possession of it by the final order of the Magistrate made in this proceeding on the 1st of October, and it cannot be doubted that a Magistrate under this section has no power to place either party in possession of the subject-matter in dispute, or any part of it, but only to find who is in possession of it as a whole, and, if that is impossible, to make an order under sec. 146.”

These observations must be read by the light of the facts of the particular case, and they could not be read as applicable to a case where the component parts of the subject-matter of dispute are quite divisible from each other, and where it is quite possible to make an order confirming the possession of one of the parties in regard to some of those

parts, and, in the event of its being found that other parts are not in the possession of either party, to make an order for attachment of those parts.

In the case to which reference has been made, the subject-matter in dispute was not divisible and had to be dealt with as a whole, and could not be dealt with in parts; and it seems to me that the observations of the learned Chief Justice in the case could hardly have any application to the case now before us.

Referring then to the language of secs. 145 and 146, it seems to me that, while the sections speak of the subject-matter in dispute, that subject-matter may be read as referring to the whole or to any component part or parts thereof. If that component part is distinct and separable from the rest, it cannot rightly be held that, because the Magistrate cannot find possession of one of the component parts of the subject-matter in dispute with either party, he is bound to attach the whole, although that component part is distinct and separable from the rest. Otherwise it seems to me, a great deal of injustice might be done to a party who may be found to be in undoubted possession of the other component parts of the subject-matter. If in such a case an order for attachment be made in regard to the whole subject-matter, that party should have to institute a civil suit for declaration of title and also for recovery of possession, not only of the portion in regard to which the Magistrate is unable to find possession with either party, but also in regard to that portion of the property in regard to which, on

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the date of the Magistrate's order he is found to be in possession, thus giving to his opponent an undoubted advantage over him. No doubt, if the subject-matter in dispute is indivisible, and must be dealt with as a whole, as it was in the case referred to, it must be dealt with in such a way as to make, in regard to it, one order either under sec. 145 or sec. 146 of the Code as the circumstances may be.

In this connection, another consideration arises. Supposing that there are different plots of land involved in the proceedings, and the Magistrate finds possession as to some of the plot with one party, and as to the other plots, with the other party, is he bound to make an order under sec. 146 of the Code attaching all the plots? I hardly think this position could be maintained, because that section says that if the Magistrate is unable to find possession with either party as to the subject-matter in dispute, he is bound to attach it. If he finds possession in regard to the different plots, with one or other of the parties, as indicated, it would, I think, be straining the language of secs. 145 and 146 to hold that the Magistrate is bound to attach the whole of the subject-matter in dispute, and cannot affirm the possession of the two parties, in accordance with his finding. If an order under sec. 145 may rightly be made affirming the possession of one party in regard to some of the plots, and affirming possession of the other party in regard to the rest, it follows that an order may be made under sec. 146 of the Code attaching one portion of the property, if that portion is clearly distinguishable from

the rest of the property, if the Magistrate finds that neither party has shown possession in regard to that portion.

I may also in this connection refer to the case of *Rakhal Dass Singh and another v. Rajah Sheo Pershad Singh* (2) which was a case under the old Code of Criminal Procedure. The facts of that case were somewhat different, but the order that was made in that case, which was affirmed by this Court, is rather in support of the view which I have expressed.

Upon these grounds I am of opinion that the Magistrate has not exceeded his jurisdiction in making the order that he has made. The result is that this rule must be discharged.

TAYLOR, J.—I would only add two or three words. I agree entirely in what has fallen from my learned brother that in the present case, each separate plot may be regarded as a separate subject-matter of dispute. If that is so, each separate plot might form a separate, independent proceeding. The joint trial in one proceeding of several such matters of dispute would be at most an irregularity and, on the authority of the recent case of *Iswar Chunder Chowdhry v. Ambica Churn Majumdar* (3), would not vitiate the inquiry. In the present case, it is not shown that the applicant has been in any way prejudiced. I agree in discharging the rule.

*Rule discharged.*

H. P. C.

(2) 24 W. N. Cr. 73 (1875).

(3) 4 C. W. N. 544 (1901).

## PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE  
RECORDER OF RANGOON.]

LORD HOBHOUSE.	} KONG YEE LONE & Co., Defendants, Appellants, v. LOWJEE NANJEE, Plaintiff, Respondent.
LORD MACNAGHTEN.	
LORD ROBERTSON.	
SIR R. COUCH.	
SIR FORD NORTH.	
1901.	
Heard, 2, May.	
Judgment, 13,	
June.	

*Contract Act (IX of 1872), sec. 30—Gambling and wagering contract—Suit for value received in "difference" on rice.*

*There is no difference between the expressions "gaming and wagering" as used in the English Statute and "by way of wager" in sec. 30 of the Contract Act.*

*Two parties may enter into a formal contract for the sale and purchase of goods at a given price and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise and fall of the market.*

UNIVERSAL STOCK EXCHANGE, LD. v. STRACHAN (1) approved.

This was an appeal against a decision of the Recorder of Rangoon in an action brought by the Respondent ordering that the Appellant should pay to the Respondent the sum of Rs. 1,23,625 with interest at 6 per cent.

The action was brought by the above-named Lowjee Nanjee who trades under

(1) L. R. (1896) App. Cas. 166.

the name of Robert Sutherland & Co. against the Defendants who trade as Kong Yee Lone & Co. upon two promissory notes, the Defendants being Wong Kaim Chiew (Defendant No. 1), Wong Kain Choay and Kong Wain. The promissory notes, both dated 11th September 1899, were for Rs. 1,27,820 and Rs. 5,198, of which the former was alleged to have been given for differences upon rice transactions, and the latter for brokerage. The defence was that the notes were not signed by anyone who was authorized to bind the firm and that they were given for wagering transactions and therefore could not be enforced.

The notes were in the following terms — "on demand we, the undersigned Kong Yee Lone & Co., promise to pay to Messrs. Robert Sutherland & Co. or order the sum of rupees one lac twenty-seven thousand eight hundred and twenty only for value received in difference on rice.

Signed in Chinese  
character.

(Sd.) KONG YEE LONE & Co. (in English).

*Note.* The translation of the above Chinese character is Kwong Ship Loang."

The second note exactly in the same terms was for "value received in brokerage."

The contracts between the parties were divisible into two classes. They were distinguishable on their face by what was called the option clause. In the first class of contracts the seller had the option to deliver rice from a number of mills specified therein among which the Defendants' mill was not included. The second class of contracts left no option to the seller and the Defendants' mill

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alone was mentioned. The Defendants' mill was a small one capable of putting out only 30,000 bags a month. Their capital was also small, being fixed by the partnership deed at a trifle more than a lac of rupees.

The second class of contracts were for the sale by the Defendants to the Plaintiff of 22,500 bags of rice from the Defendants' mill. All these were duly fulfilled by delivery and payment.

The first class of contracts dealt with about 1,99,000 bags at various prices aggregating upwards of 5 crores of rupees and were some of them contracts for sale of rice by Defendants to Plaintiff, and some contracts for sale by Plaintiff to Defendants. Not a single bag under this class was delivered, and the first promissory-note in suit was for the difference in price of these bags of rice.

The Judgment of the Recorder of Rangoon was as follows :—

The Plaintiff in this case is a broker and also a dealer in rice. During the year 1899 he had dealings with the Defendants who are rice-millers and bought rice to a very large extent from them. Some of the rice he took delivery of and paid for. In other cases he resold the rice to the millers. According to his evidence these transactions were carried out on behalf of the Defendants by one Kaim Chiew who has absconded. On the 11th of September the Defendants' firm owed the Plaintiff a sum of Rs. 1,27,820 for "differences," and Kaim Chiew gave the Plaintiff a promissory note, Exhibit A for this amount "for value received in difference on rice." He also gave him another promissory note for Rs. 5,198-1 "for value received in brokerage." Subsequently the

Plaintiff received two bills from the Defendants against one Moolla Abdool Rahim for Rs. 10,500. He collected this sum, and after giving the Defendants credit for it sues for the balance Rs. 1,23,625-12.

It is not disputed that the second word in the Chinese signature on the promissory note does not read "Yes." Some witnesses say that part of it reads "ship" others that it is unintelligible.

The Defendants' case is first that the business of the firm was carried on by one Puck Chan until he became ill towards the end of 1898 and that subsequently it was carried on by one Chang Wa. I have no doubt however after Mr. Mack's evidence that the business was carried on by Kaim Chiew and there is one very significant fact in support of this, namely, that the Defendants have not been able to call any independent evidence to show that at the time of the transactions between Plaintiff and Defendants' firm the business was carried on by Chang Wa. But it is not disputed that Kaim Chiew was a member of the Defendants' firm, and as a member of the firm he would be entitled to carry on business on its behalf, and no private arrangement between the partners not communicated to the Plaintiff would bind him. I hold then that Kaim Chiew did carry on the business of the Defendants' firm and had power to bind it by the notes in dispute.

Then the Defendants' case further is that the notes were not signed in such a manner as to bind the firm, and evidence has been given to show that when borrowing money from the firm of R. M. M. A. the promissory notes were signed by three of the partners and the "shop" mark of the firm affixed. But Cheng

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Wa has to admit that he alone signed contracts in the name of the firm and did not use the "chop" mark. It has also been argued on the authority of *Kirk v. Blurton* (2) where the signature "John Blurton & Co. instead of "John Blurton" the true style of the partnership was held not to bind the firm, that as the second word in the signature is not "Yee" the Defendants are not bound. Other authorities were referred to, to the same effect, *Stephens v. Reynolds* (3), *Faith v. Richmond* (4), *Leverson v. Lane* (5), and *Yorkshire Banking Co. v. Beatson* (6).

I do not consider however that these authorities can apply in such a case as this where the signature is in a language unknown to the person taking the document purporting to bind the firm. It is different in England where the signature is in a language known to both parties. It would be impossible to carry on business in such a town as Rangoon if it was necessary for a person taking a document purporting to be signed by a partner in the name of the firm to satisfy himself that the name was correctly signed. Documents may be and are signed every day in mercantile offices in Chinese, Burmese, Hindustani, Bengali, Tamil, Telugu, Gujarati, Hebrew and other languages. No firm, or at all events very few firms, could possibly keep a collection of expert clerks who could inform them whether the signatures were correct. The question in every case must be whether the person signing purported

to sign the name of the firm. It would open the door to fraud of the gravest character to hold otherwise.

Then it was argued on behalf of the Defendants that the transactions were gambling transactions and were to the knowledge of the Plaintiff fraudulent as against their firm. As to this last charge there is no evidence whatever. The question as to gambling is settled by *The Universal Stock Exchange, Ltd. v. Strachan* (1). That was a case of bargain and sale of stock. Cave, J., in summing up said:—"A man goes to a broker and directs him to buy and sell so much stock as the case may be. That may be in the eye of the purchaser a gambling transaction or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock, if he means to sell again before the settling day arrives, that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it,.....notwithstanding these ostensible terms of business, was there a secret understanding that the stock should never be dealt with?" This summing up was held to be perfectly

The question then is "Was there a common intention to wager." I do not see how I can so hold having regard to

(2) 9 M. and W. 284 (1847).

(3) 5 Hurl. and Nor. 512 (1860).

(4) 11 A. and E. 339 (1840).

(5) 13 C. B. 278 (1882).

(6) L. R. 5 C. P. D. 109 (1880).

(1) L. R. (1896) App. Cas. 166.



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the fact that rice was in certain instances delivered and paid for. In the case I have just referred to and in *In re Gieve* (7) there never was any transfer of stock at all. In my opinion the Plaintiff is entitled to succeed and there will be a decree for the amount claimed with interest from date of decree at 6 per cent. with costs.

*Mr. Arthur Cohen, K. C.*, and *Mr. James Fox* for the Appellants contended, criticising the evidence, that the Recorder was wrong in holding that Wong Kaim Chiew, the 1st Defendant (who had disappeared from Rangoon on or about 31st October 1899, the date the action was commenced, and had not been since heard of), was the managing partner of Defendants' firm or had authority to bind that firm. That there was no evidence that the signature to the promissory notes was either that of the firm, or such as they were in the habit of using.

That the so-called contracts for the differences were gaming and wagering transactions; that there was no consideration for the small note; and that they could not be sued on or enforced in law. Sec. 30 of the Indian Contract Act was noticed and *The Universal Stock Exchange, Ltd. v. Strachan* (1) and *Ex parte Gieve* (7) were commented on.

*Mr. Danckwerts* and *Mr. Mayne* for the Respondent in addition to commenting on the above cases contended that the transactions were legal and binding, and Wong Kaim Chiew had ample authority to bind the Defendants' firm. They referred to *Forbes v. Marshall* (8). It was

submitted that the Indian Contract Act was narrower than the English Act, see sec. 30. It did not contain "gaming;" *Forget v. Ostigny* (9); secs 17 and 18, Indian Registration Act.

*Mr. Cohen* replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—The Respondent in this appeal, who is Plaintiff in the original suit, sued the Defendants now Appellants in the Court of the Recorder of Rangoon for the recovery of money secured by two promissory notes. The Plaintiff is a rice trader carrying on business under the firm of Robert Sutherland & Co. in Rangoon. The Defendants carry on business with other persons under the firm of Kong Yee Lone as Rice Millers, General Merchants and Commission Agents.

The notes sued on are in the form following:—

"Rangoon, 11th September 1899.

"Rs 1,27,820.

"On demand we, the undersigned Kong Yee Lone & Co., promise to pay to Messrs. Robert Sutherland & Co. or order the sum of rupees one, lac twenty-seven thousand and eight hundred twenty only for value received in difference on rice.

"Signed in Chinese character.

"(Sd.) KONG YEE LONE & Co. (in English).

"Note.—The translation of the above Chinese character is—"KWONG SHIP LOANG."

"Rangoon, 11th September 1899.

"Rs. 5,198-1-0.

"On demand we, the undersigned Kong Yee Lone & Co., promise to pay to Messrs. Robert Sutherland & Co. or order the sum of rupees five thousand one hundred and ninety-eight and anna one only for value received in brokerage.

"Signed in Chinese character.

"(Sd.) KONG YEE LONE & Co. (in English).

"Note.—The translation of the above Chinese character is—"KWONG SHIP LOANG."

(9) L. R. (1895) App. Cas. 318 at p. 323.

(1) L. R. (1896) App. Cas. 166

(7) L. R. (1899) 1 Q. B. 794.

(8) 11 Exch 166 at p. 175 (1855)

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The Defendants pleaded that the character signed to the notes indicates not their firm but somebody or something else; and further that the dealings on which the notes are founded were effected between the Plaintiffs and one Kaim Chiew who, though a partner, was not the manager of the firm and had no authority to bind it. A large part of the controversy in the Court below and at this Bar related to these two defences. Their Lordships will not discuss them further now. One turns on the niceties of Chinese handwriting; and the other on a variety of circumstances adduced to show the position of Kaim Chiew in the Defendants' firm. Both have been ruled by the learned Recorder in favour of the Plaintiff, and at the close of the argument their Lordships were clear that the evidence fully justified his rulings.

A more serious objection to the Plaintiff's suit is that the consideration for which the promissory notes were given was a gambling transaction. The law applicable to the case is the Indian Contract Act which enacts as follows:—

“30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.”

This is substantially a transfusion of English law into the Indian statute book. Mr. Danckwerts urged that there is a difference between the expression “gambling and wagering” used in the English Statute and in the earlier Indian Act, XXI of 1848, and the expression “by way of wager” used in the present

Indian Act. Their Lordships are unable to perceive the distinction. Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market. The question is of which nature were the dealings which formed the consideration for the notes sued on. Were they for genuine purchases of rice or only for payment of money by one or the other according to the changes and chances of the market?

The contracts by which the Plaintiff purports to buy rice from the Defendants are broadly divisible into two classes. They are distinguishable on their face by what is called the option clause. In one class of contracts, shown in Exhibits D12 to D20, the seller has an option to deliver rice from a number of specified mills, among which that of the Defendants is not included. In the other class, shown in Exhibits D to D11, the only mill specified is that of the Defendants. In fact this second class leaves no option to the seller, though the expression used in and appropriate to the first class is retained in the class where only the Defendants' mill is specified.

The Defendants' mill is a small one, capable, as the Plaintiff states, of putting out 30,000 bags in a month. Their

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partnership capital, too, is small, being fixed by their deed at a trifle more than a lac of rupees.

In the year 1899, by 14 contracts ranging in time from January to the end of August, the Plaintiff bought from the Defendants 22,250 bags of rice. All these contracts, which are set out in the record and are conveniently tabulated in the case lodged for this appeal, are contracts of the second class, *viz.*, for rice from the Defendants' mill. All were duly fulfilled by delivery and payment.

Contracts of the first class are very different both in their character and in the treatment of them, by the parties. The Plaintiff's clerk, Sitaram, produced an account (Exhibit I, Rec. p. 106) showing the dealings which took place between the parties from January 1898 to August 1899. They are very large, considerably exceeding half a million of bags. The witness was asked to mark the items for which the rice had been delivered. The items so marked (see Exhibit I. 1) consist of the 22,250 bags which fell under the contracts mentioned as of the second class, and 5,000 more which are the subject of other contracts made subsequently to the date of the promissory notes. It does not appear by the record whether those 5,000 bags were bought under the first or the second class of contract.

There is some difficulty in applying Sitaram's oral evidence to Exhibit I, because the exhibit relates to a wider range of dealings than those under discussion. The oral evidence is to the following effect:—

"Out of 193,250 bags sold to Plaintiff 27,250 were delivered.

"Of the amount in Exhibit I put down as bought by Defendants from Plaintiff, *i.e.*, 2,58,000 bags none at all were delivered. Those were re-sales for differences. On the 28th June whoever acted for Defendants began a very heavy speculation. On that day Defendants sold to the Plaintiff 30,000 bags, on the 5th July 30,000, on the 10th July 10,000, on 18th 30,000, on 18th 15,000, 24th 30,000 for delivery August—October.

"On 5th August Defendants bought 62,000 and 94,000, bags. On 7th August 20,000; on 21st August Plaintiff purchased 20,000 bags.

"Exhibit A was given for differences on these sales."

Whether the differences were for the sales in August alone or for those in June and July also, is not clear, and there is a slight discrepancy in the figures. But that does not substantially affect the result of the witness's accounts and statements, which is clear enough. Out of the half million or more bags represented in Exhibit I, there were delivered prior to the date of the promissory notes 22,250 bags, every one of which was sold under the second class of contract. As to the other 5,000 delivered it is not shown that they were under the first class. For all that appears there has not been delivery of a single bag under the first class. During seven weeks in June, July and August 1889 were made the contracts on which the notes in suit are founded. They are the last seven items in Exhibit I. They appear to be for 1,99,000 bags at various prices aggregating upwards of 5 crores of rupees. The latest delivery was to be on the 7th October.

Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts; and they had dealings with other persons besides the Plaintiff. The capital of the

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firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundred fold. It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact they never completed nor were they called on to complete any one of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared: the one class suitable to traders such as the Defendants and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment; the rational inference is strengthened into a moral certainty. Their Lordships think that from these data it is unreasonable to draw any other conclusion than that the description which the larger promissory note gives of the consideration for it is the correct one. It is for "difference on rice;" not, as now contended, for the price of rice resold by the Plaintiff to the Defendants.

The judgment of the learned Recorder does not dwell on the above considerations. He quotes the judgment of Mr. Justice Cave in the case of *The Universal Stock Exchange, Ltd. v. Strachan* (1), which, as their Lordships agree, lays down the law very clearly. He then asks whether there was in this case a common intention to wager; and he adds 'I do not see how I can so hold, having regard to the fact that the rice was in certain instances delivered and paid for.' But he does not observe that the instances all belong to the class of contracts as to

which it is reasonable to infer that they were genuine contracts for the sale and delivery of goods.

Their Lordships hold that the consideration of the notes sued on was a number of wagering contracts within the meaning of the Indian Contract Act. They will humbly advise His Majesty so to declare, and reversing the decree below to dismiss the suit with costs. The Plaintiff must also pay the costs of this appeal.

Solicitors: *Messrs. Hopgoods and Dowson* for the Appellants.

Solicitors: *Bramal, White and Sanders* for the Respondent.

*Appeal allowed with costs.*

C. W. A.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 2117 of 1898.

ISHAN CHANDRA

BURDHAN,

PRINSEP, J.

HILL, J.

1901.

Plaintiff, Appellant,

v.

22, February.

AINUDDIN MIA and  
others, Respondents.

*Mesne profits, suit for—Onus—Notice of vacating possession.*

*In a suit for mesne profits as in other cases it is incumbent on the Plaintiff to establish not only the existence of his right, but also the extent of it.*

*There is nothing in the circumstances of the present case to take it out of this general rule.*

This was an appeal preferred on the 21st of November 1898, against the decree of Babu Mohendra Nath Roy, Subordinate Judge, 1st Court of Zillah

ISHAN CHANDRA BURDHAN v. AINUDDIN MIA.

**Mymensingh**, dated the 28th June 1898, modifying the decree of **Babu Okhoy Kumar Mittra**, Munsif of Pingna, dated the 17th of May 1897.

This appeal arose out of a suit for recovery of mesne profits. Plaintiff stated that he was eight annas co-sharer in a certain *jote*, that he was dispossessed from the land by Defendants Nos. 1 to 9 and by one Jabani Sheikh, the predecessor in interest of Defendants Nos. 10 to 15, and that in execution of a decree he took symbolical possession on the 26th Falgoun 1298, but that the said Defendants having declined to deliver up actual possession of the land, Plaintiff again sued for possession and mesne profits from 26th Falgoun 1298 to 25th Agrahayan 1300 and obtained a decree which had been confirmed in appeal, and Plaintiff took possession of the land on the 27th Agrahayan 1303. The present suit was brought for mesne profits from 26th Falgoun 1300 to 27th Agrahayan 1303 and the claim was laid at Rs. 1,000.

*Babu Dwarka Nath Chuckerbutty* for the Appellant.

*Babu Sharat Chunder Roy Chowdhry* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

HILL, J.—The facts of this case have not perhaps been ascertained by the Courts below with as much precision as could have been desired, and there are certain matters of detail with respect to which our information is faulty. We have not, however, been asked to obtain that information, and the appeal has been argued upon the basis of the facts actually found.

The suit was for mesne profits for a period extending from the 26th Falgoun 1300 to the 27th Agrahayan 1303. Of the 16 Defendants in the suit the last is impleaded merely *pro forma*. The 10th to the 15th inclusive are the representatives of one Jabani Sheikh, deceased. The first three are talukdars and the remaining Defendants along with Jabani Sheikh appear to have been either their servants or cultivators of the land. The Plaintiff is the owner of an 8 annas share in a *jote* situated in the *taluk* of the first three Defendants, and he asserts that while in possession of this share he was dispossessed by the first nine Defendants and Jabani Sheikh. He thereupon instituted a suit in the Court of the Munsif of Chowki Pingna and obtained a decree restoring him to possession. This decree was put into execution, and on the 26th Falgoun 1298 the Plaintiff obtained symbolical possession of the property. He failed however in consequence of the continued opposition of the then Defendants to obtain actual possession and in consequence he again sued the same persons for possession. This suit also resulted in a decree in the Plaintiff's favour, but Ainnuddin Mia, the present first Defendant, presented an appeal against the decree which appeal was pending until the 25th October 1895, when it was dismissed. On the 27th Agrahayan 1303 the Plaintiff obtained possession under his decree. The claim is thus with respect to the period intervening between the institution of the second suit for possession and the date upon which the Plaintiff went into possession. In the meantime and during the pendency of the appeal above-mentioned,

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the then Defendants with the exception of Mathura Nath who seems to have been a mere servant of the talukdar Defendants Makura Bluia who died several years ago though the date of his death is not shown, and Jabani Sheikh filed a petition in the Court of the Munsif of Chowki Pingna in which they asserted that they had quitted the land, and disclaimed all further connection with it, praying the Munsif at the same time to pass such orders as would free them, from further harassment at the hands of the Plaintiff. This petition was dated the 3rd November 1894 (18th Kartic 1301). It was replied to by the Plaintiff on the 23rd Agrahayan 1301 by a counter-petition in which he prayed that the Defendants' petition might be dismissed with costs on the grounds that it was a mere ruse; that all the Defendants had not joined in it, and that consequently those who were parties to it could not effectually yield up possession; and that the Defendants had no right to apply to give up possession unless and until the first Defendant withdrew his appeal. Whether any order was passed on these petitions does not appear, but it is mentioned by both the lower Courts in their judgments in the present suit that the Plaintiff stated in his evidence that his reason for not resuming possession when the petition of the 3rd November 1894 was presented was that the appeal of the first Defendant was then pending, and there was no knowing whether it would be decided in his favour or against him. It was in these circumstances that the present suit was brought, and the Munsif found that the Defendants were, notwithstanding their petition, in posses-

sion during the whole of the period between the 26th Falgoun 1300 and the 27th Agrahayan 1303 and decreed accordingly. The Subordinate Judge however being of opinion that there was no satisfactory evidence to show that the Defendants were in possession after the 18th Kartick 1301 or that they in any way interfered with the Plaintiff's enjoyment of the property after that date modified the Munsif's decree by limiting the mesne profits to the time between the 26th Falgoun 1300 and the 18th Kartick 1301, and hence this appeal.

It was contended before us that the Subordinate Judge was in error in throwing upon the Plaintiff the onus of proving the duration of the Defendants' possession; that the mere fact that the Defendants had vacated the land without the intervention of the Court was not sufficient to exempt them from liability for subsequent mesne profits: that inasmuch as all the Defendants did not join in the petition of the 3rd November 1894, it was ineffective as regards those who did: that since all the Defendants were instrumental in ousting the Plaintiff from possession they were all liable for mesne profits for the whole of the period during which any one of them remained in possession: and lastly that the effect of the pendency of the first Defendant's appeal was to preclude him and his co Defendants from altering their position *qua* the possession of the land.

With respect to the first objection it appears to me that it is incumbent on the Plaintiff in a suit for mesne profits as in other cases to establish not only the existence of his right but also the extent of it. The first he does by proof

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that the Defendant has either personally or by his agents or dependants wrongfully deprived him of the enjoyment of the land which may be in question ; the second by proof of the duration of the wrongful possession, and it is for that period only, the period of actual or constructive possession by the Defendant, that damages are claimable. This is the general rule, and it appears to me that there is nothing in the circumstances of the present case to take it out of it. The Court below which had the evidence on both sides before it has held that the Plaintiff failed to establish that the Defendants were in possession or otherwise interfered with the Plaintiff's enjoyment after the 18th Kartick 1301, and that, I think, is conclusive of the appeal, for it is a finding which embraces all the Defendants and in the face of which it is impossible for us to hold that any one of them was in possession at a later date. The argument that it would be unjust to require the Plaintiff to be continually on the watch for the purpose of ascertaining when his property was vacated by a wrong-doer was disposed of in the case of *Abbas v. Fassih-ud-din* (1) and at all events the Defendants' petition of the 18th Kartick which has been treated by the Court below as a *bona fide* proceeding was sufficient to give notice to the Plaintiff in the present case that the Defendants were, as has in fact been found, no longer in possession. This petition does not, I may add, operate to my mind as a mere tender of possession but was intended to notify to the Plaintiff through the medium of the Court

that the land had been already vacated. The fact that one of the Defendants was at that time prosecuting an appeal which questioned the Plaintiff's right to possession is not inconsistent with the conclusions of the Subordinate Judge, for it would have been open to him though not in possession, and even if the Plaintiff had been actually in possession to procure the reversal of the decree giving possession to the latter if it so happened that his own title was the better one. It is a consideration which, to my mind, is quite beside the true issue.

In this view of the case it becomes unnecessary to deal with the more difficult question of what the rights of the parties would have been, if it had been found that the Defendants were jointly instrumental in dispossessing the Plaintiff and that some of them remained in possession after the 18th Kartick. The argument on this point, I may add, proceeded wholly on an assumption which is unsupported by anything in the findings of the Court below, *viz.*, that in point of fact the Defendants were jointly concerned in the acts of dispossession.

It seems to me that this appeal ought to be dismissed with costs. \*

PRINSEP, J.—I am of the same opinion.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE.

No. 24 of 1899.

RAJ NARAIN,  
minor, byRAMPINI, J.  
GUPTA, J.  
1901.  
10, April.MUSSANUT CHATRI KOER,  
Defendant No. 3,  
Appellant,  
v.KHOBDARI RAI,  
Plaintiff, Respondent.

*Civil Procedure Code (Act XIV of 1882),  
sec. 13—Res judicata between co-Defendants  
—Transfer of Property Act (IV of 1882),  
sec. 118—Exchange or partition—Transfer,  
without writing or registration.*

*In a suit for a declaration of title to a certain property, when the Court makes a declaration in favour of the Plaintiff as to a certain share of the property and a declaration as to certain other shares in favour of some of the Defendants, the latter declaration is not binding on the other Defendants.*

*Where Plaintiff and Defendants Nos. 4 to 6 were joint owners of a certain property and Plaintiff alone was owner of another property and by an oral arrangement Plaintiff got the former property in its entirety :*

*Held—That the transaction was an exchange under, sec. 118 of the Transfer of Property Act and not a partition and was invalid in not being in writing and registered.*

GYANNESSA v. MOBARAKANNESSA (1) distinguished.

This was an appeal preferred on the 3rd of January 1899, against the decree of the Subordinate Judge of Sarun (Babu Behari Lal Mullick), dated 17th September 1898, modifying the decree of the Mun-

(1) L. L. R. 25 Cal. 210 (1897).

siff, 1st Court, Chapra, dated the 23rd March 1898.

The facts of the case were as follows :—

The suit, out of which this appeal arose, was brought by the Plaintiff for a declaration of his title to certain property and for confirmation of his possession therein. The Plaintiff claimed the whole of the property under the following titles, namely, one-half by right of inheritance from his father, one-eighth by exchange from the Defendants Nos. 4 to 6, and three-eighths by right of inheritance from one Hanuman.

As to the one-eighth share the Plaintiff and the Defendants Nos. 4 to 6 were the joint owners of Rudrapur and the Plaintiff alone was the owner of a share of Rampur. The Plaintiff instead of getting Rudrapur partitioned, which he was entitled to do, by an oral arrangement with those Defendants obtained Rudrapur in its entirety and gave his share of Rampur to the Defendants.

The Defendant No. 3 who alone contested the suit put the Plaintiff to the strict proof of his title.

The Court of first instance gave the Plaintiff a decree, which was on appeal modified by the Subordinate Judge who gave the Plaintiff a declaration of his right to  $\frac{2}{8}$ th of the property and a declaration of confirmation of possession to that extent.

The Defendant No. 3 preferred this appeal, and on his behalf it was urged, *first*, that the lower Court had no power to make a declaration in favour of Defendants Nos. 4 to 6, and, *secondly*, that the lower Appellate Court was wrong in holding that the exchange of the one-eighth share of the property said to have been effected between the Plaintiff and



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the Defendants Nos. 4 to 6 was valid on the ground of the transaction having been really a partition.

*Babu Dwarka Nath Mitter* for the Appellant.

*Babu Surendra Nath Roy* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal against the decision of the Subordinate Judge of Sarun, dated the 17th of September 1898.

The suit is brought by the Plaintiff for a declaration of his title to certain property and for confirmation of his possession therein. The Plaintiff claims the whole of the property under the following titles, namely, one-half by right of inheritance from his father, one-eighth by exchange from the Defendants Nos. 4 to 6, and three-eighths by right of inheritance from one Hanuman.

The contesting Defendant was the Defendant No. 3, who traversed the whole of the Plaintiff's case and put him to proof of his title as well as of his possession.

The Court of first instance gave the Plaintiff a decree.

The Subordinate Judge modified the first Court's decree and gave the Plaintiff a declaration of his right to  $\frac{2}{3}$  of the property and a declaration for confirmation of possession to that extent.

The Defendant No. 3, the only contesting Defendant in this Court, now appeals. On his behalf two pleas have been urged before us, namely, *first*, that the declaration in favour of the Defendants Nos. 4 to 6 given by the lower Appellate Court is *ultra vires*, and,

*secondly*, that the lower Appellate Court is wrong in holding that the exchange of the one-eighth share of the property said to have been effected between the Plaintiff and the Defendants Nos. 4 to 6 is valid on the ground of the transaction having been really a partition.

We think there is no force in the first of these contentions, because although the lower Appellate Court has in its decree given to the Defendants Nos. 4 to 6 a declaration that they are owners of  $\frac{2}{3}$  of the property, that declaration can really have no effect whatever against the present Appellant, the Defendant No. 3. The suit was brought by the Plaintiff, and what is operative in favour of the Plaintiff and against the Defendant No. 3 is the declaration which the Plaintiff has obtained. The declaration which the Defendants Nos. 4 to 6 have obtained is superfluous and cannot injure the Defendant No. 3, because it is a well-known principle of law that there is no *res judicata* between co-Defendants.

With regard to the second of the contentions on behalf of the Appellant in this case we are of opinion that it is a good plea and must be given effect to. The Sub-Judge upon this point says : "The facts are that the Plaintiff and Defendants Nos. 4 to 6 are the joint owners of Rudrapur, and the Plaintiff is the owner of Rampur. The Plaintiff had a right to get Rudrapur partitioned with Defendants Nos. 4 to 6 and others. Instead of having Rudrapur partitioned, he got it in entirety and gave to the Defendants Nos. 4 to 6 his share in Rampur. This was something like partition, and though it was an exchange, it was not the exchange as defined in sec. 118

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as was held by the High Court in the case quoted above *Gyannessa v. Mobarakannessa* (1) and required no registered writing for its completion." The Sub-Judge, therefore, admits in this passage in his judgment that the transaction was an exchange, yet he says it was not affected by sec. 118 of the Transfer of Property Act, because it was some thing like partition, and he justifies his conclusion to this effect by a reference to the case of *Gyannessa v. Mobarakannessa* (1).

We have, however, examined this case and we think that it is a case of an entirely different nature from the present one. In that case "some of the owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties;" and it was held that this transaction was not an exchange within the meaning of sec. 118 of the Transfer of Property Act, but the completed transaction amounted to a partition which is not required by law to be effected by an instrument in writing." Now, it will be observed that in that case all the owners had shares in the properties affected by the transaction, that is to say, all had shares in the specific property given to the Plaintiff and all had shares in the property in which the Plaintiff gave up his share, taking the specific instead. But these are not the facts in the present case. In the present case the Plaintiff and the Defendants Nos. 4 to 6 were joint owners of Rudrapur; but the Plaintiff alone was owner of Rampur and the Defendants Nos. 4 to 6 had no share in Rampur. Therefore the tran-

saction was clearly an exchange and does not come within the purview of the case cited by the Sub-Judge and the transaction must be held invalid under sec. 118 of the Transfer of Property Act. The learned pleader for the Respondents admits that the partition is not, strictly speaking, a partition, and that the case cited by the Sub-Judge is not, strictly speaking, in point, but he justifies the finding of the lower Appellate Court upon two grounds: (i) that there was no question on this point raised in the Court of first instance, and (ii) that his client is found by both the Courts to be in possession of the entire property. The first of these arguments has been dealt with by the Sub-Judge in his judgment. He says:—"On this point the lower Court said that because the Defendants Nos. 4 to 6 did not come forward to deny the exchange and because the Plaintiff did not expressly deny it, therefore it was proved. But the lower Court omitted to consider whether this oral exchange, even if proved, was valid according to law, and, secondly, that the Defendant by his reservation in the written statement put the Plaintiff to strict proof of the exchange and its validity." The Defendant referred to in this passage is the Defendant No. 3 because he is the only contesting Defendant; and that being so, looking at his pleadings in his written statement, it was incumbent, as pointed out by the Sub-Judge that the Plaintiff should strictly prove his case. We are accordingly of opinion that the Plaintiff has failed to prove his title to the one-eighth share in question.

Then with regard to the second plea of the Respondent, no doubt it is perfectly

(1) 1 L. R. 25 Cal. 210 (1897).



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case, should not the prosecution be under sec. 211 of the Indian Penal Code, if a prosecution is to lie at all? It has been held that sec. 211 and not sec. 182 applies to the case of a person bringing a false charge, *In the matter of Russick Lal Mullick* (2); and to the case of a person who makes a complaint to the Police of a cognizable offence, *Karim Buksh v. Queen-Empress* (1). In the present case a charge was made and no mere information was given to a police-officer. One of the charges, that of theft, was a cognizable offence.

2. Under the circumstances of this case, is a prosecution precluded by reason of one of the charges, namely, the using abusive language, having been found to be true? In the case of *Mukti Bewa v. Jhotu Santra* (3) it was held that where one of several charges jointly made, proved to be true, no compensation could be given to the accused for the charges which proved to be false. Is that principle to be held to include prosecutions under sec. 182 or sec. 211, where one of several charges is true and the others false?

*Mr. O'Kinealy* appeared for the Crown.

No one appeared for the accused.

THE JUDGMENT OF THE COURT was as follows:—

Two questions of law have been referred to us, under sec. 432 of the Code of Criminal Procedure, by one of the Presidency Magistrates of Calcutta. Before mentioning these questions, it is necessary to state how the case came into the

Magistrate's Court. It appears that on the 6th of December last, one Giridhari Naik made a certain complaint at the Colutola Thana. That complaint was entered in a book kept for the purpose, and was investigated by the Police, who came to the conclusion that part of it was true and the other part false. The Inspector of the Thana, thereupon, prosecuted Giridhari Naik under sec. 182 of the Indian Penal Code, for giving false information, with intent to cause a public servant to use his lawful power to the injury of another person, namely, Bechoo Kurmi. This prosecution was started with the sanction of the Commissioner of Police.

The questions submitted to us are whether the prosecution should not have been under sec. 211 of the Indian Penal Code, if at all, and not under sec. 182; *secondly*, whether considering the fact that a portion of the complainant's story was found to be true, a charge either under sec. 211 or under sec. 182 of the Indian Penal Code, can be maintained against him.

So far as the first question is concerned, it seems to us that the matter is concluded by the Full Bench ruling in the case of *Karim Buksh v. Queen-Empress* (1), where it was substantially decided that when a false charge is made to the Police of a cognizable offence, the offence committed by the person making the false charge falls within the meaning of sec. 211 of the Indian Penal Code,

Regarding the second question, it is necessary to refer to the provisions of sec. 211, which runs as follows: "Whoever, with intent to cause injury to any

(1) I. L. R. 17 Cal. 574 (1888).

(2) 7 C. L. R. 382 (1880).

(3) I. L. R. 24 Cal. 53 (1896).

(1) I. L. R. 17 Cal. 574 (1888).

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person institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both, etc." In the present case, the complaint was made at the Thana with the object of setting the Police in motion. It seems to us difficult to lay down any precise rule or principle in respect of the question upon which we are called to express an opinion. It appears to us that each case must depend upon its own circumstances, and, what is to be looked to, is the nature of the charge. The section, undoubtedly, contemplates a charge, which is indivisible in its nature, and, therefore, what is to be considered is the nature of the complaint or charge made by the accused: In other words, whether the complaint is substantially true and what is false is a mere fringe to the complaint, or whether the substantial complaint is false and what is true is a mere fringe or in other words a mere accessory circumstance. This is a matter entirely for the consideration of the Court which has to determine the question. The case referred to by the learned Presidency Magistrate only declares that where a portion of the case is substantially true, it can hardly be said that it is frivolous or vexatious so as to entitle the Magistrate to award compensation. An analogy of that case may assist the Magistrate or the Judge in dealing with prosecutions under sec. 211 of the Indian

Penal Code, to determine the character of the real charge preferred by the present accused under sec. 211, whether it is substantially true or whether it is substantially false.

With these remarks we direct that the reference be returned to the Chief Presidency Magistrate for communication to the Magistrate concerned.

H. P. C.

### PRIVY COUNCIL.

[ON APPEAL FROM THE BENGAL  
HIGH COURT.]

LORD HOBHOUSE.	JOSEPHINE ROSE
LORD MACNAGHTEN.	HARRISS and
LORD ROBERTSON.	another, Plaintiffs,
SIR R. COUCH.	Appellants,
SIR FORD NORTH.	v.
1901.	EDWARD BROWN and
Heard, 1 & 11, May.	others, Defendants,
Judgment, 22, June.]	Respondents.

*Will, construction of—Bengali Will—Terms of art—Words of direct and simple gift—Vesting of a bequest, words necessary for—Parjyapta haibek, meaning and effect of—Appointment of guardian with direction to make over gift on legatee attaining majority, effect of—Judges trying a cause consulting another Judge, propriety of—Ex parte hearing—Re-hearing, application by Respondent for re-hearing.*

*In construing Bengali Wills it must be remembered that there is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. The only safe course is to give to the words their plain and ordinary meaning.*

*There are no particular words necessary to the vesting of a bequest or a legacy.*

*The words "parjyapta haibek" whether it means "descend to" or "devolve or go"*

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or "shall become vested" has the effect of vesting the legacy at once.

*Where there is a bequest in favour of a person simply it confers a vested interest and the appointment of an executor and guardian to that person while he is a minor, with a direction to make over the property to him on his attaining majority does not postpone the vesting of bequest.*

*Judges who have heard the arguments and who are responsible for the decision can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a Judge of the High Court.*

This was an appeal from a decision of the Calcutta High Court (Amcer Ali and Pratt, JJ.), dated the 10th June 1898, dismissing the suit which had been partially decreed by the Subordinate Judge of Barisal.

The facts of the case are shortly as follows:—One Thomas Paul D'Silva died on the 7th February 1857 leaving a Will in the Bengali language and character, dated the 5th January 1857, whereby he appointed Edward Brown, the Defendant No. 1, his executor. The testator left him surviving two nieces, Flora and Cecilia, Defendants Nos. 2 and 7. Flora was a minor and unmarried at the time of the testator's death, and Cecilia was of age and married to F. M. Proby. The clauses of the Will material to this report were the 11th and a portion of the 15th. The 11th clause was as follows:—

"After carrying out all the directions and paying the legacies specified in the above-mentioned paragraphs, all my ancestral and self-acquired moveable and

immoveable properties that shall remain, as also the moveable and immoveable properties left by Domingo Manuel Anthony D'Silva and which I have inherited, shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother John Emanuel D'Silva (namely) Mrs. Cecilia Proby and Miss Flora D'Silva who are now alive. The sons of those daughters (of my brother) shall, after their birth, remain under the control and guardianship of the Executor Saheb until they attain majority at the expiry of 21 (twenty-one) years, and whenever the eldest son of any of the ladies shall attain majority, the executor will make over his share to him to his satisfaction.\* Of my two brother's daughters I give to the elder (namely) Cecilia Proby the Bharpasha Tofetbari dwelling-house inherited by me, and to the younger (namely) Miss Flora the house at Shibpore. But if, for the purposes of management of my properties, it should be necessary for the executor to stay in any one of the said two houses, there shall be raised no objection to his doing so. And as regards the ornaments and tables and almirahs and other articles that I

\* The Bengali words were as follows:—

"১১' দফা : উপর দফা সমস্তের লিখিত নির্ধারণ দাতব্য সমস্তের মতচরণ হইয়া তদ্ব্যতীত আমার পৈতৃক ও নিজকৃত ও Domingo Manuel Anthony D'Silva তাজ্য আমার প্রাপ্ত সমুদয় স্থাবর অস্থাবর সম্পত্তি আমার ভ্রাতা মৃত John Emanuel D'Silva সাহেবের কন্যাগণ শ্রী Mrs. Cecilia Proby ও Miss Flora D'Silva যে বর্তমান আছেন তাহাদের পুত্রসন্তান জন্মিলে প্রত্যেক কন্যার জ্যেষ্ঠ পুত্রে তুল্যাংশে পর্যাপ্ত হইবেক। ঐ কন্যাগণের পুত্রগণ জন্মিয়া সম্পূর্ণ একুশ বৎসর গতে বয়ঃপ্রাপ্ত হওয়া পর্যন্ত উহি সাহেবের শাসন সংরক্ষণে থাকিয়া যখন যে কন্যার যে জ্যেষ্ঠ পুত্র বয়ঃপ্রাপ্ত হয় উহি সাহেব তখন তাহার অংশ তাহাকে বুঝাইয়া দিবেন।"

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have in my custody and under my control, I give the same to the said daughters (of my brother) in equal shares. The elder of them is married. Immediately upon my death, she will get her half share of the same from the executor. The younger one has not been married yet. She is under age. When she arrives at marriageable age, she will be given in marriage to a suitable person with the consent and according to the views of the executor. At the time of her marriage, the executor will give her the half share she is entitled to, and as regards the sum of Rs. 50 (fifty) a month which has been fixed for the maintenance of each of the said two daughters (of my brother), the elder of them will be paid her monthly allowance month after month. The younger shall be sent to school and her necessary expenses at the school will be met from her fixed monthly allowance. Finis."

The material portion of the 15th clause was to this effect:—"The terms of this *vasiatnama* (Will) will remain final, irrevocable and unaltered down to the death of the executor appointed by me, that is to say, down to the time when *the eldest sons of my brother's daughters* shall after birth attain majority."

By the said Will the testator further gave a monthly allowance of Rs. 50 each to the two nieces for their natural lives. Cecilia had a son born of her who lived beyond the age of 21 years and a moiety of the residuary estate was duly made over to him.

Flora married George Williams in 1878. She had an infant son born to her in August 1883 who lived only a few hours. The husband and wife subsequently

lived apart. On 31st March 1882 Flora, in the belief that she was entitled to the moiety of the residuary estate as an heiress of the testator, sold one-half of the said moiety to three Mahomedan gentlemen who were the 3rd, 4th and 5th Defendants to the suit. The 3rd Defendant transferred his interests to Amar Chand Pal, the 6th Defendant. The 7th and 8th Defendants were Cecilia Proby and her husband.

On the 12th August 1892 Flora sold her remaining half share of the moiety and also her monthly allowance of Rs. 50 to Amrita Lal Banerji for Rs. 3,000.

On the same date George Williams assigned to the same individual for Rs. 4,000 any right he had as sole heir to his son to receive the moiety of the testator's estate.

Amrita Lal on the same day sold to A. E. Harriss, the Plaintiff, for Rs. 9,000 what he had acquired under the two last-mentioned deeds.

George Williams died soon after the assignments, and no further issue was born to him.

The present suit was thereupon instituted by A. E. Harriss (now represented by the Appellants) as assignee of the interests of Flora Williams and her husband George Williams against the executor of the Will of Thomas Paul D'Silva and the other Defendants hereinbefore mentioned praying, *inter alia*, (1) that the Will may be construed and the rights of the parties declared, (2) for a declaration that the moiety of the residuary estate vested in the deceased son of Flora Williams and after his death devolved on George Williams, and that the Plaintiff was entitled to recover this as purchaser

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and for possession of the same, and (3) for a declaration that he was entitled to the monthly allowance of Rs. 50 which had been given by the testator to Flora Williams from the 12th of August 1892.

The principal question in the suit was the right construction of the 11th clause of the Will.

The Plaintiff's case was that, on the birth of the infant son of Flora Williams, the moiety of the testator's estate vested in him and on his death passed to his father. The Defendants, on the other hand, contended that the moiety did not vest in the infant son and that there was an intestacy as to this moiety which passed equally to Flora and Cecilia.

A further question was raised by Flora Williams that her assignment to Amrita Lal Banerji had been fraudulently obtained and was not binding on her.

The Subordinate Judge held that under the Will the moiety did not vest in the infant son but was given to the eldest surviving son of Flora who attained the age of 21 years and that accordingly Amrita Lal obtained nothing by his purchase from George Williams, but he found that the assignment by Flora to Amrita Lal was binding on her and the latter was thereunder entitled to the monthly allowance. The material portion of the Subordinate Judge's judgment on the question of construction was as follows:—

"The learned counsel contended that paragraph 11 of the Will, on which the case mainly turned showed that the words "eldest son" alluded to therein meant the first-born son and that the estate vested in him as soon as he was born. The Will is in the Bengali language. There are words and expressions in paragraph 11 which, as it seems to me, indicate that

the construction suggested cannot be accepted as correct. The passage I rely upon is:—'তখন যে কন্যার যে জ্যেষ্ঠ পুত্র বয়োপ্রাপ্ত হইবে তাহাকে বৃদ্ধি দিবেন।' The words 'যে জ্যেষ্ঠ পুত্র' coming after the words 'যে কন্যার' are in my opinion significant. They mean the eldest son living and not the first born eldest son. The words 'যে জ্যেষ্ঠ পুত্র' in the passage denote whoever may be the eldest son living to complete the age of 21 years. Again, there is not a single word in the Will to indicate that the estate bequeathed would vest in the son as soon as he would be born. On the contrary, the testator directed that the share bequeathed would be made over to him by the executor on his attaining and completing the age of 21 years and not before. The English translation [of the passage] quoted above from the judgment of the Honourable Court in this connection is:—"and whenever the eldest son of any of the daughters shall attain majority, the executor will make over charge of his share to him to his satisfaction." The word 'charge,' it seems to me, has not been well placed there. The expression 'তখন তাহার অংশ তাহাকে বৃদ্ধি দিবেন' means in this connection, that the executor shall make over his share (and not the charge of his share) to him to his satisfaction. If the word 'charge' be retained in the translation, it might mean that the estate would vest in the son on his birth and the executor would remain in charge of the same till he would attain majority, when merely the charge of the same would be made over to him. The testator intended, and to my mind in clear and explicit language, that the estate would remain in the hands of the executor, a trusted and valued friend of his who had rendered him sundry good offices as recited by him in the Will, till the sons of his nieces would complete their respective ages of 21, and then, and not before, the estate or shares of the estate would be made over to them, and that they would have, before the arrival of that time, to remain under his control and guardianship."

The Plaintiff appealed from the above judgment and the Defendant Flora Williams filed a cross-appeal. The High Court (Ameer Ali and Pratt, JJ.) agreed



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with the Subordinate Judge on the construction of the Will but reversed his decision as to the monthly allowance. They did not find that the assignment was obtained by fraud but were of opinion that the assignment was an unconscionable bargain and was not binding on Flora Williams. On the question of construction their Lordships' judgment was as follows:—

"The Will is in the Bengali language and character and English documents cannot, in our opinion, give an indication of the meaning of the testator's words in this case. We must endeavour to gather his intention and meaning from his own document. The Subordinate Judge, who is a Bengali himself, and is fully conversant with the language in which D'Silva's Will is written, has held that the testator did not intend to give a vested interest to the eldest sons of his nieces immediately upon birth. The passage in the judgment dealing with this question is extremely important and is as follows:—(here their Lordships quoted the passage given above).

Considering that the learned Judge who has construed the document is, as we have already pointed out, himself a Bengali it would require very cogent reasons to induce us to place a different construction upon the clause in question. But after giving to it our own independent and careful consideration, we think the view taken by the Subordinate Judge is perfectly correct. (Then their Lordships stated the passage in Bengali in Roman character).

"We had this passage translated by one of the Court translators, who has chosen to translate the words *pariyapta haibek* by the English words "will become vested." We regret that, in our opinion, his version is entirely incorrect. The translation made by the sworn Interpreter on the Original Side of the Court accords, in the interpretation of the words *pariyapta haibek* with the translation in the Paper-book. The technical meaning conveyed by the English expressions "shall vest," "shall become vested," etc., are not, in our opinion, conveyed by the Bengali words *pariyapta haibek*, which really

mean "shall devolve or go," and indicate the line of devolution. It will be observed that the testator goes on to add that the sons of his brother's daughters, not merely the eldest born, shall, after their birth, remain under the control and guardianship of the executor until they attain majority at the expiry of 21 years, showing thus that it was not the eldest or first-born who would take the property, but the eldest among them who shall attain the age of 21.

"The learned counsel for the Plaintiff contended, that the sons of those daughters who were to remain after their birth under their control and guardianship of the executor meant the two eldest sons in whom the estate had already vested. But the original "putragan" really refers to all their sons, the intention of the testator evidently being that during their minority his nieces' sons should be maintained out of his residuary estate, and only when the two eldest among them should attain majority were their respective shares to be made over to them. And this view is confirmed by what the testator declares in the 15th clause of his Will, that is, that until the majority of whoever might be the eldest at the time among the sons of his brother's daughters, the estate was to remain in the hands of the executor absolutely and for all purposes. In the construction of this clause, we have also had the advantage of the opinion of Mr. Justice Gupta, who is fully conversant with the Bengali language, which is his mother tongue, and who agrees with us in the meaning to be attached to the clause in question

\* \* \* \* \*

"In our opinion therefore the view taken by the Subordinate Judge in this case is fully borne out by the language of the Will, namely, that the testator intended that the moiety should go to the eldest male child of his two nieces who attained the age of 21; and inasmuch as Flora Williams, though a widow, may still marry and give birth to a son, the residuary estate must, in accordance with the wishes of the testator, remain in the hands of the executor, as provided by Thomas Paul D'Silva."

The Plaintiff thereupon appealed to the Privy Council.

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*Mr. Asquith, K. C., and Mr. Mayne* for the Appellant.

1st May 1901—

*Mr. Asquith* argued, that the “eldest son” took a vested interest, there was no gift over. The gift was not made contingent. There cannot be two eldest sons. The High Court was wrong in coming to the conclusion that it meant the eldest son living and not the first-born son; whether the correct translation was “shall descend” or “shall devolve” or “shall go to,” the vesting was on the birth of the eldest son. It was an erroneous construction to say that only when the two eldest sons of his nieces should attain majority were their respective shares to vest. On the other point *Mr. Mayne* was to follow, but their Lordships intimated that they did not consider it necessary to hear *Mr. Mayne*.

The Respondents were not represented by counsel.

Their Lordships reserved their judgment.

On the 11th May—

Before Lords Macnaghten, Davey, Lindley and Sir Richard Couch and Sir Ford North, an application was made on behalf of one of the Respondents for the re-hearing of the appeal.

In the petition of the Respondent Cecilia Proby to the Right Hon'ble the Lords of the Judicial Committee it was stated that the record in the above appeal arrived in London in August 1890; that Appellants' solicitors entered appearance at the Privy Council Office on 6th November 1900. That by the mail which left Calcutta on 7th March last the Calcutta agents of Petitioner's London solicitors, Messrs T. L. Wilson & Co.,

wrote them stating that Petitioner's muktcar had called on them and had promised to remit funds to enable Messrs. T. L. Wilson & Co. to appear by counsel on her behalf at the hearing of the appeal.

That on receipt of such letter Messrs. T. L. Wilson & Co. wrote to Appellants' London solicitors on 26th March asking them to consent to the appeal standing out of the list for May into the June list.

That Appellants' solicitors declined to give the consent.

That Petitioner's solicitor then on 1st April cabled to their Calcutta agents, Messrs. Wilson and Chatterjee, “Hearing 3rd May.”

That the appeal was heard *ex parte* by their Lordships on the 1st May, and judgment was reserved. That on the 2nd May Messrs. T. L. Wilson & Co. received the following cable from Calcutta: “Appear for Respondent Cecilia.” That thereupon Messrs. T. L. Wilson & Co. wired back that appeal had been argued and judgment reserved.

That on 3rd May the said Calcutta agents cabled back instructions to make an application for a re-hearing and Petitioner prayed their Lordships to permit counsel to be heard on her behalf in support of the judgment of the High Court.

*Mr. C. W. Arathoon* who appeared on behalf of the Petitioner pointed out that this appeal had come on for hearing within 9 months of the arrival of the record and referred to the facts mentioned in the petition.

SIR RICHARD COUCH.—If the application is granted, you will have to pay the costs of the re-hearing in any event.

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Are you agreeable to its standing over for you to consider that?

*Mr. Arathoon.*—Yes, that order will suit me very well. Mr. Mayne appears to oppose.

*Mr. Mayne* urged that it will establish a bad precedent, if Respondents were allowed after they find out that an appeal is going against them to make such applications, it was likely that they would frequently act in this manner. He further pointed out that leave to appeal was granted so far back as February 1899, and there was no reason shown for any indulgence in this case. Any way if the application is granted, then costs must be paid of the rehearing.

*LORD MACNAGHTEN.*—Their Lordships always regret having to hear an appeal *ex parte*.

After consideration Lord Macnaghten said the prayer will be refused with costs.

*On the 22nd June—*

Their LORDSHIPS' JUDGMENT was delivered by

*SIR RICHARD COUCH.*—Thomas Paul D'Silva, who died in February 1857, made a Will, dated the 5th January 1857, of which he appointed the Respondent, Edward Brown, sole executor.

After leaving various legacies, he disposed of the residue of his estate by clause 11, which is as follows:—

"After carrying out all the directions and paying the legacies specified in the above-mentioned paragraphs, all my ancestral and self-acquired moveable and immoveable properties that shall remain, as also the moveable and immoveable

properties left by Domingo Manuel Anthony D'Silva, and which I have inherited, shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother John Emanuel D'Silva (namely) Mrs. Cecilia Proby and Miss Flora D'Silva, who are now alive. The sons of those daughters (of my brother) shall after their birth remain under the control and guardianship of the Executor Sahib until they attain majority at the expiry of 21 (twenty-one) years, and whenever the eldest son of any of the ladies shall attain majority, the executor will make over his share to him to his satisfaction. Of my two brother's daughters I give to the elder (namely) Cecilia Proby, the Bharpasha Tofelbari dwelling-house inherited by me, and to the younger (namely) Miss Flora, the house at Shibpore. But if for the purposes of management of my properties it should be necessary for the executor to stay in any one of the said two houses, there shall be raised no objection to his doing so.

"And as regards the ornaments and tables and almirahs and other articles that I have in my custody and under my control I give the same to the said daughters (of my brother) in equal shares.

"The elder of them is married. Immediately upon my death she will get her half share of the same from the executor. The younger one has not been married yet. She is under age. When she arrives at marriageable age she will be given in marriage to a suitable person with the consent and according to the views of the executor. At the time of her marriage the executor will give her the half share she is entitled to, and as

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regards the sum of Rs. 50 (fifty) a month, which has been fixed for the maintenance of each of the said two daughters (of my brother) the elder of them will be paid her monthly allowance month after month. The younger shall be sent to school, and her necessary expenses at the school will be met from her fixed monthly allowance. Finis."

The Will is in the Bengali language, and this is the translation, which has been transmitted by the High Court to the Registrar as an official translation of it.

Cecilia Proby had a son born on 17th May 1858 who lived to be 21, and to whom on his attaining his majority, one moiety of the estate was handed over by the executor.

Flora married George Williams in 1878. She had an infant son born on 23rd August 1883, who only lived a few hours. Subsequently, she and her husband had differences and lived apart. George Williams died after the assignments next spoken of, and no further issue was born to them.

On the 31st March 1892, Flora Williams sold half of her interest in the second moiety of the testator's estate to the third, fourth and fifth Respondents.

On the 12th August 1892, Flora Williams executed a deed to Amrita Lal Banerji by which after reciting her previous assignment to the above three Respondents she assigned to him for Rs. 3,000 the residue of her interest in the half-share of the residue of the testator's estate and also the allowance to her of Rs. 50 per month. On the same day George Williams executed a deed, by which, after reciting that upon

the birth of the eldest son of Flora Williams by him the moiety of the residuary estate became as he was advised and believed vested in the said eldest son and upon his death he George Williams became entitled to it as his heir, he assigned to Amrita Lal Banerji all his interest in it for Rs. 4,000, and Amrita Lal Banerji on the same day assigned to Alfred Edmund Harriss all his interests under those two deeds for Rs. 9,000.

The suit in this appeal was brought by Harriss who has since died and the Appellants are his administrators against Brown the executor and the other Respondents. The plaint prayed that the Will might be interpreted and the rights of the respective parties declared by the Court, that it might be declared that the moiety of the remaining estate vested in a deceased son of Flora Williams, and after his death it devolved upon George Williams, and the Plaintiff was entitled to recover this as purchaser; that if the Court held that Flora Williams was entitled to anything then the Plaintiff was entitled to recover it as purchaser, that Flora Williams had sold her monthly allowance of Rs. 50 to the Plaintiff and he was entitled to it. The Respondent Brown by his written statement alleged that nothing vested in the infant son of Flora Williams and that there was an intestacy under which that moiety passed equally to Flora and Cecilia. Flora Williams in her written statement alleged that she had transferred half of her interest to the third, fourth and fifth Respondents and that the deed in favour of Amrita Lal Banerji was obtained from her by fraud.

The first question for consideration

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is what is the construction of the Will as to the shares of the residue. The suit was first heard by the Officiating Second Subordinate Judge of Backergunge on the 12th September 1896. In his judgment (Rec. 77) he states the paragraph of the Will in the same words as are stated in the translation in the transmitted record of proceedings with one exception. Instead of the words being as in that "the executor will make over his share to him" it is "the executor will make over *charge* of his share to him." Then after a paragraph which need not be noticed the Judge refers to the contention of the Plaintiff's counsel that the words "eldest son" meant the first-born son and that the estate vested in him as soon as he was born, and says that the Will is in the Bengali language and there are words and expressions in paragraph 11 which as it seems to him indicate that the construction suggested cannot be accepted as correct. The learned Judge then says: "The passage I rely upon is (quoting the Bengali original); the words mean the eldest son living and not the first born, the words in the passage denote whoever may be the eldest son living to complete the age of 21 years." Now an eldest son to be born is not the same as an eldest son who shall live to attain the age of 21 years and who may be a second, third or fourth born son. The correctness of the translation "eldest son to be born" does not appear to be questioned, but the words are held not to have their ordinary meaning apparently because they are followed by the direction to the executor to make over the share to the son on his attaining majority. Then he says

*"Again there is not a single word in the Will to indicate that the estate bequeathed would vest in the son as soon as he would be born."* This is a serious error. The words "descend to the eldest son," mean to go down to him, to belong to him in succession to the testator and refer to his birth. It will be seen that the High Court translates the Bengali by "devolve or go" which has the same meaning.

The learned Judge proceeds to say *"On the contrary* the testator directed that the share bequeathed would be made over to him by the executor on his attaining and completing the age of 21 years and not before." This is another error. The Will is not to the contrary when it says that the sons of the daughters shall after their birth remain under the control and guardianship of the executor until they attain majority at the expiry of 21 years and whenever the eldest son of one of them shall attain majority the executor will make over his share to him. It will be seen that the High Court also relies upon the direction to the executor to make over the share as showing that it was not to be vested until the attaining the age of 21 years. The Subordinate Judge had a translation with the word "charge" in it which it seemed to him ought not to be there and he says that "if the word 'charge' be retained it might mean that the estate would vest in the son on his birth and the executor would remain in charge of the same till he would attain majority when merely the charge of the same would be made over to him." This is really what is intended by the direction that the sons shall remain under the control and

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guardianship of the executor until they attain majority and whenever one of them does the executor "shall make over his share to him." The executor as guardian would have charge of the share vested in the son and these words merely point to the possession or enjoyment of it.

Upon the question whether the assignment by Flora Williams to Amrita Lal Banerji was valid and that effect should be given to the purchase by Harriss the Judge held that it should and accordingly made a decree in his favour only for a fourth share of the accumulations of the income of the half share bequeathed to the son of Flora Williams and for the monthly allowance of Rs. 50 and dismissed the suit as to the rest of the claim.

Harriss having died, the present Appellants as his representatives appealed to the High Court and Flora Williams made a cross-appeal on the ground that her sale to Amrita Lal Banerji was not binding on her. After noticing in its judgment that the Will is in the Bengali language and character and that the Subordinate Judge, who is a Bengali himself, was fully conversant with the language in which the Will is written, the High Court states the passage in the judgment of the Subordinate Judge which their Lordships have commented upon. Then having stated in Roman characters the Bengali words of the material part of the clause, they say "we had this passage translated by one of the Court translators who has chosen to translate the words *parjyapta haibek* by the English words 'will become vested.'" We regret that in our opinion

his version is entirely incorrect. The translation made by the sworn interpreter on the original side of the Court accords in the interpretation of the words *parjyapta haibek* with the translation in the Paper-book. The technical meaning conveyed by the English expressions "shall vest" "shall become vested" are not in our opinion conveyed by the Bengali words *parjyapta haibek* which really mean "shall devolve or go" and indicate the line of devolution." This appears to their Lordships to be a misconception of what words are necessary for the vesting of a bequest or legacy. A bequest in favour of a person simply (that is without any intimation of a desire to suspend or postpone its operation) confers a vested interest. It must be remembered that it is within a comparatively recent period that Indian testators have adopted English modes of creating interests in their estates. There is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. It is not suggested in this case that the meaning affixed by the Courts to the testator's language is a sense required by a course of practice known to vakils. The only safe course is to give to his words their plain ordinary meaning. The official translation in the record, that by the sworn interpreter of the High Court, and that of the Judges agree regarding the critical words. They are words of direct and simple gift to the eldest son. The learned Judges appear to find in the appointment of an executor and guardian to the minors with a direction to make over the property to them on their attaining majority something

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contrary to an intention that the gift should vest in the object at once. It is new to their Lordships to hear that these ordinary directions have any effect in suspending the ownership of the property and it seems to them that such a ruling is calculated to disturb settled principles. The judgment continues—"It will be observed that the testator goes on to add that the sons of his brother's daughters, not merely the eldest born, shall after their birth remain under the control and guardianship of the executor until they attain majority at the expiry of 21 years *showing* that it was not the eldest or first-born who would take the property but the eldest among them who shall attain 21. The learned counsel for the Plaintiff contended that the sons of those daughters who were to remain after their birth under the control and guardianship of the executor meant the two eldest sons in whom the estate had already vested. But the original 'putragan' clearly refers to all their sons, the intention of the testator evidently being that during their minority his nieces' sons should be maintained out of his residuary estate and only when the two eldest among them should attain majority were their respective shares to be made over to them." In their Lordships' opinion the contention of the Plaintiff's counsel is right. The words "the sons of those daughters" following immediately the bequest plainly refer to the sons to whom it is made. The 15th clause of the Will to which the learned Judges refer as confirming their opinion is consistent with the contention of counsel and their Lordships do not see any reason for the opinion that all the sons were

during their minority to be maintained out of the residuary estate. The result is that their Lordships are of opinion that on the birth of the son of Flora Williams the half share in dispute became vested in him and on his death it passed to his father as his heir. The learned Judges say that in the construction of the clause they have had the advantage of the opinion of Mr. Justice Gupta who is fully conversant with the Bengali language which is his mother tongue and who agrees with them in the meaning to be attached to it. Their Lordships remark upon this that Judges who have heard the arguments and who are responsible for the decision can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a Judge of the High Court. It is true that this case is a peculiar one in which Judges have to interpret a language which seems to be imperfectly known to themselves and to be familiar to a colleague. But then their Lordships are not informed how Mr. Justice Gupta translates the Bengali words. It is only said that he agrees with the meaning which the other learned Judges below attach to the clause in question. He does not appear to have thrown any new light on the rendering of the words into English. It must be taken that on this point he agrees with his colleagues of the High Court and with their sworn interpreter and with the official translation in the record. If so, the agreement with the decision must be on account of that further reasoning which has led the Courts below to inferences from which their Lordships dissent.

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The learned Judges say that, as the Subordinate Judge is a Bengali, it would require very cogent reasons to induce them to place a different construction on the clause in question. Certainly, it is impossible to be too careful in ascertaining the exact effect of the Bengali terms. But that has been done after an unusual amount of testing, and there is no disagreement about it. The decision of both lower Courts rests on principles of construction common alike to English and Indian documents; and that is the point on which their Lordships differ from them.

The second question is whether the deed of sale to Amrita Lal Banerji by Flora Williams of the 12th August 1892 was valid, she having in her written statement alleged that it was fraudulently obtained. The Subordinate Judge held that the fraud was not proved and that Harriss's purchase from Amrita Lal Banerji "must stand and be given effect to." The High Court in the appeal to it did not decide this question but considering the amount of the accumulations which Flora Williams would be entitled to receive upon their construction of the Will as well as the monthly allowance of Rs. 50 they were of opinion that the bargain was of an unconscionable character and could not be sustained. According to their Lordships' construction of the Will Amrita Lal Banerji obtained only the monthly allowance by his purchase and there is no ground for holding that this was an unconscionable bargain.

Their Lordships will humbly advise His Majesty to reverse the decrees of both the lower Courts and to make a decree declaring that a moiety of the

residuary estate was vested in the deceased son of Flora Williams and at his death it devolved upon George Williams and the Appellants are entitled to it as representing Harriss the purchaser. And ordering that an account of the estate since the death of the testator be taken and that any money found due from the Respondent Brown on adjustment of the account shall be paid to the Appellants. Also declaring that Flora Williams sold her monthly allowance of Rs. 50 and that the Appellants are entitled to it and ordering all the money that is due for it from the 12th August 1892 with interest at Rs. 6 per cent. per annum to be paid to them.

Their Lordships think that the Appellants and the executor Edward Brown are entitled to take their costs of all the proceedings in India out of the portion of the estate of Thomas Paul D'Silva in the hands of the executor but that all other parties should bear their own costs of those proceedings and they will humbly advise His Majesty accordingly. The Appellants will likewise have their costs of this appeal from the same source.

Their Lordships have already directed that the Appellants' costs of opposing the petition of the Respondent Cecilia Proby to be heard after the hearing had concluded shall be paid by her.

Solicitors: *Messrs. Edwards Heron & Co.* for the Appellants.

*Appeal allowed with directions as to costs of the various parties and an account ordered to be taken.*

C. W. A.



## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 346 OF 1899.

SYED MOAZIM

MACLEAN, C. J.

HOSSEIN KHAN BAHADUR and another,

BANERJEE, J.

Appellants, De-

1901.

fendants,

Heard,

21, 22 &amp; 23, May.

Judgment,

RAPHAEL ROBINSON,

18, June.

Respondent,

Plaintiff.

*Private international law—Foreign Court—Foreign judgment—Suit on a foreign judgment to recover money due for board, lodging and tuition—Contract, breach of, within jurisdiction, if necessary—Jurisdiction of English Court over British subjects residing in British India—Notice of action—Jurisdiction of British Indian Court to go into merits of the action in the English Court—Civil Procedure Code (Act XIV of 1882), secs. 2, 13, Expl. 6—Order XI, Rule 1 (e) under the Judicature Act—Residence in England if necessary to fix liability on a foreign judgment—Interest on money decreed, when no provision for such is made in foreign judgment, if recoverable—Order XLII, Rule 16—1 and 2 Vict., c. 110, sec. 17—Indian Interest Act (XXXII of 1839).*

*As a general rule a Court can exercise jurisdiction over a foreigner only if he is resident within the limits of its territorial jurisdiction. Natives of British India, though foreigners, owe allegiance to the common sovereign of England and British India and are subject to the supreme legislative authority in the British Empire. If therefore the supreme legislature in the British Empire authorises an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction and that foreigner*

*is a native of British India, he cannot treat the judgment passed as a nullity merely because he did not reside within the jurisdiction of the Court which passed it. Order XI, Rule 1 (e) under the English Judicature Act constitutes a legislative Act of the sovereign power regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary territorial jurisdiction of the English Courts and gives the English Courts jurisdiction over such British subjects in a case which falls within the order. But it is open to a Defendant to show that this is not so and that the English Court had in fact no jurisdiction.*

GURDYAL SINGH v. RAJA OF FARIDKOT (1) followed and explained.

*In a suit based on a foreign judgment, the Plaintiff cannot recover more than appears on the face of the judgment and when such judgment is silent as to interest, he cannot make the Defendant liable for interest on the amount of the English judgment, the English statutes as to judgments carrying interests (Order 42, Rule 16, and 1 and 2 Vict., c. 110, sec. 17) not applying to India.*

This was an appeal preferred on the 20th of November 1899, against the decree of Babu Chandi Charan Sen, 1st Sub-Judge of Backergunge, dated the 10th of July 1899.

The facts of the case were shortly as follows:—

The Plaintiff, Raphael Robinson, as the representative of one Herman Robinson, brought the present suit, out of which this appeal arose, on a foreign judgment—an *ex parte* judgment of the Queen's

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Bench Division of the High Court of Justice of England—for an amount equal to Rs. 6,551 and odd against Syed Moazim Hossein Khan Bahadur and his son Syed Mutahar Hossein. The foreign judgment upon which the suit was brought said nothing about interest. The claim in the English Court was for board, lodging and tuition of Syed Mutahar Hossein, the son. In his defence the father pleaded that he was not served with the writ or any copy thereof in the English action, that he had never been within the jurisdiction of the English Court, that he never resided either permanently or temporarily within the jurisdiction of the English Court, and that the judgment was made without jurisdiction and was inoperative against him. His son's defence was substantially the same, though he admitted he had been in England for upwards of two years but had left some time before the institution of the suit. Both Defendants pleaded that, on the merits, the judgment in the English Court ought not to have been passed and that it was a fraudulent action. The father further said that he had no dealings with Herman Robinson and that he never undertook to pay the boarding and lodging expenses of his son with the latter. It was further contended that neither of the Defendants had personal notice of the action in England and that they did not appear in the English action, nor submitted to the jurisdiction of that Court; and that the claim for interest was untenable.

*Mr. Henderson*, with him *Babus Basanta Kamar Bose* and *Jnanendra Mohun Das*, for the Appellant.

*Mr. J. G. Woodroffe* and *Babu Prosunno Gopal Roy* for the Respondent.

*Mr. Henderson*.—The cases of the first and second Defendants stand on a different footing. The evidence of the father shows that he received no notice of the suit in England; and if so, he is not bound. Apart from this there was no jurisdiction as against him as he had never been a resident in England or subject to the English Courts. His son did at one time reside in England, but he had left that country before the suit in which the judgment sued upon was passed was instituted, and therefore there was no jurisdiction in his case also. *Gurdial Singh v. Raja of Faridkot* (1). The lower Court has distinguished this from the case cited holding that British India is not an independent country and that natives of British India do owe allegiance and obedience to the British Sovereign. But the Privy Council in referring to the independence of the country and allegiance of the party sued were merely describing the state of things which existed in that particular case and did not intend to lay down a different rule for a case such as the present. So in *Nalla Karuppa Settiar v. Mahomed Ibura Saheb* (9), it was held that the Court at Kandy in Ceylon had no jurisdiction over the Defendant. In any case the Defendants are not entitled to interest.

*Babu Basanta Kumar Bose*, (on the same side).—The matter must be determined by reference to the terms of Order XI of the Judicature Acts which authorises service outside the jurisdiction. Here the case is not within the

(1) L. R. 21 I. A. 171: s. c. I. L. R. 22 Cal. 222 (1894).

(9) I. L. R. 20 Mad. 112 (1896).

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of the order for there was no breach of contract within the jurisdiction of the English Courts.

*Mr. J. G. Woodroffe* (for the Respondent).—The service has been duly proved. It is clear upon the authorities that the merits of the case cannot be examined. Want of jurisdiction may no doubt be shown, but there is a presumption of jurisdiction which has not been removed. This is not a case of simple but of assumed jurisdiction over the parties: Piggott's Foreign Judgments, 2nd Ed., 129, 132—133—136, 145, 164. Service out of the jurisdiction is an express statutory enlargement of the jurisdiction of the English Courts. Piggott's Service out of the Jurisdiction i, xlii, xlv, xlix, lvii. Though legislation is presumably territorial, Parliament has power to extend the operation of a statute to the whole or any part of the British Empire, *Id.* lviii—lx, lxiii. That has been done in the case of Order XI, which has operation over British subjects in British India. Even if it be held that it has not operation *proprio vigore* then inasmuch as the British Legislature has thought it proper to confer jurisdiction on English Courts over non-residents, it is not for the Courts of a Dependency to say that such a rule is contrary to justice, convenience or the principles of private international law, and such Courts should give effect to the judgment and recognition to the principles upon which the jurisdiction to issue service out of the jurisdiction is based. *Turnbull v. Walker* (10), *Cookney v. Anderson* (11), *Whaley v. Busfeld* (4).

(4) L. R. 32 Ch. D. 123 (1886).

(10) 67 Law Times 767 (1892).

(11) 31 Beav. 452 (1862).

The case is within Order XI. As regards the son there was an actual breach of contract within the jurisdiction of the English Courts. As regards the father the case was apparently one of contract by correspondence, and the place where the answer ceased to be under the sender's control was the place where the contract was made. Piggott's Foreign Judgments, Additional Notes, 1886, p. 7. As to interest, see 1 and 2 Vic., Cap. 110.

*Mr. Henderson* in reply. The citations from Piggott on Foreign Judgments and Service out of the Jurisdiction whilst recommending the views urged by the Respondents show that the case-law has not gone the length of actually deciding in favour of the propositions submitted by them. In any event assuming the correctness of those propositions the Respondent has not brought himself within the terms of Order XI upon which the jurisdiction is said to be based.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—The Plaintiff in this suit is the legal personal representative of one Herman Robinson, and the Defendants are father and son, *viz.*, Syed Moazim Hossein Khan Bahadur, and Syed Mutahar Hossein, Barrister-at-law. I shall refer to them as the father and the son. The suit is on a foreign judgment, *viz.*, on an *ex parte* judgment of the Queen's Bench Division of the High Court of Justice of England, for an amount equivalent to 6,551 rupees and odd, a judgment recovered against both the Defendants. In his defence the father pleaded that he was not served

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with the writ or any copy thereof in the English action, that he had never been within the jurisdiction of the English Court, and that the judgment was made without jurisdiction, and was inoperative as against him. His son's defence was substantially the same, though he admitted he had been in England for upwards of two years, but had left some time before the date of the institution of the suit. Both Defendants pleaded that, on the merits, the judgment in the English Court ought not to have been passed, and that it was a fraudulent action. Upon this latter point I may remark at once that, even if it were competent for the Defendants to go into the merits of the suit on which the English judgment was based, which I do not think they can properly do, the son has not tendered himself as a witness in this case, nor put in any evidence whilst the father does not go beyond saying that he had had no dealings with Herman Robinson, and that he never undertook to pay the boarding and lodging expenses of his son with the latter. The claim in the English Court was apparently for board, lodging and tuition. Neither of the Defendants appeared in the English action, or submitted to the jurisdiction of that Court. Upon the question of whether or not the Defendants were duly served, and had notice of the English action, the son has not ventured to go into the box and challenge the statement as to service, told by the witness Nibaran Chandra Chattopadhyaya, whilst the father only ventures to say that he does not recollect that any writ from England was served upon him. On the evidence, it must be taken that both Defendants were

duly served. Assuming there was jurisdiction in the English Court, and that it was properly exercised, it has not been disputed that, as a general principle, the Court in which the suit on the foreign judgment is brought cannot properly go into the merits of the action which resulted in the foreign judgment sued upon, but the Appellants contend that by virtue of the last words of explanation 6 of sec. 13 of the Code of Civil Procedure, which explanation runs as follows: "Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction," they are entitled to rebut the presumption by proving the want of jurisdiction of the English Court. It is said for the Appellants that the jurisdiction of the English Court was based entirely upon the view that the case fell within Order XI of 1883, Rule 1, sub-sec. (e), and the Defendants say they are entitled to show that that was not so, and consequently that there was a want of jurisdiction in the English Court. I think they are entitled to show this. The father says he has substantiated this by his evidence, that he never wrote to Herman Robinson and had no dealings with him, and in this suit that evidence is uncontradicted, and may, I think, be relied upon. This argument, however, does not assist the son, for he has put in no evidence. I now pass to the important question of whether the English Court had jurisdiction over the Defendants, and upon

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this point I refer to the case of *Gurdial Singh v. Raja of Faridkot* (1) where the law on the subject was very carefully considered. That no doubt was the case of a judgment obtained in a foreign country, but against one who was not a subject of that country. In the present case the English Court is a "foreign Court" within the meaning of sec. 2 of the Code of Civil Procedure, and the judgment is a foreign judgment. Their Lordships of the Judicial Committee say:—"Under these circumstances, there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the Plaintiff must sue in the Court to which the Defendant is subject at the time of suit (*actio sequitur forum rei*") which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, sec. 891) "to lie at the root of all international, and of most domestic, jurisprudence on this matter. All jurisdiction is properly territorial and *extra territorium jus dicenti, impune non paretur*." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country.....As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognise against foreigners, who owe no alle-

giance or obedience to the power which so legislates.

"In a personal action to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced.

"These are doctrines laid down by all the leading authorities on International law; among others, by Story (Conflict of Laws, 2nd edition, secs. 546, 549, 553, 554, 556, 586) and by Chancellor Kent (Commentaries, Vol. I, p. 284, note (c), 10th edition), and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice." I have cited from this judgment at length, as it was much relied upon by the Appellants. Here the father was never permanently or even temporarily resident within the territorial jurisdiction of England, and consequently, had he been a foreigner, that jurisdiction would not have attached upon him. But then arises the question whether the principles laid down in the

(1) L. R. 21 I. A. 171: s. C. I. L. R. 22. Cal. 222 at pp. 237, 238 (1894).

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Privy Council case from which I have quoted, apply to the case of an Indian who is a subject of the Sovereign both of England and of British India, or merely to the cases of foreigners who owe no allegiance or obedience to the power, the Courts of which have passed the judgment sued upon.

In Dicey's "Conflict of Laws," p. 369, the following rule is laid down; "in an action in *personam* in respect of any cause of action the Courts of a Foreign country have jurisdiction."

Case 2.—"When the defendant is at the time of the judgment in the action, a subject of the Sovereign of such country," and reference is made to *Schibsby v. Westenholz* (2) and *Rousillon v. Rousillon* (3). In the former case the Court said: "We think some things are quite clear on principle. If the defendants had been, at the time of the judgment, subjects of the country where judgment is sought to be enforced against them, we think that its laws would have bound them." In the present case the Defendants were, at the time of the judgment, subjects of the sovereign both of England and of British India, though at the date of the judgment they were not within the territorial jurisdiction of England: they were resident in British India. It is, however, contended for the Plaintiff that *quod* the circumstances of this case, there exists territorial legislation of the sovereign power giving the English Courts jurisdiction over British subjects wherever they may be, and placing them under the jurisdiction of the English Courts, or at least making

it compulsory upon them to come in and submit to that jurisdiction. Upon this point I may perhaps refer to the observations of the late Lord Justice Cotton who says, in the case of *Whaley v. Busfeld* (4) "service out of the jurisdiction is an interference with the ordinary course of the law, for generally, Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from Statute, a Court has no power to exercise jurisdiction over any one beyond its limits." It is contended for the Plaintiff that Order XI of 1883, Rule 1, sub-sec. (c) which has a statutory force and which order was referred to by Lord Justice Fry in the case I have just cited as "a complete code governing service out of the jurisdiction"—(I am referring to the English Courts' orders)—gives the English Courts jurisdiction over subjects of the British Crown wherever they may be. The Appellants say that the object of service under that order is not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, so as to give him an opportunity of coming in to defend them, *The Credits Germanische, Limited v. Van Weede* (5). This no doubt is so, in the case of a foreigner, but is it so in the case of a subject of the British Crown resident outside the territorial jurisdiction of England, but in a Dependency of the British Crown? Though no doubt, British India has its

(2) L. R. 6 Q. B. 155, 161 (1870).

(3) 14 Ch. Div. 351—371 (1880).

(4) L. R. 82 Ch. Div. 123 at p. 181 (1888).

(5) 12 Q. B. D. 171 (1884).

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own Legislative Councils, the subjects of the British Crown there are subject to the Supreme Legislative authority of the Imperial Parliament, and Order XI Rule 1, sub-sec. (e) would appear to be general in its sphere of operation excepting only Scotland and Ireland.

In my opinion the order in question constitutes a Legislative Act of the Sovereign power regulating the jurisdiction in the case of a British subject resident in British India, and outside the ordinary territorial jurisdiction of the English Courts, and gives the English Courts jurisdiction over such British subjects, assuming that the particular case falls within the order. I think, however, that it was open to the Defendants to show, and that the father has shown, that the action in the English Court was not founded, as it purported to be, upon any breach or alleged breach within the jurisdiction of the English Court of any contract made by him, which was to be performed within such jurisdiction, and consequently that the English Court had no jurisdiction in the matter or to order service out of its jurisdiction. The present suit therefore must fail as against the father, and the suit as against him be dismissed with costs, and he must have the costs of the appeal.

The case of the son is different. No evidence has been put in on his behalf to rebut the presumption that the English Court was one of competent jurisdiction, as was done by the father, and that being so, I think, upon the grounds which I have stated, that he is liable. I do not think, however, that he is liable for interest on the amount of the English judgment: the Plaintiff cannot, I think,

recover more than appears on the face of the judgment sued upon. The English Statute as to judgments carrying interest does not apply to India, nor does the Indian Statute as to interest assist the Plaintiff. The decree against the son must be modified to that extent. That however is a very small matter, and should not affect the costs of the appeal. The decree, therefore, subject to such modification, must stand as against him, and his appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion.

This appeal arises out of a suit brought by the Plaintiff-Respondent against the Appellants. The suit is based on a judgment of the Queen's Bench Division of the High Court of Justice in England, which is a Foreign judgment within the meaning of the term as defined in sec. 2 of the Code of Civil Procedure; and the main question for determination in this appeal is whether that judgment is binding on the Appellants.

It is contended for the Defendants-Appellants, *first*, that the judgment upon which the suit is based is not binding on the Defendants as neither of them resided within the territorial jurisdiction of the Court when the suit was brought; *secondly*, that it is not binding on the Defendants as neither of them had personal notice of the suit; *thirdly*, that it is not binding on the Defendants as the Court which passed it had no jurisdiction over the subject-matter of the suit; and, *fourthly*, that the claim for interest is untenable.

In support of the first contention, it is argued that residence, permanent or

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temporary, within the territorial jurisdiction of the Court, is necessary to make a Defendant, who is a foreigner, subject to its jurisdiction; and Story's Conflict of Laws, secs. 539 and 546, Phillimore's International Law, Vol. IV, sec. dcccxc, and *Sirdar Gurdyal Singh v. Raja of Faridkot* (1) are relied upon. Upon principle as well as upon authority, it is no doubt true, as a general rule, that a Court can exercise jurisdiction over a foreigner only if he is resident within the limits of its territorial jurisdiction. But the reason of the rule is, as stated by Story in his Conflict of Laws, (sec. 539) that "no Sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions;" and the same reason is given by the Privy Council in *Gurdyal Singh v. Raja of Faridkot* (1) in the following passages of their Lordships' judgment: "As between different provinces under one Sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognise against foreigners who owe no allegiance or obedience to the power which so legislates." Now can it be said that the same reason holds good when the foreigner is a native of British India, and the Court which passed the judgment in question was the Queen's Bench Division of the High Court of Justice in England? Though the Defendants here are foreigners they owe allegiance to the common sovereign of England and British India,

and are subject to the supreme Legislative authority in the British Empire. It is true that India has a separate Legislature, and an Act of Parliament does not apply to India unless India is expressly included in its operation; but that is based upon convenience of legislation and not upon any want of authority in the Parliament to legislate for India. If, therefore, the Supreme Legislature in the British Empire authorises an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction (as is the case where Order XI, Rule 1 (e) under the Judicature Acts applies), and the foreigner is a native of British India, he cannot treat the judgment passed as a nullity, merely because he did not reside within the jurisdiction of the Court which passed it. The first contention of the Appellants must, therefore, in my opinion fail.

The second contention might upon the authorities, see *Sreehuree v. Gopal Chunder* (6), *Edulji v. Manekji* (7), *Bangarusami v. Balasubramanian* (8) and *Rousillon v. Rousillon* (3) have succeeded, if it had been shown that the Defendants had no personal notice of the suit in the English Court. But upon the evidence I do not think that that has been made out; and I agree with the Court below in holding that they had notice of the suit. The second contention therefore must also fail.

It remains now to consider the third contention of the Appellants. By sec. 13,

(3) L. R. 14 Ch. Div. 851 (1880),

(6) 15 W. R. 500 (1871).

(7) I. R. R. 11 Bom. 241 (1886).

(8) I. L. R. 13 Mad. 496 (1890).

(1) L. R. 21 I. A. 171: s. c. I. L. R. 22 Cal. 222 (1894).

(1) I. L. R. 22 Cal. 222 at p. 238.



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Explanation VI of our Code of Civil Procedure the Foreign judgment produced is presumptive evidence that the Court which made it had competent jurisdiction, but the presumption may be removed by proving want of jurisdiction; and in my opinion that has been done so far as Defendant No. 1 is concerned. For the only basis of the jurisdiction of the English Court in this case was that under Order XI, Rule 1 (e), that is, by reason of the breach of contract upon which the suit was founded having occurred within the jurisdiction of that Court; and the evidence of Defendant No. 1 on this point, which stands un rebutted and which I see no reason to disbelieve, shews that he never entered into any contract with the Plaintiff and so there never could have been any breach of contract by him within the jurisdiction of the English Court. I may add that in saying this I am not going into the merits of the case but am only considering the evidence which it is open to the Defendants under Explanation VI of sec. 13 of the Code of Civil Procedure to adduce to shew that the Foreign Court had no jurisdiction to pass the judgment in question.

The case of Defendant No. 2, however, stands on a different footing. There is no evidence adduced on his behalf on this point, and the judgment of the English Court which is presumptive evidence in favour of that Court having jurisdiction, stands un rebutted in his case. The fourth contention in appeal, namely, that relating to interest, is, I think, well-founded. The foreign judgment on which the suit is based says nothing about interest; and neither Order XLII, Rule 16 nor Statute 1 and 2 Vict.,

c. 110, sec. 17 on which the claim for interest seems to be based, is applicable to India; nor does the case come within the scope of Act XXXII of 1839.

The result then is that this appeal will be allowed and the decree of the Court below set aside with costs as regards Defendant No. 1, but as regards Defendant No. 2, the appeal will be dismissed and the decree of the lower Court affirmed with costs, subject to the modification indicated above, namely, that the claim for interest is disallowed.

*Appeal of Deft. No. 1 allowed.*

*Appeal of Deft. No. 2 dismissed.*

H. P. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 473 OF 1901.

LOLIT MOHAN MOITRA,

1st Party,

Petitioner,

GHOSE, J.

TAYLOR, J.

1901.

MAHARAJA SURYA

Heard, 21, June. KANTA ACHARYA CHOW-

Judgment, DHRY and others, 2nd

9, July.) and Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 145, 526, 435, 439—Charter Act (24 and 25 Vict., Ch. 104)—Letters Patent, sec. 29—Case under sec. 145, Criminal Procedure Code, transfer of—High Court, power of, to transfer such cases—"Case" and "criminal case," meaning of, as used in the Code, whether co-extensive and interchangeable—Bias, reasonable apprehension of, in an officer trying a case—Absence of real bias—Expediency of transfer—Inconvenience to parties or witnesses—Previous law.*

(Per GHOSE, J.)—*It is doubtful whether the Legislature meant to confer on the High Court the power by sec. 526 of the Code, of making a transfer of a case other than that in which a person is charged with an offence.*

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*The High Court has the power to make an order of transfer of a case under sec. 145 of the Code, which a Magistrate has taken cognizance of, under its general powers of superintendence under sec. 15 of the Charter Act.*

*When by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it is expedient for the ends of justice to transfer the case from his file to that of some other officer competent to try it, though there may not be any actual bias.*

QUEEN-EMPRESS v. BHAIKAB CHUNDER CHAKRABUTTY (11) and DUPREYON v. DRIVER (10) followed.

(PER TATEOR, J.)—*It is doubtful whether the High Court has the power under sec. 526 of the Code to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law. The High Court has such power under sec. 29 of the Letters Patent, where the expression "criminal case" appears without the distinction which apparently exists in the Code of Criminal Procedure in respect of cases tried by a Criminal Court as opposed to civil cases.*

*Meaning of "case" and "criminal case" as used in the Code discussed.*

This was a rule issued on the 23rd of May 1901, against the proceedings instituted against the Petitioner by the District Magistrate of Maldah on the 25th of April 1901.

The facts of the case and the argu-

ments addressed to the Court appear from the judgment of Ghosh, J. For arguments refer to the notes: s. c. 5 C. W. N. cclv.

Mr. Jackson and Babu Sarat Chandra Khan for the Petitioner.

The Advocate-General, Babus Dwarka Nath Chakravarti and Joygopal Ghose for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

GHOSH, J.—This is a rule calling upon the District Magistrate of Maldah to show cause why, having regard to the statements made in paras. 3 and 4 of the affidavit of one Baman Chandra Chowdhury, affirmed on the 23rd May 1901, and those contained in para. 12 of the verified petition presented to this Court, as also the statements made by the Petitioner to the Magistrate himself in a petition dated the 10th May, the case under sec. 145, Criminal Procedure Code, mentioned in the said petition to this Court, and now pending in the file of the said District Magistrate, should not be transferred to Rajshahye or some other district.

The District Magistrate has, through a Deputy Magistrate, submitted an explanation, in which, among other matters, he raises the question whether this Court has power, under sec. 526, Criminal Procedure Code, to transfer a case under sec. 145, Criminal Procedure Code, to some other Magistrate. And he has relied upon the case of *Pandurang Govind Pujari* (1) decided by the Bombay High Court.

The learned Advocate-General on behalf

(10) I. L. R. 23 Cal. 495 (1896),

(11) 2 C. W. N. 65: s. c. I. L. R. 25 Cal. 727 (1897).

(1) I. L. R. 25 Bom. 179 (1900).

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of the opposite party has also raised before us the same question ; and he has contended that, in the circumstances of the case, it is not expedient to transfer the proceedings from Maddah to some other Magistracy.

I propose, in the first instance, to discuss the question whether, under sec. 526, Criminal Procedure Code, the High Court has the power to make the transfer, and, if it has not such power, whether it can do so under the Charter Act.

It will be observed, on a reference to sec. 435 of the Code, that though the High Court may call for and examine the record of any proceeding before any inferior Criminal Court in order to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by such inferior Court, yet proceedings under Ch. XII which contains among others sec. 145, are not proceedings within the meaning of the section ; and it may, therefore, be doubted whether, under sec. 439 of the Code, this Court is possessed of revisional powers in regard to a proceeding under sec. 145. But it has been held in several cases that this Court under the powers of general superintendence vested in it by sec. 15 of the Charter Act, 24 and 25 Vict. Ch. 104, has the power of interfering with an order under that section, if it be made without jurisdiction or it is an illegality affecting jurisdiction, see *Ansh Mollah and others v. Ejakar Uddi Mollah and ors.* (2). And the question here arises, whether this Court, being possessed of revisional

powers, though not under Ch. XXXII of the Code, which deals with reference to, and revision by, the High Court, has not also the power to transfer a proceeding under sec. 145 from one Court to another, when the ends of justice require it.

Sec. 526 of the Code begins by saying "whenever it is made to appear to the High Court—(a) that a fair and impartial enquiry or trial cannot be had in any Criminal Court subordinate thereto, or (b) that some question of law of unusual difficulty is likely to arise, or (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory enquiry into or trial of the same, or (d) that an order under this section will tend to the general convenience of the parties or witnesses, or (e) that such an order is expedient for the ends of justice or is required by any provision of this Code."

And it then says : "It may order (i) that any offence be inquired into or tried by any Court not empowered under secs. 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence ; (ii) that any particular criminal case or appeal or class of such cases or appeals be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction ; (iii) that any particular criminal case or appeal be transferred to and tried before itself, or (iv) that an accused person be committed for trial to itself or to a Court of Session."

Two important questions here arise : first, whether an investigation in a case under sec. 145 is not an "enquiry" within the meaning of clause (a), and

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second, whether the Court of a Magistrate, when it deals with a case under sec. 145 is not a "Criminal Court" within the meaning of the section. That it is an "inquiry" within the meaning of the Code is perfectly clear from sec. 4, clause (k), which says "inquiry includes every inquiry other than a trial conducted under this Code by a Magistrate or Court;" and so it has been held in the case of *Satish Chandra Panday v. Rajendra Nath Bagchi* (3) where a question was raised whether a District Magistrate or a Sub-divisional Magistrate is entitled to transfer or withdraw a case under sec. 145 from the file of a Magistrate subordinate to him; and it was held that such power did exist.

As to the other question, namely, whether the Court of the Magistrate taking cognizance of a case under sec. 145 is a "Criminal Court," it seems to me that it is a Criminal Court within the meaning of the Code. It is a Court which is constituted under sec. 6 of the Act, and bound to administer the law relating to Criminal Procedure as prescribed by the Code. If, therefore, a proceeding under sec. 145 is an enquiry in a Criminal Court as indicated in the first part of sec. 526, let us consider, whether it is a criminal case within the meaning of the second part of the section. No doubt the first clause in that part of the section refers to an "offence," but the second clause is more general, and it seems to me that, if the expression "particular criminal case or appeal" or "class of such cases or appeals" refers only to offences, nothing could be simpler for the Legislature than

to have framed it, so that there could be no doubt about it. They might have said that "the inquiry into or trial of any particular offence, or the appeal in such case, or class of such cases or appeals, be transferred, etc., etc.;" but instead of that, they use a different phraseology. Reference was, however, made in the course of the argument to the fact that inasmuch as the word "criminal" governs the word case, as also the word appeal, both the proceedings must arise out of some offence committed, and that the use of the expression "accused person" in clause (iv) bears out that position. No doubt, the word "criminal" governs both the case and the appeal, but I am not prepared to say that it follows from this that the "criminal case" referred to must have reference to some offence committed, nor do I think that the expression "accused person" supports that contention. These words, with reference to some other sections of the Code (secs. 340, 342 and 437) have received a wider interpretation, namely, "a person over whom a Magistrate is exercising jurisdiction," see *Jhoja Singh v. Queen-Empress* (4), *Queen-Empress v. Mona Puna* (5), *Queen-Empress v. Mutasaddi* (6).

Upon reference to Act IV of 1840, secs. 2 and 4, it will be found that, in the event of a dispute likely to induce a breach of the peace concerning any property, the Magistrate was authorised to inquire which party was in possession, when the dispute arose and was empowered to put such party into possession, and

(3) I. R. 22 Cal. 898 (1895).

(4) I. L. R. 28 Cal. 498 (1896).

(5) I. L. R. 16 Bom. 661 (1892).

(6) I. L. R. 21 All. 107 (1898).

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to maintain him in possession, until the rights of the parties were determined by a competent Court; and, further, that where a person had been forcibly dispossessed of any property, the Magistrate was authorised to restore that party into possession and maintain him in such possession until the right to possession was determined by a competent Court. This Act, however, was repealed by Act XVII of 1862, which was in turn repealed by Act X of 1872. In the meantime, by Act XIV of 1859, sec. 15, it was provided that a suit would lie in the Civil Court for recovery of possession of any immovable property, if a person be dispossessed otherwise than by due course of law, if such suit were brought within six months from the dispossession. And we also find that, by sec. 318 of the Code of Criminal Procedure of 1861, the Magistrate was empowered to determine, in the case of a dispute likely to induce a breach of the peace concerning any land, water or fishery, which party was in possession of the subject-matter of dispute. Ever since then, the Magistrate has continued to exercise jurisdiction in a case like this, when there is a likelihood of a breach of the peace; and the Civil Court has also continued to exercise the jurisdiction which was vested in it by sec. 15, Act XIV of 1859 (substituted by sec. 9 of the Specific Relief Act). The jurisdiction which under Act IV of 1840, was vested in the Magistrate, seems now to be divided between the Criminal Court and the Civil Court; and while the Civil Court under sec. 9 of the Specific Relief Act is authorised to restore a party into possession, if he has within the last six months been disposses-

sed without his consent, otherwise than by due course of law, the Criminal Court, in the event of an imminent danger of a breach of the peace resulting from a dispute between the parties, can only maintain a person in possession, if he is found to be in such possession upon the date of the institution of a proceeding under sec. 145, or, if he was in possession within two months antecedent to that date. But the foundation of a proceeding under sec. 145 of the Code, as already indicated, is the existence of a dispute likely to cause a breach of the peace; and when such a dispute is not shown to exist, the Magistrate has no jurisdiction to take action. In this view of the matter, the proceeding under sec. 145 partakes of the character of a criminal case and, though that section lays down only a preventive measure and it occurs in Ch. XII which is contained in Part IV headed "Prevention of offences" yet I am not prepared to hold, as it has been contended before us, that it is not a "criminal case" within the meaning of the Code. It will be observed that there are other sections of the Code, which deal with preventive measures, and which are contained in the same Part IV, *e.g.*, secs. 107 and 110. Are proceedings under these sections, criminal cases or what? I think these may well be described as criminal cases; and this Court, I am informed, has exercised jurisdiction in transferring such cases under sec. 526 of the Code, see, for example, the case of *Ahmed Hossein* (7); and I find that in that case, the question was raised by the

(7) Unreported. Cr. Rev. 33 of 1899, decided 12th June 1899.

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Magistrate concerned, upon the authority of a case in *In the matter of Amar Singh* (8) whether this Court had authority to transfer such cases to some other district; and, notwithstanding the objection raised, an order was made for the transfer. If a proceeding under sec. 107 or sec. 110 may be regarded as a criminal case which may be transferred, I do not see how a proceeding under sec. 145 can be regarded in any other light, and as to which this Court has not the power to make an order of transfer. It is noteworthy that sec. 192 of the Code, under which a District Magistrate or a Sub-divisional Magistrate may make an order of transfer in any case, occurs in Part VI, headed "proceedings in prosecutions," and in a chapter which deals mostly with the procedure in enquiry into offences. And it seems to me that it would be rather anomalous if a District Magistrate, while not authorized to interfere with an order made under sec. 145, has the power to transfer a case instituted under that section from the file of one Subordinate Magistrate to another, the High Court, though possessed of Revisional powers and entitled to set aside such an order, is not authorized to make an order of transfer. In this connection, I may refer to a note by Sir Henry Prinsep, in his recent edition of the Code of Criminal Procedure under sec. 526, p. 516, which runs as follows :—"The High Court may also order that a criminal case or appeal be transferred to and tried before itself, or that the accused be committed to itself, or to a Court of Session. It should be noted that by the use of the

expression 'a criminal case' the order of the High Court is not restricted to an enquiry or trial of an offence. But an order for the transfer of a criminal case or appeal can be made only when such case or appeal is before a Court ordinarily competent to try or hear it."

Upon these considerations I should be inclined to think that the expression "criminal case" occurring in sec. 526 may well be understood, as simply distinguished from a civil case or, in other words, that "a criminal case" is one over which a Criminal Court exercises jurisdiction.

But there is one point which, I am bound to say, does raise a doubt whether the Legislature meant to give the High Court power to make a transfer in a case other than strictly criminal, under sec. 526. Secs. 192 and 528, in speaking about the withdrawal or transfer of a case by a District Magistrate, use the words "any case" whereas sec. 526 says "criminal case." And while sec. 44 of the old Code of 1872 (corresponding to sec. 192 of the present Code) provided for the transfer "of criminal cases" by the amending Act XI of 1874, the word 'criminal' was struck out, and has been omitted from all the subsequent enactments while sec. 64 (corresponding to sec. 526) of the Code of 1872 used the expression "criminal case," and this expression has throughout been retained. These two circumstances create a doubt whether, the Legislature meant to confer on the High Court the power of making a transfer in cases other than those in which a person is charged with an offence. And that being so, I proceed to consider whether this Court has not the

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power to make the order of transfer under the Charter Act. Under sec. 15 of the Act, the High Court has the general power of superintendence over all Courts which may be subject to its Appellate jurisdiction including the power to direct the transfer of any suit or appeal, and it has been held by this Court in several cases that the High Court has the power to set aside an order under sec. 145 if such an order is made without jurisdiction, or if there is an illegality in the order affecting jurisdiction. Under that section, this Court has taken powers to revise the proceedings of Presidency Magistrates, such powers being doubted to exist under the Code of Criminal Procedure, see *Empress v. Naba Kumar Patnaik* (9), and I do not understand why, if this Court is empowered under its general powers of superintendence under the Charter Act to interfere with the proceedings held by a Magistrate under sec. 145, it has not also the power to transfer such proceedings from the file of one Magistrate to that of another. In this connection I desire to refer to sec. 178, Criminal Procedure Code, which runs as follows: "Notwithstanding . . . sec. 526." The proviso, to my mind, clearly indicates that the High Court has the power to make an order of transfer either under sec. 526 of the Code, or under sec. 15 of the Charter Act. If the High Court may, under sec. 15 of the Charter Act, direct the transfer of any case or class of cases committed for trial in any district, for trial to any Sessions division, I do not understand why the same power may not be exercised in respect of a

case under sec. 145 of the Code, which a Magistrate has taken cognizance of. I hold that this Court has the power to make an order of transfer under the Charter Act. And I may here mention that this Court has on certain occasions entertained applications for the transfer of cases under sec. 145 though I cannot find any case where the order was actually made, the applications being rejected on the merits.

I now come to deal with the merits of the application that has been presented to us. This Court has on several occasions observed that, next to the importance of deciding a case fairly and impartially, is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done to them. And I need hardly say that, if by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it would be expedient for the ends of justice to transfer the case from his file to that of some other officer competent to try it, though there may not be any actual bias, see *Dupeyron v. Driver* (10) and *Queen-Empress v. Bhairab Chunder Chakraborty* (11). In the present instance, the affidavits presented to this Court and a petition presented to the Magistrate himself before whom the case is pending attribute to him certain words as having been uttered by him, in the course of the investigation, to the agent of the Petitioner which, if uncontradicted, might

(10) I. L. R. 23 Cal. 495 (1896).

(11) 2 C. W. N. 65: s. c. I. L. R. 25 Cal. 727 (1897).

(9) 1 C. W. N. 146 (1897).

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reasonably create an apprehension in his mind that the Magistrate is biased against him. Neither the explanation submitted by the Magistrate, nor the counter-affidavit filed by the opposite party, distinctly contradicts the statements made on behalf of the Petitioner. We can have no doubt in our own minds that, notwithstanding the words which have been attributed to the Magistrate, he has no real bias against the Petitioner; but still, so far as the Petitioner is concerned, such words are calculated to create in his mind a reasonable apprehension that justice may not be done to him. In this view of the matter, and without casting upon the Magistrate the slightest reflection, we think it expedient for the ends of justice to transfer the case from his file to that of the District Magistrate of Rajshahye.

We gather from the affidavits that have been presented on either side that most of the witnesses to be examined in this case are witnesses that would come from or near the property, the subject-matter of dispute, and that the means of communication between that part of the district of Maldah and the town are nearly the same as between it and Rajshahye. That being so, I do not think that it would cause any real hardship to any of the parties concerned, or to their witnesses if they have to go to Rajshahye. It will be for the District Magistrate of Rajshahye to determine whether he should take up the case himself or transfer it to the file of some other Magistrate in his district. If there be any sub-division in that district which is comparatively closer to the property, which is the subject-matter of dispute, than the headquarters of the district, the District Magistrate will transfer it for inquiry to the officer in charge of that sub-division.

We accordingly make the rule absolute.

TAYLOR, J.—Looking at the history of the present Code of Criminal Procedure it is clear that in 1874 by Act XI of that year a distinction was made by the Legislature between “cases” and “criminal cases.” In certain sections but not in all, the wording was altered from the latter to the former; the word “criminal” being on those instances omitted.

Having regard to this fact and to the further fact that the distinction has been continued and extended (see secs. 178, 192, 528, 556 where the wording is “case” and secs. 526, 527 where the wording is “criminal case”), I am of opinion that the two phrases are not in the Code of Criminal Procedure co-extensive; and that the phrases are not used indiscriminately or interchangeably. And further it appears to me that the phrase criminal case is intended to be used in a limited sense and not to apply to every case cognizable by a Criminal Court. For this reason and also in consideration of the provision of sec. 435 (3), Criminal Procedure Code, I would doubt the existence of a power under sec. 526, Criminal Procedure Code, to transfer cases which do not relate to matters which may strictly be described as “criminal” as relating to a crime or offence under the law.

But the power, it appears to me, exists under sec. 29 of the Letters Patent. In the Letters Patent “criminal case” appears to be used without the distinction which apparently exists in the Code of Criminal Procedure in respect of cases tried by a Criminal Court as opposed to civil cases. Under the circumstances of the present case, which have been set out fully in the judgment of my learned brother, I am of opinion that we ought to exercise the power we undoubtedly possess in the interests of justice and I concur in the proposed order.

H. P. C.

*Rule made absolute.*



## PRIVY COUNCIL.

[ON APPEAL FROM THE BENGAL HIGH COURT.]

LORD HOBHOUSE.	RADHA RAMAN
LORD MACNAGHTEN.	SHAHA and ors., De-
LORD ROBERTSON.	fendants, Appellants,
SIR R. COUCH.	
SIR FORD NORTH.	PRAN NATH ROY
1901.	and ors., Plaintiffs,
2, May.	Respondents.

*Suit to set aside ex parte decree and sale thereunder—Fraud—Application to set aside ex parte decree refused—Suit, maintainability of—Civil Procedure Code (Act XIV of 1882), secs. 13, 108, 244 and 311.*

*A suit lies to set aside an ex parte decree and the sale held in execution thereof on the ground of fraud, though an application to set aside the decree under sec. 108, Civ. P. C., had previously been refused.*

This was an appeal from a decision of the Calcutta High Court (Macpherson and Ameer Ali, JJ.), reversing the decree of the Sub-Judge of Pubna.

The object of the suit brought by the Respondent, Pran Nath Roy, as Plaintiff, was to set aside an *ex parte* decree for rent obtained by the 1st and 2nd Defendants against the 7th Defendant Ram Krishna Sircar, and the Plaintiff, and to recover from Defendants 3rd, 4th and 5th (i.e., the Appellants) possession of a property (village Dogachi) belonging to Plaintiff which was sold in execution of that decree, and purchased by them in the name of Defendant No. 6, Navadip.

The Plaintiff's case was that the suit culminating in that sale was from first to last a fraud in which the Defendants who purchased were concerned.

The Appellants filed written statements in which besides objecting on the merits,

it was pleaded that the Plaintiff having attempted unsuccessfully to set aside the *ex parte* decree under sec. 108, C. P. C., and the execution under sec. 311 and not having appealed therefrom could not bring the present suit.

The Sub-Judge summarily dismissed the suit as not maintainable in consequence of the proceedings under sec. 108.

On appeal the High Court (Macpherson and Ameer Ali, JJ.) delivered the following judgment:—

"This suit has been dismissed, without trial, on the preliminary issue as to whether it was maintainable having regard to the provisions of secs. 13 and 244 of the Civil Procedure Code, and the fact that the Plaintiff's application for setting aside the decree and the sale under secs. 108 and 311 of the Code were rejected.

• The object of the suit is to set aside an *ex parte* decree for rent obtained by the first and second Defendants against Ram Krishna Sircar, the seventh Defendant, and the Plaintiff, and to recover from the third, fourth and fifth Defendants possession of a property of the Plaintiffs, which was sold in execution of that decree and purchased by them in the name of the sixth Defendant. The plaint sets out that the Plaintiff had nothing to do with the *jote* in respect of which the rent was decreed, or with Ram Krishna Sircar; that the suit was fraudulently brought at the instigation of the third, fourth and fifth Defendants in order to get hold of the Plaintiff's property at a low price, and that with a view to carry out the fraud no summons was served and a false return of service was caused to be given; that the Defendants did not proceed against the tenure

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for which the arrears were due as against the property of Ram Krishna, but fraudulently caused a very valuable property of the Plaintiffs to be sold without service of any of the processes required by law and by getting false returns of service submitted, and themselves purchased it for a price much below its value. In short, the Plaintiff's case is that the suit culminating in the sale was, from first to last, a fraud, in which the Defendants, who purchased and got possession of his property, were concerned.

In order to see whether the suit is maintainable, we must assume the facts to be as stated: two more facts which are not mentioned in the plaint, but about which there is no dispute, must be added. Those are, that the Plaintiff applied under sec. 108 of the Code to get the *ex parte* decree set aside, and also applied under sec. 311 to get the sale set aside, and that both applications failed.

As we understand the judgment of the Subordinate Judge, he would have decided the preliminary issue referred to above in favour of the Plaintiff but for the one circumstance that the Plaintiff had applied unsuccessfully to get the *ex parte* decree set aside under sec. 108 of the Code. He says that, in applying under that section, the Plaintiff adopted the proper, but not the only, course open to him; that there was an appeal against the order rejecting his application, of which he did not avail himself; that the effect of the rejection order was to change the *ex parte* decree into a contested decree which the Court had no jurisdiction to set aside except by way of appeal, and

that without setting aside the decree the Plaintiff could not get back the property sold in execution of it.

It is not, and could not be now, contended that a suit will not lie to set aside a decree obtained by fraud, nor is it contended that a fraudulent decree which is obtained *ex parte*, can only be set aside under the provisions of sec. 108 of the Procedure Code. The case of *Abdul Mazumdar v. Mahomed Gazi* (1) is an authority that a suit will lie to set aside an *ex parte* fraudulent decree although no endeavour has been made to get the decree set aside and the suit revived under sec. 108.

The contention is, that when a person against whom an *ex parte* decree is passed, does apply under sec. 108 to have the decree set aside and fails, he cannot afterwards, on the same ground as was put forward in the proceeding under sec. 108, bring a suit to get the decree set aside, even if fraud is alleged. It is said as regards the decree, that the only fraud here alleged is in the non-service of the summons, and that it was found in the proceedings under sec. 108, that the summons was served, or at all events, that the Plaintiff had failed to prove that it was not served. We do not understand the learned pleader for the Respondent to argue that the question of the service of the summons is in this case *res judicata*. His argument, broadly stated, is that when two courses are available and one is resorted to and fails, recourse cannot be had to the other.

It may be conceded that the Plaintiff could not bring a suit to set aside the

(1) I. L. R. 21 Cal. 605 (18 4).

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decree on the bare ground that the summons was not served, or that he was prevented for some good reason from defending the suit; and that would be so whether he had or had not availed himself of the remedy provided by sec. 108. Nor could he maintain a suit to set aside the decree on the bare ground that he was not liable for the rent decreed, for it was decided in the suit that he was liable. His case is not of that description: it is that the suit in which the decree was obtained was a fraud in its inception and throughout, and he seeks to recover property of which he has been deprived by means of the fraudulent decree, and which has passed into the possession of persons who are said to have been parties to the fraud, but not parties to the suit in which the fraudulent decree was passed. It is not correct to say that the only fraud alleged is in the non-service of the summons. This was a part of the scheme and the means, or one of the means, by which the fraud was committed. It may be necessary for the Plaintiff, in order to get relief, to attack the decree, and he does attack it as fraudulent. If the decree was obtained by fraud and the Plaintiff was in consequence deprived of his property, the Court has full power to set aside the decree and restore his property unless its jurisdiction in the case of *ex parte* decrees is taken away; but there is nothing in secs. 108, 244, 311 or in any other provisions of law to which we have been referred, which does take it away. Sec. 13 of the Code clearly offers no bar. The issues which arise are not the same, the parties are not all the same, and the

Court which decided the *ex parte* suit has no jurisdiction to decide this suit.

The mere fact that the Plaintiff failed to obtain relief on the narrow ground on which he might have obtained it under sec. 108, cannot prevent him from getting relief on the much wider grounds now put forward.

It is said, and correctly, that the Plaintiff might have appealed against the rejection order under sec. 108. All that can be said is that if he had appealed and succeeded, there might have been no necessity for the present suit. If this is a valid objection, it would apply equally to a case in which a Plaintiff had made no application under sec. 108, but had at once brought a suit to set aside the decree. The avoidance of unnecessary litigation may furnish some ground for arguing that before a person brings a suit, he ought to exhaust the remedy provided by sec. 108; but not that if he fails in his application under sec. 108, he is debarred from bringing a suit.

The only case cited as a direct authority for the Appellant's contention, is that of *Rajkishen Mookerjee v. Modhoo Soodun Mundul* (3). There the Plaintiff brought a suit to set aside a rent-decree obtained under Act X of 1859, on the ground that a confession of judgment on which the decree proceeded, was not put in by him, but was fraudulently placed on the record by other parties. The Plaintiff had applied to the Deputy Collector who passed the decree, to revive the suit under sec. 58 of the Act on this particular ground; but the Deputy Collector rejected the application, holding that the confession of judgment was not

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fraudulently obtained. The Plaintiff did not appeal, as he might have done, against the rejection order, and a Division Bench of this Court held that the Plaintiff having a remedy by way of appeal, which he did not resort to, was precluded from bringing a suit in the Civil Court to set aside the decree. The ground on which the decision is arrived at, is not clear, and there is no allusion in the judgment to fraud as the foundation of the suit. The case might be an authority for holding that no civil suit would lie until the remedy provided by sec. 58 of Act X of 1859, which is, generally speaking, analogous to the provisions of sec. 108 as regards civil suits, was exhausted, in which event it would apparently conflict with the decision in the case of *Abdul Macumdar v. Mahomed Gazi* (1); but it is no authority for the proposition that a person failing to obtain relief under sec. 108 is debarred from bringing a suit to get the decree set aside on the ground of fraud. When there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed.

We must hold that the suit is maintainable and that the decision of the Subordinate Judge is wrong. The decree is set aside and the case remanded under sec. 582 of the Procedure Code for trial. The costs of this appeal will abide the result. The Appellant will be entitled to a refund of the value of the Court-fee stamps."

The Defendants thereupon appealed.

*Mr. Mayne* for the Appellants relied on sec. 108, Civ. P. C., and the proceedings that took place on that application. \*

The Respondents were not represented.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—Their Lordships are all agreed that the preliminary objection cannot be sustained, and that the High Court were right in overruling it. We have nothing before us but the bare fact that the Plaintiff endeavoured to get an *ex parte* decree set aside under sec. 108 of the Code of Civil Procedure, under which the Court may try whether the summons was served or whether the Plaintiff was prevented by any sufficient cause from appearing. We are not told what went on before the Court upon that occasion, and it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of sec. 108.

It seems to their Lordships that the High Court have taken an entirely right view of the matter, and they will humbly advise His Majesty that the appeal ought to be dismissed. No Respondent having put in an appearance, there will be no costs.

Solicitor: *Mr. W. W. Box* for the Appellant.

C. W. A. *Appeal dismissed.* \*

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 102 OF 1899.

MACLEAN, C. J. v. A. B. MILLER, Appellant,  
BANERJEE, J.

1901. [LAKHIMONI DEBI, Decree-  
holder, Respondent.

*Insolvency Act (11 and 12 Vic., c. 21)—Insolvency proceedings—Vesting order—Prior attachment—Priority of claim—Attaching creditor and Official Assignee—Civil Procedure Code (Act XIV of 1882), sec. 244—Official Assignee, whether representative of judgment-debtor—Appeal.*

*A vesting order made under the Insolvency Act, 11 and 12 Vic., c. 21, has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at his instance previous to the passing of such order: the Official Assignee stands in the shoes of the insolvent and takes the property subject to any equities which are good against the latter.*

ANUND CHUNDER PAL v. PUNCHOO LALL SOOBALAH (3) followed.

SHIB KRISTO SHANU CHOWDHRY v. A. B. MILLER (4) distinguished.

*Where the objection of the Official Assignee was that the property attached though belonging to the judgment-debtor was not liable to be sold in execution of the decree by reason of a vesting order passed in the insolvency proceedings:*

*Semle—That the Official Assignee was a representative of the judgment debtor within the meaning of sec. 244, C. P. C.*

KASHI PRASAD v. MILLER (1) and SARDAR-MAL JAGONATH v. ARANVAYAL (2) referred to.

(1) I. L. R. 7 All. 752 (1885).

(2) I. L. R. 21 Bom. 205 (1896).

(3) 14 W. R. (F. B.) 33 (1870).

(4) I. L. R. 10 Cal. 150 (1883).

This was an appeal preferred on the 6th of April 1899, by A. B. Miller, Official Assignee of Bengal and Assignee to the estate of Ambica Charan Dutt, Insolvent, Judgment-debtor, against the order of Babu Karuna Das Bose, Subordinate Judge, 1st Court of Zillah 24-Pergunnahs, dated the 18th of February 1899.

The facts of the case appear from the judgment of the Chief Justice.

*Babus Sarada Charan Mittra, Boidya Nalh Dutt and Nalini Nath Sen* for the Appellant.

*Babu Karuna Sindhu Mukerjee* for the Respondent.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—Two points arise upon this appeal. The facts, stated shortly, are these. In 1895, the decree-holder, in a suit to enforce his mortgage, attached certain immoveable property. In 1898 one of the judgment-debtors was declared an insolvent. On the 6th of May 1898 a vesting order was duly made in the insolvency proceedings. Subsequently an order for sale of the property attached was made, and on the 3rd of October 1898, the Official Assignee intervened, and on the 18th of February 1899, the First Subordinate Judge of the 24-Pergunnahs passed the order which is the subject of the present appeal. By that order he held that the decree-holder had priority in respect of the attached property over the Official Assignee. The latter has appealed. A preliminary objection is taken that no appeal lies in this case, on the ground that the Appellant, the Official Assignee, is not the "representative" of the judgment-debtor within the meaning of cl. (c)

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of sec. 244 of the Code of Civil Procedure. The point is not free from difficulty. There are authorities in the Allahabad and Bombay High Courts, the first *Kashi Prasad v. Miller* (1), and the second, where, however, the point is only incidentally touched upon, *Sardarnal Jagonath v. Aranvayal* (2) which are against the view of the Official Assignee being the "representative" within the meaning of the section. If these authorities be well-founded, no appeal lies to this Court.

It is not necessary for the purposes of to-day to decide the point, but the inclination of my opinion is against the above view. It seems to be a somewhat narrow construction to place on the term "representative," looking at the position in which the Assignee stands to the insolvent. The Official Assignee no doubt represents in one sense the interests of the judgment-debtor's creditors, generally, but can it be justly said that he does not also represent the interests of the judgment-debtor himself. For instance, to the extent of any surplus remaining after paying the creditor, the Official Assignee represents the debtor in respect of that surplus.

Upon the merits, it looks, at first sight as if there were a conflict between two Full Bench decisions, viz., the one *Anund Chunder Pal v. Punchoo Lall Soobalah* (3) in which it was distinctly held that the Official Assignee can only take the interest which the judgment-debtor had, which in this case would be an interest subject to the rights of the attaching

creditors, and the other *Shib Kristo Shaha Chowdhry v. A. B. Miller* (4). But there is this distinction between the last-mentioned case and the present one; in the former the attachment was before judgment, here it is after decree. But apart from this distinction, which, perhaps, in principle, is not very material, my view is that the law, as propounded in the earlier case, ought to be followed on the short ground that the Official Assignee stands in the shoes of the insolvent, and that he takes the property subject to any equities which are good as against the latter. In other words the Official Assignee cannot be in a better position than the insolvent.

The appeal therefore fails and must be dismissed with costs, three gold mohurs. The record may be sent down as early as possible.

BANERJEE, J.—I am of the same opinion. There are two questions arising for determination in this case, *first*, whether the Official Assignee is the representative of the insolvent judgment-debtor within the meaning of sec. 244 of the Code of Civil Procedure, and the point to be determined in this case is, consequently, one under cl. (c) of that section so as to make the order of the Court below appealable, and, *second*, whether the effect of a vesting order made under the Insolvency Act, 11 and 12 Vic., c. 21, has the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at his instance previous to the passing of such order.

Upon the first question I may say that the matter is not free from doubt and

(1) I. L. R. 7 All. 752 (1885).

(2) I. L. R. 21 Bom. 205 at p. 219 (1896).

(3) 14 W. R. (F. B.) 38 (1870).

(4) I. L. R. 10 Cal. 150 (1883).

## A. B. MILLER v. LAKHIMONI DEBI.

difficulty. The question whether the point in this case comes under cl. (c) of sec. 244 of the Code of Civil Procedure has to be determined with reference to the nature of the objection raised by the Official Assignee. His objection here was, that the property in dispute, though belonging to the judgment-debtor was not liable to be sold in execution of the decree obtained by the Respondent against him by reason of the order passed in the insolvency proceedings. So far as that objection goes, the Official Assignee represents not so much the judgment-debtor as the creditors taken as a body. But though that is so, it must be borne in mind that if the Official Assignee succeeds in defeating the present application for execution of decree, the property released from attachment will go to augment the assets of the insolvent for distribution among his creditors, and may help to secure the final discharge of the insolvent under sec. 59 of the Act. And I may add that the Official Assignee so far represents the judgment-debtor, that all the property that the judgment-debtor may have is vested in him. He may also, under sec. 29 of the Statute, institute and defend actions and suits on behalf of the insolvent. On the whole, therefore, I agree with the learned Chief Justice in holding that the Official Assignee is a representative of the insolvent judgment-debtor within the meaning of sec. 244 of the Code and that the order appealed against is therefore appealable.

On the second point raised in this case, I need only say that it is governed by the decision of the Full Bench in the case of *Anund Chunder Pal v. Punchoo*

*Lall Soobalah* (3) and that the case of *Shib Kristo Shaha Chowdhry v. A. B. Miller* (4)\* is distinguishable from the present, as the attachment in that case was one before judgment and not in execution of a decree, as it was in this case.

*Appeal dismissed.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

NOS. 267 AND 291 TO 295 OF 1900.

MACLEAN, C. J.	KEDAR NATH CHATTERJEE, Judgment-debtor,
BANERJEE, J.	Appellant,
1901.	v.
13, July.	ARDHA CHANDRA ROY CHOWDHURY, Decreeholder, Respondent.

*Decree for rent by a co-sharer landlord for a sum not exceeding Rs. 500 in value—Application for execution—Limitation Act (XV of 1877), Sch. II, Art. 179—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6.*

*An application for execution of a decree for a sum not exceeding Rs. 500 in value obtained by one of two or more joint-landlords for his share of the rent is not governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act but by the general law of limitation, namely, Art. 179 of the second schedule of Act XV of 1877.*

PREM CHAND NASKAR v. MOKSHADA DEBI (1), JUGOBUNDHU PATTAUCK v. JADU GHOSE ALKUSHI (7), BENI MADHUB ROY v. JOAD ALI SARKAR (4), NARAIN MAHTON v.

(3) 14 W. R. (F. B.) 33 (1870).

\* (4) I. L. R. 10 Cal. 150 (1883).

(1) I. L. R. 14 Cal. 201 (1887).

(4) I. L. R. 17 Cal. 390 (1890).

(7) I. L. R. 15 Cal. 47 (1887).

## KEDAR NATH CHATTERJEE v. ARDHA CHANDRA ROY CHOWDHURY.

MANOFI PATTUK (2), PARAMESWARA NAMA-SUDRA v. KALI MOHAN NAMASUDRA (3), DURGA CHURN MUNDAL v. KALI PROSUNNO SIRCAR (5) referred to.

This was an appeal preferred on the 16th of July 1900, against an order of F. E. Pargiter, Esq., District Judge of Zillah 24-Pergunnahs, dated the 15th May 1900, affirming an order of Babu Amrita Lal Mukerji, Munsif, 3rd Court at Alipur, dated the 14th February 1900.

The facts of the case appear from the judgment.

*Babus Saroda Churn Mitter and Shorosi Churn Mitter* for the Appellant (In No. 267).

*Babus Nil Madhub Bose and Benode Behary Mukerji* for the Respondent.

*Babu Shorosi Churn Mitter* for the Appellant (In Nos. 291 to 295).

*Babu Benode Behary Mukerji* for the Respondent.

THE JUDGMENT OF THE COURT was delivered by

BANERJEE, J. (MACLEAN, C. J., concurring).—In these appeals which arise out of applications for execution of certain rent decrees for sums not exceeding Rs. 500, the main question for determination is, whether an application for the execution of a decree obtained by one of two or more joint-landlords for his share of the rent, is governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act or by the general law of limitation,

namely, Art. 179 of the second schedule of Act XV of 1877.

If the special law of limitation applies, the applications for execution are barred, unless they can be treated as being in continuation of certain previous applications made within three years from the date of the decrees. If the general law of limitation governs the cases, the applications are in time.

The Courts below have held that the applications which are admittedly made by a co-sharer landlord for the execution of decrees for his share of the rent, are not governed by Art. 6 of Sch. III of the Bengal Tenancy Act, and are not barred by limitation; and hence these appeals by the judgment-debtor.

Babu Saroda Churn Mitter for the Appellant contends that a suit by one of several joint-landlords for his share of the rent, being a suit between landlord and tenant, is a suit under the Bengal Tenancy Act, and a decree made in such a suit is a decree under that Act, although certain provisions of the Act, namely, those relating to the sale of tenures and holdings in execution of rent decrees, may not apply to such a decree. He argues that if it were otherwise, and if the special law of limitation did not apply to these cases, anomalous results would follow, such as this, that whereas a rent decree for a sum not exceeding five hundred rupees, if obtained by all the joint-landlords suing together, must be completely executed within three years, a co-sharer landlord obtaining such a decree can keep it alive for execution against the tenant for twelve years by making successive applications at intervals of three years. And in support of

(2) I. L. R. 17 Cal. 489 (1890).

(3) 4 C. W. N. 801: s. c. I. L. R. 28 Cal. 127 (1900).

(5) 3 C. W. N. 586: s. c. I. L. R. 26 Cal. 727 (1899).



KEDAR NATH CHATTERJEE v. ARDHA CHANDRA ROY CHOWDHURY.

his contention he relies upon secs. 143 and 144 of the Bengal Tenancy Act, and the cases of *Prem Chand Naskar v. Mokshada Debi* (1), *Narain Mahton v. Manofi Pattuk* (2) and *Parameshwara Namasudra v. Kali Mohan Namasudra* (3). On the other hand, Babu Nilmadhub Bose for the Respondent argues that the only rent decrees which can be treated as decrees under the Bengal Tenancy Act are decrees obtained by the entire body of landlords; that a decree obtained by one of several joint-landlords for his share of the rent is one obtained independently of that Act; and that the anomaly pointed out by the other side may be explained by the fact that a co-sharer landlord cannot obtain satisfaction of his rent decree by the sale of the tenure or holding in arrear, and the Legislature may in consideration of that fact have thought it fit to allow him a longer time for realizing the amount of his decree. And in support of this argument, reliance is placed upon sec. 188 of the Bengal Tenancy Act, and the cases of *Beni Madhub Roy v. Joad Ali Sarkar* (4), *Durga Churn Mundal v. Kali Prosunno Sircar* (5) and *Sadagor Sirkar v. Krishna Chandra Nath* (6). It is further contended for the Respondent that even if the cases were governed by the special law of limitation, the applications were not barred as they

were made in continuation of previous applications, which were in time.

If the last-mentioned contention of the Respondent be well founded, it would not be necessary to consider the question raised by the Appellant. But I am unable to accept it as correct, seeing that the previous applications contained no list of properties to be attached, that they were not amended but were rejected, and that the present applications have been made as fresh applications. It is unnecessary therefore to determine the question stated at the outset. That question is not free from difficulty. After a careful consideration of the able arguments on both sides, the conclusion I arrive at is that the decision of the Courts below that the cases are not governed by the special law of limitation is right.

The special law of limitation relied upon by the Appellant, namely, Art. 6 of Sch. III of the Bengal Tenancy Act, is, by its express terms, limited in its operation to decrees made under that Act or any Act repealed by it. The decrees in these cases were not made under any of the Acts repealed by the Bengal Tenancy Act, as they were made after those Acts have been repealed. Then were they made under the Bengal Tenancy Act? It is argued for the Appellant that they were so made, because they were made in suits between landlord and tenant, and all suits between landlords and tenants are suits under the Bengal Tenancy Act. The minor premise in the above reasoning is true, but not so the major. It is true that a suit by a co-sharer landlord for his share of the by a tenant is a sui

(1) I. L. R. 14 Cal. 201 (1887).

(2) I. L. R. 17 Cal. 489 (1890).

(3) 4 C. W. N. 801 : s. c. I. L. R. 28 Cal. 127 (1900).

(4) I. L. R. 17 Cal. 390 (1890).

(5) 3 C. W. N. 586 : s. c. I. L. R. 26 Cal. 727 (1899).

(6) 3 C. W. N. 742 : s. c. I. L. R. 26 Cal. 937 (1899).

## KEDAR NATH CHATTERJEE v. ARDHA CHANDRA ROY CHOWDHURY.

between landlord and tenant; but to say that such a suit is one under the Bengal Tenancy Act would be to ignore the general scheme of the Act, as indicated by sec. 188, which says that anything which is required or authorized to be done by the landlord under the Act must be done by all the joint-landlords acting together, or by their authorized agent. Secs. 143 and 144 of the Act relied upon by the Appellant no doubt speaks of suits between landlord and tenant generally, but they do not show that a suit by a co-sharer landlord for his share of the rent is, in the face of sec. 188, a suit under the Act. Such a suit is maintainable, not as a suit under the Bengal Tenancy Act, but as a suit independent of the Act, and outside its scope, as was in effect held in *Prem Chand Naskar v. Mokshada Deli* (1) and *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (7). I may here add that the preamble of the Bengal Tenancy Act, which may be referred to as indicating its general scope [see Maxwell on the Interpretation of Statutes, 3rd Edition, p. 59, and *Turquand v. Board of Trade* (8)] shews that the Act is intended to amend and consolidate, not the entire law of landlord and tenant, but only certain enactments relating to that law. The old law (see Act X of 1859, secs. 105 and 108, and Act VIII of 1869, B. C., secs. 59, 64) contained provisions for the execution of rent decrees obtained by co-sharer landlords for their separate shares of the rent as well as those obtained by all the joint-landlords acting in concert. But

the Bengal Tenancy Act contains provisions only in respect of rent decrees of the latter sort, these being the only rent decrees which, regard being had to sec. 188, can come within its scope. It has accordingly been held by a Full Bench of this Court in *Beni Madhub Roy v. Joad Ali Sarkar* (4) that sec. 170 of the Act applies only to rent decrees obtained by all the joint-landlords acting together. Moreover, the view I take, that a decree obtained by a co-sharer landlord for his share of the rent is not a decree under the Bengal Tenancy Act, is in accordance with that taken in the case of *Durga Churn Mundab v. Kali Prosunno Sarkar* (5). There are no doubt several provisions in the Bengal Tenancy Act which are quite general in their terms, and some of these, as for instance those of sec. 153 and of Art. 3 of Sch. III, have been held applicable to suits by or against one of several joint-landlords, see *Narain Mahton v. Manofi Pattuk* (2) and *Parameshwara Namasudra v. Kali Mohan Namasudra* (3). But those cases were decided with reference to the language of the provisions of the Act bearing upon them. Thus in the first-mentioned case the words "amount of rent annually payable by a tenant" occurring in sec. 153, were held to "include the case of rent payable by a tenant to one of the co-sharer landlords who collects his rent separately; and in the second case Art. 3 of Sch. III of the Act was held applicable to a suit against a co-sharer

(1) I. L. R. 14 Cal. 201 (1887).

(7) I. L. R. 15 Cal. 47 (1887).

(8) L. R. 11 App. Cas. 286 (1886).

(2) I. L. R. 17 Cal. 489 (1890).

(3) 4 C. W. N. 801; s. c. I. L. R. 28 Cal. 127 (1900).

(4) I. L. R. 17 Cal. 390 (1890).

(5) 3 C. W. N. 586; s. c. I. L. R. 26 Cal. 27 (1899).

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landlord. Sec. 188 has no bearing upon either of these two cases; and the decisions in those cases do not militate against the view I take of the meaning and scope of Art. 6, which speaks, not of decrees for rent nor of decrees in suits between landlord and tenant, but of "decrees made under the Act," which must be held to mean decrees obtained in suits brought in accordance with and not in disregard of sec. 188. It is argued for the Appellant that as Art. 6 of Sch. III is expressly applicable to decrees made under Act VIII of 1869, B. C., and Act X of 1859 (repealed by the Bengal Tenancy Act) and a decree obtained by a co-sharer landlord for his share of the rent would be a decree under either of those two Acts if the suit was brought when those Acts were in force, it would be unreasonable to hold that the article is inapplicable to such a decree where the suit is brought after the repeal of those enactments. The answer to this argument is that the Legislature may have intended to make a change in the law, and there is reason for thinking that a longer time may have been given to a co-sharer landlord to have satisfaction of a rent decree obtained by him, than is given to joint-landlords acting together, seeing that the latter can obtain satisfaction of their decree by the sale of the tenure or holding in arrears. And this circumstance will explain also the anomaly referred to in the Appellant's arguments.

For these reasons I think the order appealed against is right, and those appeals should be dismissed with costs.

*Appeals dismissed.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 357 OF 1900.

SURJA KUMAR DUTT,

Judgment-debtor,

Appellant,

v.

MACLEAN. C. J.

BANERJEE, J.

1901.

3, May.

ARUN CHANDRA ROY

and others, Decree-

holders, Respondents.

*Indian Limitation Act (XV of 1877), sec. 7—Joint decree-holders, one of whom is a minor—Applicability of sec. 7 of the Limitation Act—Execution of decree.*

*When one of several joint decree-holders is a minor, sec. 7 of the Limitation Act can save an application for execution by the minor decree-holder from being barred by limitation.*

*That section is not limited to a case where either the sole decree-holder is a minor or all the decree-holders are minors.*

SESHAN v. RAJA GOPALA (2) and NARAYANAN v. DAMODARAN (6) disapproved.

GOVIND RAM v. TATIA (4) and ZAMIR HASSAN v. SUNDAR (5) approved.

ANANDO KISHORE DASS BAKSHI v. ANANDO KISHORE BOSE (1) referred to.

This was an appeal preferred on the 31st of August 1900, against the order of G. Gordon, Esq., District Judge of Zillah Dacca, dated the 28th of May 1900, affirming the order of Babu Sudhangshu Bhusan Roy, Subordinate Judge of that district, dated the 24th of April 1899.

This appeal arose out of an application for execution made in a partition suit.

(1) I. L. R. 14 Cal. 50 (1886).

(2) I. L. R. 13 Mad. 236 (1889).

(4) I. L. R. 20 Bom. 383 (1895).

(5) I. L. R. 22 All. 199 (1899).

(6) I. L. R. 17 Mad. 189 (1893).

*SURJA KUMAR DUTT v. ARUN CHANDRA ROY.*

In 1890 a decree for partition was made in a suit between the parties. Under that decree the Appellant was directed to pay to the Respondents, who were Defendants Nos. 2 and 3 in that suit, and to the Defendant No. 1 therein, a sum of Rs. 800 by way of equality of partition. At that time the Respondents, *i.e.*, the Defendants Nos. 2 and 3 were minors. No application for execution was made until April 1899, when the present application was made. On that date the Defendant No. 2 had attained majority but only within 3 years of his making the application, while Defendant No. 3 was still a minor. The Appellant contended that the application was barred by limitation. Both the Subordinate Judge and, on appeal, the District Judge held that sec. 7 of the Limitation Act was applicable and the application was not barred. Hence this appeal.

*Babu Basanta Kumar Bose* for the Appellant.

*Babu Hari Bhusan Mookerjee* for the Respondents.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—The only question which arises on this appeal is, whether the present application for execution is barred by the statute of limitation.

It appears that the suit is one for partition in which a decree was made so far back as 1890, and under that decree, the present Appellant had to pay to the Defendants Nos. 1, 2 and 3 a sum of Rs. 800 or Rs. 900 by way of equality of partition. So far as this payment was concerned it was a joint decree. Defendants Nos. 2 and 3 are the present Re-

spondents. Nothing has been done by the Defendants Nos. 1, 2 and 3 to enforce the above-mentioned portion of the decree until the present application was made by the Defendants Nos. 2 and 3, the younger of whom is still a minor, whilst the other attained his majority a short time, at any rate within 3 years, before the present application.

The question is, whether the present application is out of time, and this depends upon whether or not the applicants are entitled to the benefit of sec. 7 of the Limitation Act. Both the lower Courts have held that the claim is not statute-barred.

There is no case in this Court which directly touches the question, though that of *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1) has some bearing upon it. It is conceded by the Appellant that the case does not fall within sec. 8 of the Limitation Act. There was no one who could give a discharge for the money without the concurrence of the minors, the Defendants Nos. 2 and 3.

But it is urged for the Appellant that the present applicants are not protected by sec. 7 of the Act. Now sec. 7 says:—I will read only that portion which is pertinent—“If a person entitled to make an application be, at the time from which the period of limitation is to be reckoned, a minor.....he may.....make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.”

SURJA KUMAR DUTT v. ARUN CHANDRA ROY.

To my mind there is no difficulty in the construction of the section: the language is quite clear, and read in its natural and ordinary meaning, covers the case of the present applicants. Here the applicants at the time from which the period of limitation was to be reckoned were minors, and *prima facie* they would appear to be entitled to the special protection afforded by the section. But it is contended for the Appellant that the section does not apply when the minor is not the sole creditor or claimant, but is one of several joint creditors or claimants. There is nothing in the language of the section to support this view which seems to me to be contrary to sec. 8 which defines what is to happen in the case of one of several joint creditors or claimants being a minor, and which section would be unnecessary if the Appellant's contention were well founded. However, as I have indicated above, I can see nothing in the section to warrant such a construction.

The Appellant, however, relies upon certain cases in the High Court of Madras, which no doubt are in his favour.

In the case of *Seshan v. Raja Gopala* (2), it was held that the section applied to cases in which there is either one decree-holder and he is a minor or in which all the joint decree-holders are minors or labor under some other disability. The learned Judges relied upon an English case, that of *Perry v. Jackson* (3), which, however, was a case decided under the proviso to the statute of James 1, and of 3 and 4 William 4, c. 42, s. 4. But there is an important difference be-

tween the language of the proviso in the English statute, and sec. 7 of the Indian Limitation Act. In the proviso in the English statute the words are: "If any person or persons" which seem to indicate that the proviso applies only to cases in which the sole claimant is a minor or if there are more than one claimant where they are all minors or otherwise under disability. And this is pointed out by Lord Kenyon in his judgment, for he says: "the words of this clause, grammatically speaking, do not apply to the present case; they only extend to cases where the person individually a single Plaintiff, or persons in the plural, when there are several Plaintiffs, are not in a situation to protect their interests." He lays stress upon the expression "persons" in the proviso. Here, as was conceded, no valid discharge could have been given without the concurrence of the minors. I should be disposed to think that the principle of law enunciated in *Perry v. Jackson* (3) has found its way into sec. 8 of the Indian Act, but I do not think it covers the case now before us. There are two subsequent decisions in the same High Court to the same effect.

The view, however entertained by the Madras High Court, has not been accepted by other High Courts in India. In the case of *Govind Ram v. Tatia* (4), where the case in the Madras High Court was cited, a different conclusion was arrived at, and the construction of sec. 7 of the Limitation Act for which the present Appellant contends was not accepted, whilst in the case of *Zamir*

(2) I. L. R. 18 Mad. 236 (1889).  
(3) 4 T. R. 519 (1792).

(3) 4 T. R. 519 (1792).  
(4) I. L. R. 20 Bom. 383 (1895).

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*Hassan v. Sundar* (5) decided by a Full Bench of the Allahabad High Court, the last-mentioned case in the Bombay High Court was followed. There is, therefore, between the High Courts of Bombay and Allahabad, on the one hand, and of Madras on the other, a difference of opinion upon the point, and, in my opinion, speaking with all respect for the decisions in the Madras High Court, the view taken by the other High Courts appear to me to be the sounder. I see no reason to say anything about sec. 231 of the Code, the language of which is plain.

I think, therefore, that the claim is not out of time. The appeal consequently fails and must be dismissed with costs, three gold mohurs.

BANERJEE, J.—I am of the same opinion. The question upon the determination of which the decision of this case depends is, whether when one only of several joint decree-holders is a minor, sec. 7 of the Limitation Act can save an application for execution by the minor decree-holder from being barred by limitation. The learned vakil for the Appellant asks us to answer that question in the negative; and the ground upon which he bases his contention is, shortly, this, that sec. 7 of the Limitation Act can save an application for execution from being barred only where either the sole decree-holder is a minor, or where all the decree-holders are minors; and that where some of the joint decree-holders are not minors, the section cannot save the application of any one of the decree-holders from the operation of limitation. And in support of this contention he

relies upon the cases of *Seshan v. Raja Gopala* (2), and *Narayanan Nambudri v. Damodaran Nambudri* (6).

There is nothing in the language of sec. 7 of the Limitation Act to support the contention of the learned vakil for the Appellant. That section enacts—I am reading only so much of the section as bears upon this case—that “if a person entitled to make an application be, at the time from which the period of limitation is to be reckoned, a minor, he may make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.”

Where there is a joint decree in favour of several persons any one of them is, under sec. 231 of the Code of Civil Procedure, entitled to make an application for execution of the decree; and if he is a minor, the provisions for extended time, under sec. 7 of the Limitation Act, would apply to him. To hold that sec. 7 does not save the case of a minor decree-holder, when he is one of several joint decree-holders who are not all under disability, would be to import into sec. 7 some provision similar to what is contained in sec. 8 of the Limitation Act; and could that have been intended? I think not, because the reason upon which the provision in the first part of sec. 8 rests would be inapplicable to such a case, having regard to the provisions of sec. 231 of the Code of Civil Procedure. It cannot be said that one of several joint decree-holders can give a valid discharge

(2) I. L. R. 13 Mad. 236 (1889).

(6) I. L. R. 17 Mad. 189 (1893).

(5) I. L. R. 22 All. 199 (1899).

SURJA KUMAR DUTT v. ARUN CHANDRA ROY.

without the concurrence of the other. Indeed sec. 231 of the Code goes to show that there cannot be such a valid discharge, but that the Court, when it allows execution to proceed at the instance of one of several joint decree-holders, is to pass such orders as it thinks necessary to protect the interests of persons who have not joined in the application for execution. In my opinion, therefore, there is nothing in sec. 7 of the Limitation Act to support the construction contended for by the learned vakil for the Appellant.

As for the two Madras cases relied upon in the argument, with all respect for the learned Judges who decided them, I must say I am unable to agree with the view taken by them. The decisions in those cases are based upon the case of *Perry v. Jackson* (3), which was a case upon the construction of a provision in an English statute somewhat similar to sec. 7 of the Indian Limitation Act. But, as has been pointed out in the judgment of the learned Chief Justice, the language of the English statute is different, and for the present purpose, materially different, from that of sec. 7 of the Indian Act. I, therefore, dissent from the view taken in the Madras cases, and following the cases of *Govind Ram v. Tatia* (4) and *Zamir Hassan v. Sundar* (5), answer the question stated at the outset in the affirmative.

*Appeal dismissed.*

S. C. S.

(3) 4 T. R. 519 (1792).

(4) I. L. R. 20 Bom. 383 (1895).

(5) I. L. R. 22 All. 199 (1899).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 52 OF 1901.

AMEER ALI, J. } KAZI ZEANUDDIN AHMED,  
RAMPINI, J.                      Petitioner,  
PRATT, J.                                      v.  
1901.                      THE KING-EMPEROR,  
19, June.                      Opposite Party.

*Penal Code (Act XLV of 1860), sec. 154—*  
*Owner of land, liability of, when riot is*  
*apprehended or committed on his land—*  
*Absentee landlord, whether liable for the*  
*acts both of commission and omission of his*  
*agents—Scope of the section.*

*Knowledge on the part of the owner or occupier of the land of the acts or intentions of the agent is not an essential element of an offence under sec. 154 of the Penal Code, and he may be convicted under the section though he may be in entire ignorance of the acts of his agent or manager.*

(Per RAMPINI and PRATT, JJ.)—*An owner or occupier of land is liable for the acts of omission and acts of commission, not only of himself but of his agent or manager; and sec. 154 of the Penal Code makes no distinction between acts of omission and acts of commission on the part of the landlord's agent.*

*The provisions of sec. 154 of the Penal Code are intended to impose on non-resident land-holders and their agents the duty of maintaining the public peace and preventing unlawful assemblies and riots on their estates and to render the former liable for any dereliction in the discharge of this duty.*

QUEEN-EMPRESS v. PAYAG SINGH (1) referred to and followed.

(1) I. L. R. 12 All. 550 (1890).

## KAZI ZEANUDDIN AHMED v. THE KING-EMPEROR.

QUEEN v. HURNATH ROY (2), IN THE MATTER OF RADHA NATH CHOWDHRY (3), QUEEN v. SURROOP CHUNDER PAUL (4) and TARAKANT DAS v. QUEEN-EMPRESS (5) referred to and explained.

(Per AMEER ALI, J.)—*Sec. 154 of the Penal Code contemplates three different breaches of duty, viz., (a) omission to give notice of, (b) abstention from preventing and (c) negligence to suppress an unlawful assembly or a riot.*

*Penal provisions are to be strictly construed, and liability to punishment for the neglect of a statutory obligation cannot be extended by inferential reasoning.*

*The Penal Code makes a distinction between the commission of a criminal act and the neglect of a duty.*

*There is nothing in the law which makes owners of properties liable for the criminal acts of their agents and servants except on the ground of abetment.*

*It would be straining the law to make an absentee owner of land, who has himself no knowledge of the occurrence, liable for not giving information of the riot that has taken place if his agent takes part in it, and as a rioter, actually taking part in it, does not give notice of it to the Police.*

*It is the agent on the spot who is primarily responsible for the duty of giving notice to the Police, and his failure makes the owner liable for his neglect; but a charge of neglect assumes that the agent is not directly concerned in the commission of the offence; if he is so concerned it ceases to be neglect; it then becomes a substantive crime.*

(2) 3 W. R. Cr. R. 54 (1865).

(3) 7 C. L. R. 289 (1880).

(4) 12 W. R. Cr. R. 75 (1869).

(5) 4 C. W. N. 691 (1900).

QUEEN-EMPRESS v. PAYAG SINGH (1) *dis-sented from.*

This was a rule issued on the 10th of January 1901, against the order of the Sub-Divisional Magistrate of Narainganj, dated the 3rd of September 1900, which order was, on appeal, affirmed by the Sessions Judge of Dacca on the 27th of October 1900.

The facts of the case, material to this report as stated by the Magistrate, were as follows:—

“The accused is the proprietor of village Amlabo in the thanah of Raipura, and one Madhab Rai was his naib in that village, and one Ram Charan has been a refractory tenant of that village.

“On the 15th May (1900) a large body of tenants and peons of Amlabo cutchery armed with *sulfies*, *kochees*, *daos* and *lathis* pursued Ram Charan to his brother's house, and dragging him out of the hut, mortally wounded him and severely wounded his two brothers. Madhab Rai accompanied the rioters and stood close by while the riot was going on. It is admitted that accused is a 16 anna proprietor of the property, and it is clear that there was a riot of a most serious nature and that neither the proprietor nor his agent, Madhab Rai, did anything to stop it. For the prosecution it is not suggested that the landlord had any knowledge that this particular offence was likely to be committed. The question for decision is whether the zemindar's agent had any such knowledge. The answer can only be in the affirmative. It is proved that he actually accompanied the rioters and that after the riot he has been absconding; that the rioters were

(1) I. L. R. 12 All. 550 (1890).



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tenants of his *tahsil* and peons in his employ; that deceased was a man who had offended the naib in various ways by complaining against him to his landlord, by refusing to pay rent and by encouraging one Jalil to bring a case against one of the naib's men, Abir, who had, under a lease granted by the naib, cultivated land in Jalil's possession."

The accused resided in the town of Dacca, the principal city of the district in which his estates are situated.

On these facts the Magistrate convicted the accused under sec. 154, P. C., and sentenced him to pay a fine of Rs. 1,000.

On appeal to the Sessions Judge his appeal was dismissed.

The case then came in revision before a Bench of this Court, consisting of Ameer Ali and Pratt, JJ.

These learned Judges differed in opinion as to the propriety of the conviction.

*Mr. W. C. Bonnerjee* and *Moulvi Syed Mahomed Tahir* for the Petitioner.

No one appeared to shew cause.

The DISSENTIENT JUDGMENTS were as follows:—

AMEER ALI, J.—It appears that on the 15th of January last a serious riot, took place in the village of Amlabo of which the Petitioner is the proprietor. He himself resides at Dacca, and it is not alleged that he had personal cognizance of the occurrence. It is stated, however, and may be taken as found, that his naib or agent, Madhab Rai, who according to the prosecution, has been absconding since, aided and abetted the riot.

The Petitioner was prosecuted under sec. 154 of the Indian Penal Code before the Sub-Divisional Magistrate of Narainganj who, on the authority of a case in the Allahabad High Court to which I shall presently refer, has convicted and sentenced him to pay a fine of Rs. 1,000, the maximum penalty provided in that section. On the question of the part taken by the naib the Magistrate expressed himself as follows:—

"It is proved that he actually accompanied the rioters and that after the riot he has been absconding, that the rioters were tenants of his *tahsil* and peons in his employ, that deceased was a man who had offended the naib in various ways, by complaining against him to his landlord, by refusing to pay rent and by encouraging one Jalil to bring a case against one of the naib's men, Abir, who had under a lease granted by the naib cultivated land in Jalil's possession." He also found that the Petitioner had no knowledge of or concern in the riot.

On appeal the Sessions Judge affirmed the conviction. But as the naib was not on his trial, the learned Judge naturally and properly made a reservation in these terms: "he (the agent) is supposed to have abetted it (the riot) and it is possible he was present but that is a question which has not as yet been decided." Assuming, however, the finding of the Magistrate to be correct there can be no question that the naib was directly concerned in the riot.

Sec. 154 runs as follows:—"Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is

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held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and in the event of its taking place, do not use all the lawful means in his or their power to disperse or suppress the riot or unlawful assembly."

The question which we have to decide, upon the construction of the section, relates to the extent, in the circumstances of the case, of the owner's liability to punishment, in other words whether he is liable not only for the laches of his agent but also for his criminal acts, for logically reviewed the hypothesis upon which the lower Courts have proceeded amounts to that.

The question, so far as this Court is concerned, is *res integra*. The passages cited to us from the judgments of NORMAN, J.,\* and PRINSEP, J.,† do not, in my opinion, afford any help in construing the section, and I think the inferences attempted to be derived from them are somewhat misleading. But the Allahabad High Court in the case of the *Queen-Empress v. Payag Singh* (1) has

held that a landlord is liable under sec. 154 "for the acts of commission and the acts of omission not only of himself but also of his agent or manager." From this view, which is rather a sweeping generalization, I venture respectfully to dissent.

A cursory consideration of the section may perhaps give rise to the impression that as the landlord is made liable for the neglect of a duty on the part of the agent, he must perforce be liable also for his criminal acts; that, as he is liable for the "laziness" of his agent, to use the expression of the lower Courts, he must also be liable for his guilt.

An analysis of the section which unfortunately is not happily worded, and an examination of its scope and object would show, I think, that the above view is not well-founded.

The section declares in the first place that the owner of the land on which a riot or unlawful assembly is committed or held becomes punishable if he or his agent or manager, knowing that such offence is being committed or has been committed or having reason to believe that it is likely to be committed, does not give the earliest notice thereof in his or their power at the nearest police-station. (It will be observed that this portion of the section is extremely comprehensive in character and embraces not only the past and present but also the future.) The second provision makes it punishable on the part of the owner or his agent or manager if he or they "having reason to believe that a riot was about to be committed" do not use all lawful means in his or their power to prevent it. The third imposes the same

(1) I. L. R. 12 All. 550 (1890).

\* (4) 12 W. R. Cr. 75 (1869).

† (5) 4 C. W. N. 691 (1900).

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penalty if in the event of a riot taking place he or they do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

The section, therefore, contemplates three different breaches of duty (a) omission to give notice, (b) abstention from preventing, (c) negligence to suppress.

Generally speaking, vicarious punishment is not recognized by civilised systems of criminal law at least in these days. But the Indian Legislature, for probably sufficient reasons, has in Chap. VIII of the Indian Penal Code departed in some instances from this principle and made owners of property responsible for the negligence of their agents or managers, but I do not find any indication in the law that they are liable for the criminal acts of their servants except on the ground of abetment.

In my opinion penal provisions have to be strictly construed, nor can the liability to punishment for the neglect of a statutory obligation be extended by inferential reasoning. Unless, therefore, the law can be construed to mean that the owner, although absent and wholly unaware of the riot or its commission, should be regarded as guilty if his agent or manager takes part in it, it seems to me difficult to hold that he is punishable under this section.

In the present case it is not suggested that the Petitioner had any independent knowledge of the occurrence which he refrained from communicating to the Police, or that he had any means of information other than through the ordinary channel, viz., his naib. If the naib himself takes a part in the riot or aids and abets in its commission, he is guilty

of the actual commission of the offence or of its abetment and, not under sec. 154 which deals with neglect of a certain duty imposed by law. And if he cannot be made liable under sec. 154 I fail to see how, upon right reasoning, the owner whose means of information is dependant upon the naib and whose omission to give information must run on parallel lines with that of his agent, can be made liable under that section. It was urged that this view would enable landlords to escape punishment by putting forward suggestions regarding the actual criminality of their agents. To my mind, this argument leaves out of consideration the distinction the Code itself lays down between the commission of a criminal act and the neglect of a duty. The latter is punishable with a fine only whereas the substantive offence makes the offender liable to imprisonment, transportation for life or even the penalty of death, according to the circumstances of the case. It is hardly likely that a proprietor would try to evade the imposition of a fine by suggesting that his agent was actually concerned in the crime.

In my opinion it would be straining the law to make the absent owner who has himself no knowledge of the occurrence liable for not giving information of the riot that has taken place if his agent takes part in it and as a rioter actually taking part in it, does not, as a matter of course, give notice of it. Suppose, for example, the owner happens to be in England or some other distant country and a riot takes place on his property in which his agent is directly concerned either as an actor or abettor. Naturally no information is given by him to the

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Police. On what principle is the owner to be made liable under the section? Is it to be for the laches of the agent? But the act of the agent has ceased to be mere laches; it has already become a crime. Or is the owner to be punished vicariously for the crime of his servant? "The law does not furnish any warrant for this extreme view.

The notice is to be given at "the nearest police-station;" why? In order to enable the Police to take immediate action to prevent or suppress the riot or to bring the offenders to justice. It is the agent on the spot who is primarily responsible for this duty; and his failure makes the owner liable for his neglect. But a charge of neglect assumes, that the agent is not directly concerned in the commission of the offence. If he is so concerned it ceases to be neglect. It is a substantive crime.

For these reasons I am of opinion that the conviction of the Petitioner ought to be set aside and the fine, if paid, refunded.

But as my learned brother is of a contrary view, the case will be referred to the Honourable the Chief Justice under the provisions of sec. 429 of the Criminal Procedure Code.

PRATT, J.—The Petitioner was convicted by the Sub-Divisional Officer of Narain-ganj of an offence under sec. 154, I. P. C., and sentenced to pay a fine of Rs. 1,000. The conviction was confirmed on appeal by the Sessions Judge of Dacca.

This rule was issued on the District Magistrate to show cause why the conviction should not be set aside on the ground that the facts found do not warrant a conviction under sec. 154.

The facts found are that the Petitioner is sole proprietor of village Amlabo, that a serious riot involving loss of life took place on that property, that the Petitioner's naib was aware that the riot would be committed, and so far from doing anything to prevent or suppress the riot he actually accompanied the rioters and stood close by while the riot was going on, and that he has absconded and cannot be found. For the prosecution it is not suggested that the landlord himself had any knowledge that the riot was likely to be committed. He has been convicted on the authority of the case of *Queen-Empress v. Payag Singh* (1) which lays down that a landlord is liable under sec. 154, I. P. C., for the acts of commission as well as omission not only of himself but of his agent or manager. In that case, as in the present one the landlord's agent went to the scene accompanied by a great number of men and fomented the riot in which a man was killed. We are asked to hold that that decision is wrong and does not correctly interpret the law. It is urged that the law could not intend that a landlord living at a distance from the scene of disturbance should be punished for the criminal acts of his agent. Admittedly the law punishes a landlord for the culpable negligence of his agent. There is nothing in the words of the section under consideration from which it can be gathered that a distinction is to be drawn between an agent's acts of omission and of commission so far as the landlord's amenability to punishment is concerned.

There is no reported case in this Court.

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exactly in point. From some observations of Norman, J., in *Queen v. Surroop Chunder Paul* (4), it may be inferred that the accused in that case would not have been held guiltless if the finding of the first Court had stood, viz., that hired *lathials* were members of the unlawful assembly, some of them actually engaged as combatants on the side of the Paul Defendants. It was observed that; "There would be no doubt that the finding that such men were retained would have been quite sufficient to justify the inference that the zemindars and their agents, so far from using all lawful means in their power to prevent the riot, had made preparations beforehand to enable their faction to take an active part in it." So that a criminal act on the part of an agent, viz., the employment of hired *lathials* to take an effective part in the riot was held sufficient to bring the zemindars within the purview of sec. 154, I. P. C.

In the case of *Tarakant Das v. Queen-Empress* (5) Prinsep, J., in upholding the conviction of an absentee landlord under sec. 154 on account of the negligence of his local agent added the observation that: "There is much reason to believe that the riot was promoted in the interest of the zemindar." So that the learned Judge was evidently of opinion that active promotion of the riot by the landlord's agent would not excuse the landlord from being penalised under the section.

If the law were interpreted as the learned counsel for the Petitioner contends that it should be, it would always

be easy for the landlord to procure immunity by creating evidence enough to raise a doubt as to his agent's criminality.

In cases under the cognate sec. 155 where a riot is committed for the benefit of the landowner the connivance of the local agent, who fails to perform the duty imposed upon him by law, must from the nature of things be generally suspected even where it cannot be proved. The contention raised on behalf of the Petitioner if pressed to its logical conclusion would under such circumstances render it illegal or at all events unsafe to punish the landowner, and so the law would become a dead letter.

The provisions of the law are doubtless of a somewhat exceptional nature, but as I observed before there is nothing in them which differentiates between cases of active connivance and of mere passive negligence on the part of an agent, and the Courts cannot impose a distinction which does not exist and could not, in my opinion, have been intended.

I would therefore discharge the rule.

The learned Judges having differed, the matter was referred to the Honourable the Chief Justice under sec. 429 of the Cr. P. C. His Lordship the Chief Justice referred the matter to Mr. Justice Rampini for decision.

*Mr. W. C. Bonnerjee* and *Moulvi Syed Mahomed Tahir* for the Petitioner.

No one appeared to shew cause.

**RAMPINI, J.**—This is a reference under the provisions of secs. 429 and 439, Criminal Procedure Code, which was referred to me in consequence of a difference of opinion between *Amser Ali* and *Pratt, JJ.*

(4) 12 W. R. Cr. R. 75 (1869).

(5) 4 C. W. N. 691 (1900).

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The case, out of which the reference arises, is one in which a zemindar of the Dacca District, Kazi Zeauddin Ahmed, has been convicted of an offence under sec. 154, P. C., and sentenced to pay a fine of Rs. 1,000.

The facts of the case, as set out in the judgment of the Magistrate, are as follows :—

(See pages 772-773, *supra*).

On these facts the Magistrate convicted the accused under sec. 154, Penal Code, and sentenced him to pay a fine of Rs. 1,000.

On appeal to the Sessions Judge his appeal was dismissed.

The case then came in revision before a Bench of this Court, consisting of Ameer Ali and Pratt, JJ.

These learned Judges differed in opinion as to the propriety of the conviction.

Mr. Justice Ameer Ali is of opinion that the conviction should be set aside on the ground that an owner or occupier of land can only be held liable under sec. 154, P. C., for acts of omission and laches on the part of his agent and not for criminal acts committed by him. Mr. Justice Pratt, on the other hand, considers that there is nothing in sec. 154, P. C., which justifies the inference that any such distinction is to be drawn between an agent's acts of commission and his acts of omission, and relying on the authority of a ruling of the Allahabad High Court in *Queen-Empress v. Payag Singh* (1), he would affirm the conviction and discharge the rule.

It is to be noted that both the learned

(1) I. L. R. 12 All. 550 (1890).

Judges are agreed that knowledge on the part of the owner or occupier of the land of the acts or intentions of the agent is not an essential element of an offence under sec. 154, and that he may be convicted under the section though he may be in entire ignorance of the acts of his agent or manager.

In this case it is of course not found or even imputed against the accused that he had any personal cognizance of the riot at which his agent Madhab Rai was present.

I have had the advantage in this case of hearing Mr. W. C. Bonnerjee on behalf of the accused. Mr. Bonnerjee supports the view of Mr. Justice Ameer Ali that under sec. 154, P. C., an owner or occupier of land can only be held responsible for the acts of omission of his agent, and contends that when his agent or manager commits any criminal act such as rioting, or abetting a riot, then, as the agent is punishable under the criminal law, the owner or occupier of the land, the principal of the agent, is absolved from all liability to the provisions of sec. 154. He further argues that the case of *Queen-Empress v. Payag Singh* (1) has been wrongly decided.

It is clear that the case of *Queen-Empress v. Payag Singh* (1) is a direct authority for the view taken by Mr. Justice Pratt; for there it is said: "The knowledge of the owner or occupier in cases of this kind is immaterial. He is liable for the acts of commission and the act of omission not only of himself but of his agent or manager. Payag Singh's *karinda* so far from using all lawful means in his power to suppress

(1) I. L. R. 12 All. 550 (1890).

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the unlawful assembly took all unlawful means in his power to encourage it. We convict Payag Singh under sec. 151 of the Indian Penal Code."

I am unable to see that this decision of the Allahabad High Court is incorrect, and I agree with Mr. Justice Pratt in thinking that there is nothing in the terms of sec. 154, P. C., which justifies the distinction drawn by Mr. Justice Ameer Ali and Mr. Bonnerjee between acts of commission and acts of omission on the part of the landowner's agent. Mr. Bonnerjee contends that though the section itself does not expressly lay down any such rule, it intends to do so, and that such a distinction should be drawn, because when an agent commits a criminal act he is punishable under the criminal law and the law is satisfied, and does not demand another victim. But this does not seem to me to be the intention or the meaning of sec. 154. There seems to be no ground for holding that sec. 154 is intended to punish the landholder when his agent has not rendered himself liable to the criminal law, and that when the agent has done so, then his liability is at an end. On the contrary, the provisions of sec. 154 appear to me to be intended to impose on non-resident landholders and their agents the duty of maintaining the public peace and preventing unlawful assemblies and riots on their estates and to render the former liable for any dereliction in the discharge of this duty.

Mr. Justice Seton-Karr has observed in *Queen v. Harnath Rai* (2):—"A zemindar by leaving his estates and residing at the Presidency cannot avoid his duties and

liabilities, and it is his business to appoint fit and proper persons to manage his local affairs and to enable him to perform the duties imposed on him by the legislature. Moreover, it is the zemindar's duty to be regularly acquainted with all that goes on in his zemindari."

In these circumstances I cannot see why an owner or occupier of land should be responsible only for the acts of omission of his agent, and should not be held responsible for his acts of commission, which are of a more serious nature, and generally attended with graver consequences than mere acts of omission.

There appears to me to be no principle of criminal law that justice should be satisfied with one victim and that when a landowner's agent renders himself amenable to the law, his principal should go free.

It is true that the provisions of sec. 154 are of a very exceptional nature, and may in some cases work harshly. Mr. Justice Ameer Ali puts the hypothetical case of a landowner going to England or some distant country, and asks if he is still to be liable to punishment under sec. 154. It is to be presumed that Mr. Justice Ameer Ali means to ask whether he would be liable on his return to the district in which his estates are situated; for the local Courts of this country would have no authority over him as long as he resides in England. In such a case, no doubt, if the landowner had been long away from his estates, and had not intentionally visited the distant country to free himself from the responsibility for criminal acts

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committed on his estates by his agents in his absence, the provisions of sec. 154 might work harshly. But it does not follow that the provisions of sec. 154 would be held applicable in such a case; for in "*In the matter of Rudha Nath Chowdhury* (3)," a lenient and reasonable interpretation was put on the terms of sec. 154. In this case it was said: "We are disposed to think that a non-resident partner or co-sharer cannot be convicted in addition to the resident sharer under secs. 154 and 155. If the resident sharer brings himself under these sections, it is right he should pay the fine which would be a fine on the sharers: but to impose a fine on an absent sharer in addition, who has taken no active part in the management of the estate seems to us to be unduly stretching the law."

(3) 7 C. L. R. 289 (1880).

The accused in the present case, however, is not a non-resident partner or co-sharer within the meaning of this ruling. He resides in the town of Dacca, the principal city of the district in which his estates are situated. His estates are not more than two days' journey by walking from Dacca. By railway or steamer the journey is a shorter one. He is the sole proprietor of the land, which was managed for him by his agent, Madhab Rai. His agent obviously instigated and was present at a most serious riot which ended in the loss of a man's life. In these circumstances, I cannot doubt that the applicant is amenable to the provisions of sec. 154 and has been properly convicted and fined under that section.

I accordingly discharge this rule.

H. P. C.      • • Rule discharged.



## PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD HOBHOUSE.

LORD DAVEY.

GANGA BAKSH SINGH

LORD ROBERTSON.

v.

SIR R. COUCH.

BABU DALIP SINGH

1901.

and others.

20, June.

*Act XIV of 1891, sec. 8—Jurisdiction—Appeal—Additional Judicial Commissioner sitting alone.*

*Case in which an appeal, heard by the Additional Judicial Commissioner of Oudh sitting alone, was remanded to the Court of the Judicial Commissioner to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together.*

This was an appeal from a decree of the Additional Judicial Commissioner of Oudh dismissing the Plaintiff's appeal to him.

Mr. *Degruyther* for the Appellant submitted that under sec. 8, Act XIV of 1891, the Additional Judicial Commissioner had no jurisdiction, sitting alone, to hear the appeal, it should have been heard by him and the Judicial Commissioner sitting together.

Mr. *Mayne* for the Respondents admitted that that appeared to be so.

During the course of the arguments *Thakoor Hardeo Bux v. Thakoor Jarrahir Singh* (1) and *Ex parte Anderson* (2) were mentioned—also that no costs were allowed by their Lordships.

A discussion then took place whether their Lordships should hear the appeal granting special leave to Appellant or

remand the case for trial by a proper Court of Appeal.

Their LORDSHIPS' JUDGMENT was delivered by

LORD HOBHOUSE.—In this case their Lordships will humbly advise His Majesty to discharge the decree of the Additional Judicial Commissioner of Oudh, of the 17th August 1896, to allow the appeal, and to remand the case to the Court of the Judicial Commissioner of Oudh, to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together, as provided by law.

Their Lordships give no costs of the present proceedings.

Solicitors: *Messrs. Watkins and Lampriere* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

*Case remanded.*

C. W. A.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL NO. 20 OF 1901.

In the Goods of

MACLEAN, C. J.

LUCHMINARAIN BOOLA,

BANERJEE, J.

deceased.

HILL, J.

1901.

MUSSAMUT BRIA

Heard, 16, 17,

COOMAREE, Defendant,

and 18, July.

Appellant,

Judgment,

23, July.

RAMRICK DASS,

Plaintiff, Respondent.

*Probate action—Receiver—Issue of probate and discharge of Receiver—Order refusing to stay above order—Execution of decree, order refusing to stay—Civil Procedure Code (Act XIV of 1882), sec. 545—Appeal—Letters Patent, cl. 15—Execution, meaning of—Judicial discretion, appeal from exercise of—Principle upon which execution is stayed—Stay of execution, terms upon which granted.*

(1) 4 I. A. 178 (1877).

(2) L. R. 5 Ch. App. 473 (1870).

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*An order made by a Judge of the High Court refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate action is a 'judgment' within the meaning of cl. 15 of the Letters Patent and is appealable.*

THE JUSTICES OF THE PEACE FOR CALCUTTA v. THE ORIENTAL GAS CO. (1) commented on and followed.

HURRISH CHUNDER CHOWDHRY, P. KALI SUNDERI DEBI (2) referred to.

SRIMANTA RAJA YARLAGADDA DURGA PRASADA v. SRIMANTA RAJA YARLAGADDA MALLIKARJUNA (3) dissented from.

*When there still remains something substantial to be done under a decree before it can become thoroughly effectual, that decree has to be "executed" within the meaning of sec. 545, Civ. P. C.*

*A decree directing the issue of a grant of probate to the propounder of a Will is one that is capable of execution and stay of execution of such decree can be granted under sec. 545 of the Civil Procedure Code.*

*An Appellate Court ought to be extremely chary of interfering in matters dependent upon the exercise of the judicial discretion of the Court below but it can interfere and sometimes has to interfere if it thinks the facts warrant such interference.*

*The principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success.*

(1) 8 B. L. R. 433, 452 (1872).

(2) 1. L. R. 6 Cal. 594 (1881); on appeal, 1. L. R. 10 L. A. 4; 5. C. 1. L. R. 9 Cal. 482 (1882).

(3) 1. L. R. 24 Mad. 358 (1901).

POLINI v. GREY [(5) and WILSON v. CHURCH (6) followed.

*Terms upon which stay of execution pending an appeal was granted.*

In this suit the Plaintiff propounded a document as the last Will and testament of Luchminarain Bogla of which he claimed to be the executor. Luchminarain Bogla died on March 6th, 1901, leaving property worth about 30 lacs, the major portion of which consisted of a banking and money-lending business and the business of a Government contractor. The Defendant who claimed to be the heiress-at-law of the deceased and as such entitled to his estate challenged the Will on the ground that it was a forgery. Prior to the hearing a Receiver of the estate including the above-mentioned businesses had been appointed. After a protracted hearing before Stanley, J., the learned Judge on July 1st pronounced in favour of the Will and directed the immediate issue of probate to the Plaintiff and the discharge of the Receiver. On July 3rd the Defendant obtained a rule returnable the next day calling on the Plaintiff to show cause why the issue of probate should not be stayed and the appointment of the Receiver continued pending the hearing of the appeal against that decree. On July 4, Stanley, J., delivered the following judgment discharging the rule with costs.

STANLEY, J.—This matter comes before me on a rule obtained by the Defendant calling on the Plaintiff to shew cause why a stay should not be put on the granting of probate pursuant to the decree made

(5) L. R. 12 Ch. Div. 438 (1879).

(6) L. R. 12 Ch. Div. 454 (1879).

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on the 1st of this month and why a stay should not also be put on the order of the Court discharging the Receiver.

The application is made under the provisions of sec. 545 of the Civil Procedure Code, which enables the Court which passes a decree, for sufficient cause, to order execution of the decree to be stayed.

In this case the testator, Luchminarain Bogla, carried on business in Calcutta, Rangoon, Chooroo and Mandalay as a banker and money-lender, and also as a contractor for the supply of military and other stores.

This business was in full activity at the time of his death which occurred very suddenly on the 6th of March last.

The Defendant who is the adoptive mother carries on a like business of a very extensive character and is said to be a lady of great wealth.

When the application for probate was made to me originally and a caveat had been lodged by the Defendant, it became necessary that something should be done for the protection of the property of the deceased, and though I was very averse to appoint a Receiver, I found myself coerced to do so under the circumstances, and a Receiver was appointed on the 26th of March pending the final determination of the case.

It is alleged by the Plaintiff that there is a great deal of competition between these two firms, the firm of the late Luchminarain Bogla and the firm of the Defendant, and that if the executor under the Will of the deceased is not put in possession of the property, serious loss will be sustained by the estate.

The action was heard before me at great length. The hearing occupied thirty-three working days and a great deal of evidence, both oral and written, was tendered on both sides.

There were features of some difficulty and circumstances which, as I have stated in the judgment, gave rise to suspicion.

After I heard the evidence I found that those suspicions had been removed and I formed a clear opinion as to the merits of the case put forward by the Plaintiff.

I had no doubt as to the genuineness of the Will, I had also no doubt but that the defence advanced by the Defendant was unworthy of credit, but though this is my own personal view, it may be that other Judges would take a different view of the case.

A large amount of evidence which I considered of a reliable character in support of the Will has been given by the Plaintiff which has not been met or discredited.

I am asked now to put a stay on my order and, under the discretionary power which I have under sec. 545, to direct that execution be stayed until an appeal which is proposed to be made to the Appellate Court is determined.

No appeal has been presented but I am told, and I have no doubt that it is true, that an appeal is ready and can be presented forthwith.

It must be a considerable time before the case in the Appeal Court will be reached unless the case is expedited. The result of my putting a stay on the execution would be that the business which is now carried on by the Receiver, would continue in his hands with the

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result that irreparable injury would result to the estate for the reasons stated in the Plaintiff's affidavit.

The proposed order is one which would tamper and interfere with the carrying on of the business. The Plaintiff suggests that it would suit the Defendant because if the competition of the firm of Luchminarain Bogla be out of the way her business will be benefited.

It appears to me therefore that this is a very exceptional case, and I cannot but feel that that there is truth in the Advocate-General's remark that irreparable loss will be sustained if the legitimate owner of the property be not placed in possession of it.

This is not a case like the case upon which reliance is placed by the Defendant's counsel, the case of *Wilson v. Church* (6). In *Wilson v. Church* (6), under an order of Court, directions were given for payment of moneys to 900 or a 1,000 people, many of whom were resident in the Continent and others in America, and they were not parties to the suit.

If the fund in that case had been distributed under the decree it could not be recovered, whereas if the money was in Court, the Plaintiff and the bondholders could not be injured, the money would be safe and interest would run on it at four per cent.

Here however the property would be dwindling day by day as I gather and probably in a year or two would be depreciated, it may be 50 or 60 per cent.

Under these circumstances I shall not take the responsibility of staying the execution of the decree.

It is pointed out to me that if I do not put some stay on the grant of probate, probate will be handed to the Plaintiff forthwith and an appeal will be rendered nugatory.

To prevent this I will give an opportunity to the Defendant of filing his petition of appeal and also of appealing against this order.

I shall discharge this rule with costs but I shall give the Defendant a fortnight from this date to make such application to the Court of Appeal as she may be advised, and I shall stay issue of probate for one fortnight from this date and also the order discharging the Receiver.

The Defendant appealed.

*Mr. W. C. Bonnerjee, Mr. Mittra, Mr. J. G. Woodroffe, Mr. Knight, and Mr. Shelley Bonnerjee* for the Appellant.

*The Advocate-General, Mr. Palit, Mr. O'Kinealy, and Mr. Garth* for the Respondent.

The Advocate-General took a preliminary objection that no appeal lay.

*Mr. Mittra.*—Stanley, J., was under the impression that there was an appeal from his order, as is apparent from his judgment.

The application was made under sec. 545 of the Code of Civil Procedure. Any order made under that section is considered as an order in execution proceedings and as such comes within the purview of sec. 244 and the definition of a decree as given in sec. 2 of that Code and is therefore appealable. See *Ghayidin v. Fakir Buksh* (9), *Udeyadeta Deb v.*

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*Greyson* (10), *Musaji Abdulla v. Damordas* (11); and the cases cited by Mr. Justice O'Kinealy at p. 721 of the 5th Ed. of his notes to the Civil Procedure Code.

[MACLEAN, C. J.—As you raised this objection, Mr. Advocate-General, would you like to be heard first? *The Advocate-General*.—Yes. I raised the point and am entitled to a reply.]

*The Advocate-General* (on the preliminary objection).—I do not contest the rulings just now cited. They only decide that orders passed under sec. 545 of Code of Civil Procedure come within the definition given in sec. 2 of that Code and are therefore appealable from one Court to another. But I contend that the only right of appeal from an order made by one Judge of the High Court or from a Division Bench of this Court where the judges are equally divided to the High Court is under cl. 15 of the Letters Patent. If it were not for cl. 15 of the Letters Patent no appeal would lie from an order of any Judge of this Court except to the Privy Council. See *Tootsee Money Dasse v. Sudevi Dasse* (12) which decision followed a long series of cases.

The other side contend that this is an order under sec. 545 of the Civil Procedure Code and that section read with secs. 244 and 2 of that Code make this order an appealable one. My answer to that is that in dealing with an appeal from one Judge of the High Court to another Bench of the High Court you must have recourse to sec. 15 of the

Letters Patent and not to the Civil Procedure Code. Nor can you include the word "judgment" as used in sec. 15 of the Letters Patent in the definition of a decree as given in sec. 2 of the Code of Civil Procedure. There may be a decree within the definition given by the latter section which is not a judgment within the meaning of sec. 15 of the Letters Patent.

The meaning of the word "judgment" as used in sec. 15 of the Letters Patent is to be found in the case of *The Justices of Peace for Calcutta v. The Oriental Gas Co.* (1); see also *Sonlai v. Fazul Habi Dhari* (13). This order in no way affects the merits of the question between the parties by determining any right or liability. That had been done previously. There are many orders from which no appeal lies, such as an order granting a certificate that a case is a fit and proper one to appeal to the Privy Council, for such order although affecting the rights and liabilities of the parties is not a judgment within the meaning of sec. 15 of the Letters Patent. See *Moula Buksh v. Kishen Pertab* (14), *Lutf Ali Khan v. Asgur Reza* (15). Again an order refusing the grant of a certificate has been held not to be appealable; *Manly v. Patterson* (16). No appeal lies from a decision on one issue in a suit which does not deal with the whole subject-matter of the suit; *Ebrahim v. Fukrunnissa Begum* (17). An order refusing to extend the time prescribed by law within which an

(10) I. L. R. 12 Cal. 624 (1886).

(11) I. L. R. 12 Bom. 279 (1888).

(12) 3 C. W. N. 347; s. c. I. L. R. 26 Cal. 381 (1890).

(1) 8 B. L. R. 433 at p. 452 (1872).

(13) 9 Bom. H. C. R. 398 (1872).

(14) I. L. R. 1 Cal. 102 (1875).

(15) I. L. R. 17 Cal. 455 (1890).

(16) I. L. R. 7 Cal. 339 (1881).

(17) I. L. R. 4 Cal. 531 (1878).

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Appellant is required to furnish security for the costs of the Respondent is not appealable; *Kishen Persad Panday v. Tiluckdari Lall* (18). Nor is an order refusing to stay execution under sec. 608 of the Code of Civil Procedure; *Mohabir Prosad Sing v. Adhikari Kunwar* (4). There is no appeal against an order refusing an application under sec. 169 of the Indian Companies Act (IV of 1882) for extension of time for serving notice of an appeal under that Act; *Wall v. Howard* (19). See also *Kay v. Briggs* (20), *The Amstil* (21), *Lane v. Esdaile* (22), *Ex parte Stevenson* (23). In the present case the learned Judge proceeded wholly in the exercise of his discretion, as is apparent from his judgment and from the manner in which the order is drawn up, for the Defendant is not given liberty to appeal against the order but only to make such application to the Appellate Court as she may be advised. [BANERJEE, J., referred to *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* (2)]. In that case there was no discretion vested in Pontifex, J. He had no discretion to refuse to carry out an order made by Her Majesty in Council. And moreover the Privy Council held that his order did expressly decide a question affecting the rights of the parties. No appeal lies against an order refusing leave to appeal to the Privy Council against an order

refusing the appointment of a Receiver; *Chundi Dutt Jha v. Pudmanund Singh Bahadur* (24). Such an order is not a final judgment within the meaning of the provisions of the Civil Procedure Code dealing with appeals to the Privy Council.

Assuming they could apply under sec. 545 the order made on their application was no judgment within the meaning of sec. 15 of the Letters Patent. But I further contend that this is no case for the stay of execution at all and Stanley, J., could not have made any other order than he did. The decree made by him in favour of the Will and directing a grant of probate was a decree made by him sitting in the exercise of the Testamentary and Intestate Jurisdiction of this Court, and is not a decree that can be executed under the provisions of the Civil Procedure Code. There is nothing to be done under this decree by or against the Defendant. The rule was so framed as to exclude the direction to the Defendant to pay the Plaintiff's costs. It was only directed against the issue of the grant of probate and the discharge of the Receiver. Under these circumstances there is nothing under the order that has to be done by the Defendant. [BANERJEE, J.—Does the signing and sealing of the decree mean the issue of probate.] When the decree is signed the person who obtained it would take it to the Clerk of the Court and on payment of probate duty he would get his probate. There is nothing to be done by the other side. [MACLEAN, C. J.—The question whether this case falls within sec. 545 or not is a different point alto-

(2) I. L. R. 6 Cal. 594 (1881); on appeal, L. R. 10 I. A. 4: s. c.

I. L. R. 9 Cal. 482 (1882).

(4) I. L. R. 21 Cal. 479 (1894).

(18) I. L. R. 18 Cal. 182 (1890).

(19) I. L. R. 17 All. 438 (1895).

(20) L. R. 22 Q. B. D. 343 (1889).

(21) L. R. 2 P. D. 186 (1877).

(22) L. R. (1891) A. C. 210.

(23) 1 Q. B. 294; L. R. (1892) A. C. 609.

(24) I. L. R. 22 Cal. 928 (1895).

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gether to whether this order is a judgment or not under sec. 15 of the Letters Patent.] Yes, I was only indicating it. With regard to the preliminary objection, I contend that this order does not determine the rights or liabilities of any party in the suit. It is not therefore a judgment within the meaning of sec. 15 of the Letters Patent and consequently no appeal lies against it.

*Mr. Mitra contra.*—We contend that the order made by Stanley, J., is a judgment within the definition given by Couch, C. J., in *The Justices of Peace v. The Oriental Gas Co.* (1) and is therefore appealable. That definition tallied with the definition of a decree as given in Act VIII of 1859. Since then the definition of a decree has been extended and why should not the definition of a judgment be so extended as to correspond with the present definition of a decree. The cases cited by the other side are all easily distinguishable from this case and it is a noticeable fact that they have not cited a single case in which it has been held that no appeal lies from an order refusing stay of execution of a decree. A useful guide in determining what amounts to a judgment is found in the definition of a decree given in sec. 2 of the Civil Procedure Code. The definition of a judgment given by Couch, C. J., is an elastic one and is not confined within the narrow limits the other side seeks to impose upon it. It includes final, preliminary and interlocutory orders. Had this order been made by a District Judge, it would have been a decree as defined by the Civil Procedure Code and would have been appealable to the

Appellate Side of this Court. In this case the order was made by a Judge of this Court sitting in the exercise of the Ordinary Original Civil Jurisdiction of this Court and his order undoubtedly does determine a question affecting the rights and liabilities of the parties. If his order is allowed to stand the Plaintiff will get possession of the estate, for that is the natural effect of the decree granting him probate and not only will the Defendant be deprived of it, but what is more, she will be deprived of all means of protecting and preserving the estate pending the determination of the appeal. In coming to a decision as to whether an order is a judgment within the meaning of sec. 15 of the Letters Patent all the circumstances of the case must be taken into consideration.

As regards the second point raised I contend that this is a decree capable of execution. See *Dharram Singh v. Kissen Singh* (25) where the appointment of a manager and the taking possession by him of the property in suit was held to be the execution of a decree. In this case the order directing probate to issue places the property in the hands of the Plaintiff.

*Mr. J. G. Woolroffe* (on the same side).—While jurisdiction is given by cl. 15 of the Letters Patent, the Court may yet, in order to ascertain the meaning of the word 'judgment,' refer [as was done in *The Justices of Peace v. The Oriental Gas Co.* (1)] to the Code. Though the latter is of subsequent date the definition of 'decree' therein is not a merely arbitrary one, and from it an indication may

(1) 8 B. L. R. 433, 452 (1872).

(25) 12 C. L. R. 532 (1883).

(1) 8 B. L. R. 433, 452 (1872).

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be gained that the present order is of an appealable character. In any event that order is within the definition given in the case cited. The merits, there referred to, must include the merits of applications made in or after the suit otherwise there could be no appeal from anything but the final decree in the suit itself. The order appealed from determines a right of liability, namely, the right to probate and possession of the property pending appeal. The cases relied upon by the Respondent are cases in which no question was determined between the parties which directly affected their rights or liabilities.

*The Advocate-General* in reply.—The question turns on the meaning of the words used by Couch, C. J., in *The Justices of Peace v. The Oriental Gas Co.* (1). Although that is not a statutory decision, yet in the eyes of lawyers it has as much weight as a statutory decision for it has been confirmed over and over again. The order now sought to be appealed from, only repeats what the learned Judge had done before and refuses to stay his former order. The *lis* terminates with the decree. After that, the position is the same as if there never had been a *lis*, and as if the testator had died leaving an undisputed Will with executors, *Wieland v. Bird* (26). The decisions in *Lutf Ali Khan v. Asgur Reza* (15), *Kishen Persad Panday v. Tiluckdari Lall* (18) and *Chundi Dutt Jha v. Pudmanund Singh Bahadur* (24) have considerable bearing

on this point. As regards the case of *Hurriah Chunder Chowdhry v. Kali Sunderi Debi* (2) the point there was not a question of executing the decree but one which affected the main issue in the suit. As regards the definition of decree given in the Civil Procedure Code, we are, as I have contended, quite independent of that Code and act under the Charter. There is no authority for saying that the word judgment in sec. 15 of the Letters Patent and the word decree in the Code are synonymous.

[Their Lordships here intimated that they would hear the appeal before deciding the preliminary point.]

*Mr. Mittra* for the Appellant.—From the affidavits filed on both sides these facts are clear: the estate is a large one and consists principally of moveable property. There is no immoveable property belonging to it within the jurisdiction of this Court. The Plaintiff has no property in British India nor anywhere else. He is a subject of the Maharajah of Bikaner and is at present passing through the Insolvency Court at Rangoon. Probate has been ordered to be issued to him without his being directed to furnish any security. Our contention is that if he gets the property now and we succeed in our appeal we shall recover nothing from him. This is eminently a case for the Court to exercise its discretion under sec. 545 of the Civil Procedure Code. As regards any loss that may be occasioned to the businesses left by the deceased we are prepared to offer any security that the Court may consider reasonable to

(1) 8 B. L. R. 433, 452 (1872).

(15) I. L. R. 17 Cal. 455 (1890).

(18) I. L. R. 18 Cal. 182 (1890).

(24) I. L. R. 22 Cal. 928 (1895).

(26) L. R. (1894) P. 1, 262.

(2) I. L. R. 6 Cal. 594; on appeal, L. R. 10 I. A. 4; s. c. I. L. R. 9 Cal. 482 (1882).



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cover such loss. [BANERJEE, J.—No doubt the language of that section is very comprehensive, but does it contemplate a case like this? Suppose the property the subject-matter of the suit is a mercantile business with a capital of twenty lacs. In such a case could the Appellate Court direct a stay of probate and at the same time direct security to be given for any loss that the business may suffer. If not, one of the conditions of cl. (c) to sec. 545 is unsatisfied.] The Court has ample power under that section to make such a direction and to put the Appellant upon such terms that the Respondent, if the appeal is dismissed, will be in no way prejudiced. But in dealing with cases like the present one the Court ought chiefly to consider what the position of the Appellant would be if the application for stay were refused and the Appellant were successful in his appeal. The principle, it is submitted, is this: where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory. Where there is a reasonable ground of appeal, and if, not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the Appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights; *Polini v. Grey* (5), *Wilson v. Church* (6); see also *The*

*Annot Lyle* (27). The fact that this case deals with the granting of probate makes no difference for here if probate is granted it in effect amounts to a distribution of funds. [BANERJEE, J., referred to *Maharani Indar Kumari v. Maharani Jaipal Kumari* (7).]

*Mr. J. G. Woodroffe* (on the same side).—The question to be determined is, it is submitted, whether this Court which has already through its Receiver possession of the estate, the subject of litigation, should loosen its hold of such property and make it over to the Plaintiff whose right to possess the same is the subject-matter of the pending appeal. That appeal operates as an extension of the suit, *Taylor v. Taylor* (28). Both together form one continuous proceeding. This is not a case in which it is sought to dispossess a party of property of which he is in possession. The property being in the Court's custody, the burden is on the Plaintiff to show that he is presently entitled to possession. That burden is not discharged by showing a grant of probate to him when the right to the grant is the very question at issue in the appeal. It is true that there is a decision in favour of the Plaintiff but that must always be the case from the very nature of the application. In *Mohesh Chunder Dhal v. Satrugan Dhal* (8) both the lower Court and the High Court decided against the Plaintiff and the High Court refused leave to appeal to the Privy Council, yet the latter

(7) L. R. 14 I. A. 1 (1886).

(8) 4 C. W. N. 34: s. c. I. L. R. 27 Cal. 1: s. c. L. R. 26 I. A. 281 (1899).

(27) L. R. 11 P. D. 114, 116 (1886).

(28) L. R. 6 P. D. 29 (1881).

(5) L. R. 12 Ch. Div. 438 (1879).

(6) L. R. 12 Ch. Div. 454, 459 (1879).

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directed a stay of execution. That case and *Maharani Inder Kumari v. Maharani Jaipal Kumari* (7) show that the principles laid down in *Polini v. Grey* (5) and *Wilson v. Church* (6) have met with the approval of the Privy Council which in the case of *Nawab Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan* (29) indicated the facts which should be shown upon an application of this kind. The language of sec. 545 of the Code is however less strict. It is not necessary to show that irreparable damage will but that substantial loss may result unless they be granted. If the lower Court had exercised its discretion it would still be open to the Appellate Court to interfere. But it has not exercised any discretion. There is no finding upon the question (which has been entirely overlooked) whether loss may result to the Defendant; moreover the learned Judge has stated that he will not accept the responsibility of staying execution and has directed that the probate should not issue for 14 days in order that application might be made to this Court. He has thus left the question to be determined by this Court. As to security though sec. 545 is limited to security for the due performance of such decree or order as may ultimately be binding upon the applicant (in this case an order for costs) and the Court cannot compel the giving of any other security, the applicant is willing to give reasonable security for any loss which may occur to the Plaintiff by reason of the stay and the retention of the pro-

perty in the hands of the Receiver. See *Brewer v. Yorke* (30).

*The Advocate-General* for the Respondent.—No facts have been stated by the Appellant to show that irreparable mischief will be caused to her if the order she asks for is refused. The affidavit of her manager on which she relies nowhere states that he is advised that there are good grounds of appeal against the decision finding for the Will. On the other hand we show and it is in no way controverted by the other side that the Plaintiff had been the manager of the father of Luchminarain Bogla during the former's lifetime and had largely aided in building up his fortune, that after his father's death Luchminarain Bogla had been ill-treated and turned out of the house penniless by the Defendant who was his adoptive mother, that the Plaintiff thereupon took pity on Luchminarain Bogla, treated him as his son, and instituted on his behalf proceedings in the Rangoon Court in connection with the Will of Luchminarain's father which resulted in the Defendant paying to Luchminarain the sum of thirty lacs of rupees. The proposition that the Court will only consider what loss may be occasioned to the Appellant if the order now sought for is refused is not maintainable. The Court will consider the position of both parties and examine all the circumstances of the case before granting such an order. If this order is granted the Plaintiff will be kept out of the estate of which he is the executor and the businesses belonging to the testator will come to an end for the Receiver has no power to enter into fresh transactions. His ap-

(30) L. R. 20 Ch. D. 669 (1892).

(5) L. R. 12 Ch. D. 438 (1879).

(6) L. R. 12 Ch. D. 454 (1879).

(7) L. R. 14 I. A. 1 (1886).

(29) 1 Ind. Jur. N. S. 185 (1885).

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pointment has practically resulted in the winding up of the businesses and if it is to be continued the businesses are bound to come to an end. The result will be irreparable injury to the Plaintiff. On the other hand no grounds have been shown to justify the Court to come to the decision that the Defendant will suffer irreparable injury if the order is refused. The mere prospect or apprehension of injury, or the mere belief that the act complained of may or will be done, is not sufficient to entitle the Defendant to the relief she seeks. (See Tagore Law Lectures, 1897, page 105, and the cases cited there). Assuming sec. 545 of the Civil Procedure Code applies to the present case, then the granting or refusing of this order is a matter within the discretion of the Judge (Kerr on Receivers, fourth edition, page 5). The learned Judge in the Court below did exercise his discretion and after hearing the Defendant felt satisfied that no grounds had been made for him to stay his hand. In such a case the appeal Court will not interfere unless it can be shown that he proceeded on a wrong principle or made a manifest slip, which has not been shown here. (See Mew's Digest, Vol. 1, p. 382, and the cases cited there).

The appointment of a Receiver always operates as an injunction. Though actual injury need not be shown to enable a party to get this preventive relief, yet the facts relied on must show that injury will follow or to use the words of Lord Chelmsford in *Nawab Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan* (29) irreparable injury will be caused to the appli-

(29) 1 Ind. Jur. N. S. 185 (1865).

cant. As regards what kind of facts must be shown to entitle a party to this preventive relief, see *Bindubasini Chowdhurani v. Jahnnabi Chowdhurani* (31). No such facts are shown here. No case has been cited where when the Court below has affirmed the title of an executor, the Appeal Court has in an interlocutory proceeding interfered. When a Court has ordered probate to issue it will not interfere with the executor exercising the powers conferred upon him unless a special case is made [Kerr on Receivers, 4th Ed., p. 25, and cases cited there], *Devey v. Thornton* (32). Though there is a distinction between that case and the present one the principle is the same.

Where the order of a Judge is founded upon matters within his discretion the Appeal Court is reluctant to reverse his order, *Hadji Ismail v. Hadji Mahomed* (33), *Shadi v. Anup Sing* (34), *Oriental Bank Corporation v. Gobin Lall Seal* (35), *Wigney v. Wigney* (36), *Ironmongers Company v. Attorney-General* (37).

The cases of *Polini v. Grey* (5) and *Wilson v. Church* (6) are beside the point. There there was a fund in Court but here there is no such thing as a fund in Court. That is the initial fallacy that underlies the whole of the argument on the other side. Those cases do not throw any light on the question now before the Court because here the Court is dealing with the grant of probate and has nothing

(5) L. R. 12 Ch. Div. 438 (1879).

(6) L. R. 12 Ch. Div. 454 (1879).

(31) 1 L. R. 24 Cal. 260 (1896).

(32) 9 Hare. 222, 229 (1851).

(33) 13 B. L. R. 91, 101 (1874).

(34) 1 L. R. 12 All. 436, 438 (1889).

(35) 1 L. R. 10 Cal. 713, 737 (1884).

(36) L. R. 7 P. D. 177, 182 (1882).

(37) 10 Cl. and F. 908, 926 (1844).

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rule was granted on that day limited to the first two objects. That rule was heard by Mr. Justice Stanley on the 4th July and discharged with costs. Hence the present appeal. The application for stay of execution as to the costs was, I understand, not pressed. The question in dispute between the parties is as to the validity of the above Will, and the amount involved in the dispute is very large, about 33 lacs of rupees.

Under the Will the Respondent, as residuary Legatee takes a very large interest estimated at 23 lacs. If the Will be found invalid, the Appellant, the adoptive mother of the testator, takes the estate as her adopted son's heiress. \* Mr. Justice Stanley, after a trial which lasted 33 days, found in favour of the Will, and an appeal from his decision has been presented and is pending by the present Appellant, the mother. When Mr. Justice Stanley made his order of the 4th July no appeal was pending, but one has since been filed. A Receiver was appointed on the 26th March 1901.

Various objections are raised by the present Respondent, the successful party in the Court below, to any stay of proceedings being granted. It is urged on his behalf (1) that no appeal lies to this Court from Mr. Justice Stanley's order of July 4th, (2) that the case does not fall within sec. 545 of the Code of Civil Procedure, (3) that the matter was one for the exercise of the judicial discretion of the Court below, and that this Court ought not to interfere with his decision in exercise of that discretion, (4) that on the merits no case has been made out for the intervention of

the Court, that no case has been shown that if the appeal, be successful, it will be infructuous by reason of the Respondent removing the assets out of the jurisdiction of this Court, that there is no danger of such a result, and that, having regard to the nature of the assets, a going banking and money-lending business as also that of a contractor for the supply of military stores, the continuance of the Receiver and the refusal to hand out the probate will inflict substantial loss on the Respondent. I will deal with these objections *seriatim*.

I entertain no doubt but that an appeal lies. The appeal, if at all, can only lie under sec. 15 of the Letters Patent of 1865, and it is contended for the Respondent that the order of July 4th is not a "judgment" within the meaning of that section. We have been referred to many cases upon this point and to the definition of a "judgment" given by Sir Richard Couch in the well-known and often cited case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (1). That definition is now of some antiquity and is rapidly becoming, if it has not already become, almost classical. I have concurred and I still concur in that definition, but I do not say that it is exhaustive. It is perfectly true that the first order, that of July 1st, decided as between the parties, the question of the validity of the Will, and, as consequent, the discharge of the Receiver. But a new state of circumstances has arisen by reason of the appeal, as also a new and further question, whether, under such circumstances,

(1) 8 B. L. R. 433, 452 (1872).

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the Respondent ought to be given the immediate control of this large estate. Upon this new and important question, Mr. Justice Stanley has exercised his judicial discretion, and has come to a decision of great importance, which, if it remain, may possibly render a successful appeal absolutely infructuous. If the view urged by the Respondent be well-founded, viz., that it was the first order which decided the rights and liabilities of the parties, and that the order of July 4th virtually decided nothing as to such rights and liabilities, then it is difficult to appreciate how any order preliminary or interlocutory, could ever be the subject of an appeal under the section. But, obviously, this is not what Sir Richard Couch meant. In my opinion the order of July 4th has decided the very important question, very important in this particular case, that notwithstanding the appeal—for although such appeal had not actually been filed when Mr. Justice Stanley's judgment was delivered, it proceeded upon the footing that one was about to be filed immediately—the Respondent was entitled to the immediate control of the estate, a decision which, if the appeal be successful, would, as I have already said, possibly render it absolutely infructuous, and the case to my mind falls within the definition of a judgment given by Sir Richard Couch, and is consistent with the observation of the Privy Council in the case of *Hurrieh Chunder Choudhry v. Kali Sunderi Debi* (2). I am but little disposed to place a narrow construction

upon the expression "judgment" in sec. 15 of the Charter. I do not think it is necessary to refer to the other cases cited: none of them are directly in point.

Since the case was argued we have been referred to the case of *Srimanta Raja Yarlagadda Durga Prasada Nayadu v. Srimanta Raja Yarlagadda Mallikarjuna Prasada Nayadu* (3) which is directly in point. With all deference to the learned Judges who decided that case, I am unable to concur in their view and for the reasons I have stated above. It seems to me that the Judges have not quite apprehended the true effect of the Calcutta decision in *Mohabir Prosad Singh v. Adhikari Kunwar* (4) which was in substance a question as to giving security for costs, not of staying execution, though that no doubt was the form the application took.

I now pass to point No. 2. It is stated the case does not fall within sec. 515 of the Code: it is said there is nothing to execute. It is quite clear, that, as regards costs, there is a very substantial matter for execution and therefore the order of July 1st taken as a whole would be one where execution would or might be necessary. It is true that no stay as regards execution for costs is asked for now: but that cannot affect the question whether the order, as a whole, is not one where execution might be necessary. Be that, however, as it may be, I think that when there still remains something substantial to be done under a decree, before it can become thoroughly effectual, that decree has to be "executed" within the meaning of sec. 545. The order of

(2) I. L. R. 6 Cal. 594 (1881); on appeal, I. L. R. 10 I. A. 4: s. c. I. L. R. 9 Cal. 482 (1882).

(3) I. L. R. 24 Mad. 358 (1901).

(4) I. L. R. 21 Cal. 478 (1894).

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July 1st, as it stood, would avail the Respondent but little for all practical purposes: two things have to be done under it, in order to finally clothe him with the character of executor: he has to pay the stamp fees on probate, and the Court has to hand out to him the probate itself. What is this if it is not carrying out, that is, executing the order? In my opinion the case falls within the section but even if it did not, I think there is an inherent power in the Court to stay under proper circumstances, the drawing up of its own orders, or to suspend their operation if the necessities of justice so require. In my opinion Mr. Justice Stanley had power to deal with the matter, and that does not appear to have been contested before him. There is nothing in the proceedings in the Court below to suggest that any objection was taken on this head.

Then it is said that as the Judge below has exercised his judicial discretion in the matter, this Court ought not to interfere. I am entirely in accord with the view that an Appellate Court ought to be extremely chary of interfering in matters dependant upon the exercise of the judicial discretion of the Court below, but, of course, it can interfere and sometimes has to interfere. I do not know that this point is of much practical importance, for now that the appeal has been filed the Appellant could make a new and substantive application under sec. 545 as in fact she has now done. But, apart from this, the judgment of the lower Court seems to intimate that, whilst the learned Judge himself would not take the responsibility of staying execution of the decree, he was desirous

that the opinion of this Court should be taken in the matter, and he suspended the operation of his order of July 1st for a fortnight for that purpose. But, in my opinion, upon the question of interfering with the discretion of the Court below, the judgment is fairly open to the criticism that, in exercising that discretion, the learned Judge has thought only of the loss, by staying execution, to the Respondent, and has not considered the danger of the Appellant losing the fruits of her appeal, if successful. This, to my mind, is a most important feature in the case, and ought to have been well and carefully weighed. Whilst giving, then, all due consideration to the views of the Court below, I do not think there is anything to prevent our interfering in the matter, if we think the facts warrant such interference.

Lastly as to the merits. No doubt the Respondent has got a decree in his favour, based, it is said, upon a strongly expressed judgment. He is entitled to rely upon this and to throw the onus on the Appellant of satisfying us, why he should be deprived of the immediate fruits of his victory. But the position of the Respondent is not, for present purposes, a very strong one. He was the *gomasta* of the testator, apparently his managing man: he is a Marwari, and, so far as I can learn, not a British subject, but a subject of the Bikaner Raj, and moreover, he is admittedly insolvent, and has no means with which to discharge the insolvency proceedings, save out of the estate, the subject-matter of this litigation. There is evidence too, that, immediately after the testator's

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death, he took the earliest opportunity of disposing of the testator's money securities and jewels and other property, though this is denied by him. But apart from his interest in the testator's estate, it is clear that the Respondent is a person of no means, and in embarrassed circumstances, and the Appellant says that if he is allowed to get hold of this estate, he will probably realize everything he can, and as quickly as he can, and then go off to Bikaner, and that, if she is successful, her victory will be purely a barren one. On the other hand the Respondent says that, after a long trial, the Will has been found to be valid, that the bulk of the estate is consequently his; that it is very hard that he should be kept out of his money, and that, as the testator's businesses are not being carried on, he is suffering very great, and, as he says, irreparable loss. We must look at both sides of the question.

I am satisfied, on the whole that, having regard to the position of the Respondent, the Appellant has good ground for her fears, and that there is a danger that, unless execution be stayed, her appeal which is undoubtedly a *bond fide* one, if successful, is likely to be infructuous. There can be no doubt that substantial loss may result to the Appellant unless an order is made staying execution. Then what ought we to do under these circumstances? In my opinion we ought to see that the property is preserved pending the litigation, and that we may safely follow the principle laid down in the English Courts in such cases as *Polini v. Grey* (5) and

*Wilson v. Church* (6), a principle which is fully recognized by the Judicial Committee of the Privy Council in the cases of *Miharani Inder Kumari v. Maharani Jaipal Kumari* (7) and *Mohesh Chandra Dhal v. Satrugan Dhal and others* (8). It is perfectly true that the facts of these particular cases were different from those in the present, but the underlying principle is the same. In *Polini v. Grey* (5) Sir George Jessel said "the Plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, *bond fide*, to prosecute an appeal to the Court of ultimate resort. The Plaintiffs allege that that appeal will be nugatory if the fund is paid out to the Defendants, and that if the Plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend and, assuming that contention to be correct in fact, the question is, whether this Court has jurisdiction to prevent such a consequence. It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party is to reap the fruits of that litigation, and not obtain merely a barren success," and at p. 445 the learned Judge continues: "The Court having arrived at the conclusion that the appeal is *bond fide*, that

(5) L. R. 12 Ch. Div. 438 (1879).

(6) L. R. 12 Ch. Div. 454 (1879).

(7) L. R. 14 I. A. 1 (1886).

(8) 4 C. W. N. 34; s. c. I. L. R. 27 Cal. 1; s. c. L. R. 26 I. A. 281.

(5) L. R. 12 Ch. Div. 438 (1879).

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she intends to prosecute it with a view to determine her rights, and to get a final decision on those rights, and the Court, I assume (for I do not know the facts) being satisfied that there would be danger if it were not to interfere for the interim protection of the fund, of its not being forthcoming if she succeeded in the House of Lords, the question is, is it not the duty of this Court to say that the fund ought to be preserved for the successful party?" And Lord Justice Cotton expresses in effect the same view.

In my opinion, then, the probate ought not to be handed out to the Respondent, nor ought the Receiver to be discharged. But this must be done on terms. The Appellant must undertake to expedite the appeal with all reasonable despatch, and she must give, as she has offered, security for any damages which may accrue to the testator's estate by reason of this stay. The Respondent will have liberty to apply to the Court below that the Receiver may be ordered to pay him out of the estate such sum as that Court may deem reasonable in respect of the costs he has already incurred in the litigation, as also those of the pending appeal, and upon such terms as to security, or otherwise, as it may think proper, and also to apply to the Court if he so desire, that the Receiver may be at liberty to carry on the testator's business which apparently he has been ordered by the Court not to do. He may also have liberty to apply to this Court, if the appeal be not duly expedited, and also as to advancing the hearing of the appeal when it is ready for hearing. As regards the costs of this appeal, though ordinarily the Appellant should

pay them as he comes to the Court for a favour, as every point has been so hotly contested by the Respondent who has failed throughout, it would be inequitable to apply that rule in the present case, and the costs will be costs in the appeal.

BANERJEE, J.—I am entirely of the same opinion.

HILL, J.—I am also of the same opinion.

K. S. B.

*Appeal allowed.*

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No: 1000 OF 1899.

RAMPINI, J. SHEIKH KARBAN ALI and  
GUPTA, J. anr., Plaintiffs, Appellants,  
v.

1901. SHEIKH JAFAR ALI and ors.,  
22, May. Defendants, Respondents.

*Record-of-rights—Bengal Tenancy Act (VIII of 1885), Chap. X, secs. 105, 106—Res judicata—Civil Procedure Code (Act XIV of 1882), sec. 13—Settlement proceeding—Entry of rent—Procedure.*

*Sec. 105 of the Bengal Tenancy Act lays down that during the pendency of the draft publication any person affected by an entry in the record may raise an "objection" with regard to it, which the Revenue Officer is to "receive" and "consider" and dispose of in a summary manner. From an order disposing of such an "objection" there would be no appeal and no second appeal, and the order cannot have the effect of res judicata.*

*A "dispute" under sec. 106 is to be "heard" and "decided" by the Revenue Officer under the procedure laid down in the Code of Civil Procedure for the trial of suits and is subject to appeal and second*



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*appeal, and an order, disposing of such a "dispute" will have the effect of res judicata.*

**DENGU KAZI v. NOBIN KISHORE CHOWDHRAIN (1)** *considered and explained.*

This was an appeal preferred on the 22nd of May 1899, against the decree of A. E. Staley, Esq., Special Judge of Mozufferpore, dated the 22nd of February 1899, reversing the decree of Babu Charu Chunder Kumar, Assistant Settlement Officer of Mozufferpore, dated the 4th of November 1898.

The facts of the case appear from the judgment.

*Babu Joy Gopal Ghosha* for the Appellants.

*Babu Nalini Ranjan Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the District Judge of Mozufferpore, in a settlement proceeding.

The Settlement Officer had upon the application of certain raiyats held that their rents should be entered as Rs. 13-6-6 instead of Rs. 29-4-6 as alleged by their landlord. On appeal to the District Judge, he held on the authority of the case of *Dengu Kazi v. Nobin Kishore Chowdhrain* (1), that the matter is *res judicata*, as there had previously been a dispute between the parties in the course of which, *viz.*, on the 16th December 1896, the rent had been found to be as alleged by the landlords (the Respondents before us).

The raiyat Appellants now urge that

the matter is not *res judicata*, as the previous decision of the Settlement Officer was passed in a case under sec. 105, and was not passed between the same parties as the parties to the present suit.

It is not clear from the previous order itself whether it was passed in a case under sec. 105, or one under sec. 106. The Judge, however, describes it as having been passed in a case under sec. 105, but on the authority of *Dengu Kazi v. Nobin Kishore Chowdhrain* (1) seems to think it must be regarded as having been passed in a case under sec. 106 and so, having the force of a decree, must bar the present suit. There is no doubt much in the order of reference and in the judgments in *Dengu Kazi's* case which favours this view, for in that case it has been held that when a dispute arises about an entry in the record-of-rights, whether during the pendency of the publication of the draft record or even before the making of any particular entry in it, and when such a dispute is decided by the Settlement Officer, his decision is to be regarded as one in a case under sec. 106, from which a second appeal lies under sec. 108, sub-sec. 3. But it must be considered, in the first place, what the two secs. 105 and 106 mean, and in the next place, what the case of *Dengu Kazi* (1) has decided.

Clearly, we think sec. 105 means to lay down that during the pendency of the draft publication any person affected by an entry in the record may raise an "objection" with regard to it, which the Revenue Officer is to "receive" and "consider," and dispose of in a summary

(1) 1 C. W. N. 294: s. c. I. L. R. 24 Cal. 462 (1897).

(1) 1 C. W. N. 294: s. c. I. L. R. 24 Cal. 462 (1897).

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manner. From an order disposing of such an "objection," there would seem to be no appeal [for the Revenue Officer's order is not a decision within the meaning of sec. 108, sub-sec. (2)] and no second appeal, and the order cannot have the effect of *res judicata*.

On the other hand, a "dispute" under sec. 106 is to be "heard" and "decided" by the Revenue Officer under "the procedure laid down in the Code of Civil Procedure for the trial of suits" (sec. 107), and is subject to appeal [sec. 108, sub-sec. (2)], and second appeal [sec. 108, sub-sec. (3)]. Such appears to have been the intention of the legislature. The question then is "How far has the Full Bench decision in *Dengu Kazi's* case (1) altered this?" In this case a dispute had arisen between the landlord and tenant in certain settlement proceedings, which was decided by the Settlement Officer in what he described as a case under sec. 106. When this case came in second appeal before this Court, it was objected that there was no second appeal, as when the case was decided, no record-of-rights had been completed or published and so, on the authority of the cases of *Gopi Nath Masat v. Adoitonak* (2) and *Anand Lal v. Shib Chunder Mukerji* (3) it was contended that the case had been decided not under sec. 106 but under sec. 105.

Now the decision in *Dengu Kazi's* case (1), as we understand it, lays it down that a "dispute" may arise at any time both before and after the publication of

the draft record and before the record is made, and that whenever a dispute arises in this way and is decided under sec. 106 it is open to second appeal. The Full Bench does not seem to us to mean to lay down that when an "objection" is made under sec. 105 and is "received" and "considered" by the Revenue Officer, i.e., summarily, without following "the procedure laid down in the Code of Civil Procedure for the trial of suits," his order disposing of it will be open to either appeal or second appeal, or will have the effect of *res judicata*.

In the present suit, the previous order of the Revenue Officer is described by the Judge as one under sec. 105, and we have examined it and it appears to us to be an order under sec. 105; for the Revenue Officer in disposing of it does not seem to have adopted "the procedure laid down in the Code of Civil Procedure for the trial of suits." Hence we do not think it can have the effect of *res judicata*.

The Appellant's objection that the previous order is not between the same parties as the present suit is founded on the fact that in the previous order the name of the landlord is recorded as Sultan Ali, while in the present suit the names of the landlords are Karban Ali and Sultan Ali—that is to say, there is an additional landlord in the present suit. It may be, however, that Karban Ali was a party to the case under sec. 105, though his name does not appear in the form in which the Revenue Officer has recorded his order. We could not decide this question without having the whole record of sec. 105 case before us. We therefore do not rest our decision on this ground.

(1) 1 C. W. N. 294; s. c. I. L. R. 24 Cal. 462 (1897).

(2) I. L. R. 21 Cal. 776 (1894).

(3) I. L. R. 22 Cal. 477 (1895).

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For these reasons we consider that the Judge is wrong in holding that the present suit is barred by *res judicata*.

We accordingly set aside his decree and remand the case to him to be disposed of on the merits. Costs to abide the result.

- Case remanded.

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2627 OF 1898.

DURGA MOHUN DAS

and others, Defendants,

Appellants,

v.

RAKHAL CHANDRA ROY

CHOWDHURY and ors.,

Respondents.

*Permanent tenancy—Long possession and instances of transfer and succession—Notice—Homestead land in Municipal town.*

*The fact of long possession and instances of transfer and succession may raise a presumption in favour of the permanency of a tenancy. •*

TARUK PODO GHOSAI v. SHYAMA CHURN NAPIT (1), PROSUNNO COOMAREE v. SHEIKH RUTTON BEPARY (2) referred to.

This was an appeal preferred on the 23rd of December 1898, against the decree of Babu Shyam Chand Dhar, Subordinate Judge, 1st Court of Zillah Backergunge, dated the 17th of September 1898, reversing the decree of Babu Tara Pada Chatterjee, Munsif, 6th Court of Barisal, dated the 20th of July 1891.

The appeal arises out of a suit for ejectment after notice to quit. The land is homestead situated in the town of

Barisal within its Municipal jurisdiction. One Ram Sundar Dutta was the tenant of the land in *karsa* right; from him the Defendant No. 1 since deceased and the father of Defendant No. 2 purchased the tenant's right and were recognised by the Plaintiffs who received rent from them; the Defendant No. 2 was alleged to have sold his 8 annas to the Defendant No. 3 or his wife Manikya, Mala in regard to which fact there was a controversy between the parties. Manikya Mala was added as Defendant No. 5; and Defendant No. 4 was said to be on the land as sub-lessee. The question was whether the holding was one which could be terminated by notice and whether the Defendants could be ejected.

• With regard to the question as to whether the tenancy was permanent and also as to the question of notice the Subordinate Judge in delivering judgment observed as follows:—

“There is no evidence in support of the origin of the tenancy the terms of which are also not known. The land may have been used for residential purpose, but it does not appear whether it was let by the landlord expressly for any such purpose, and admittedly there is no *pucca* but only *katoha* house on it. The Defendant No. 1 was on friendly terms with the Plaintiffs, and the Defendant No. 2's father was the translator of the District Judge's Court in which he practised as a pleader and the Plaintiffs out of friendship or any other similar consideration may have acknowledged the purchase of the Defendant No. 1 and Defendants No. 2's father and realized rent from the Defendant No. 2 as they did from the Defendant No. 1 and the Defendant No. 2's father but these facts do not constitute the tenancy as a permanent one. The most that can be said in the tenant's favour is that the tenancy has been in existence from before 1268, B. S., when the Plaintiffs' right accrued, but a possession for such a period as this by itself does not raise any presumption of permanency.

(1) 8 C. L. R. 50 (1881).

(2) I. L. R. 3 Cal. 698 (1877).

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There is no obligation on the part of the Plaintiffs to acknowledge any subsequent transfer or succession, because they admitted the purchase or succession of any tenants on ground such as has been stated above and the *status* of the tenant in the case is no better than that of a tenant-at-will or from year to year liable to be ejected on a reasonable notice to quit, and no question of any local custom to the contrary is either suggested or established. In coming to the conclusion at which I have arrived, I have been guided by the cases of *Taruk Podo Ghosal v. Shyama Churn Napit* (1) and *Prosunno Coomaree v. Sheikh Rutton Bepary* (2) cited on the side of the Appellants."

The evidence shows that the Defendants Nos. 1 and 2 who were the real tenants were served with reasonable notices to quit. The transfer by the Defendant No. 2 is not acknowledged by the Plaintiffs who are not bound to admit the tenancy of the transferee. There is a controversy as to whether the Defendant No. 3 or his wife Manikya Mala who is the added Defendant No. 5 is the real transferee. The *kobala* may stand in her name but they live jointly and the evidence of late Babu Durga Mohun Das shows that the Defendant No. 3 has been in possession of the purchased share. That being so, the Defendant No. 3 may be taken as the beneficial transferee. No question of estoppel as pleaded by the Defendant No. 5 arises in the case. The Plaintiffs are not bound to serve the Defendant No. 5 with a notice but they have thought it fit to serve the Defendants Nos. 3 and 4 with reasonable notices although they were not bound to do so. No other question has been pressed.

The appeal was accordingly decreed by the lower Appellate Court.

*Dr. Rash Behari Ghose and Babu Chandra Kant Sen* for the Appellants.

*Dr. Asutosh Mukerjee and Babu Sarat Chander Dutt* for the Respondents.

THE JUDGMENTS OF THE COURT were as follows :—

**BANERJEE, J.**—In this appeal which

arises out of a suit brought by the Plaintiffs-Respondents for ejectment of the Defendants-Appellants upon notice to quit, two contentions have been raised on behalf of the Appellants; *first*, that the Court of Appeal below has not tried the question whether the fact of long possession and the instances of transfer and succession proved in the case raised any legitimate presumption in favour of the permanency of the tenancy; and, *second*, that, upon the question of notice, the Court of Appeal below has come to no sufficient finding as to whether the notices were reasonable.

Upon the first question, it is argued for the Appellant that the learned Subordinate Judge in the Court of Appeal below has merely found that neither the length of possession, nor the transfer and succession proved, can make the tenancy a permanent one, overlooking the real question for consideration, namely, whether from the length of possession and the instances of transfer and succession proved in the case, a reasonable presumption may not arise in favour of the permanency of the Defendant's tenancy; and it is urged that the concluding part of the judgment of the lower Appellate Court where the learned Subordinate Judge says "in coming to the conclusion at which I have arrived, I have been guided by the case of *Taruk Podo Ghosal v. Shyama Churn Napit* (1) and *Prosunno Coomaree v. Sheikh Rutton Bepary* (2) cited on the side of the Appellant," goes to support the view that the distinction referred to above has been overlooked. On the other hand, it

(1) 8 C. L. R. 50 (1881).

(2) 1. L. R. 3 Cal. 698 (1877).

(1) 8 C. L. R. 50 (1881).

(2) 1. L. R. 3 Cal. 698 (1877).

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is argued for the Respondents, that there is one passage, at least, in the judgment where the learned Subordinate Judge says, "the most that can be said in the tenant's favour is that the tenancy has been in existence from before 1268, B. S., when the Plaintiffs' right accrued, but a possession for such a period as this, by itself, does not raise any presumption of permanency," which would go to show that the learned Subordinate Judge has had his mind directed to the question whether the facts proved in the case were, or were not, sufficient to raise a presumption in favour of the tenancy being permanent. The passage in the judgment, just quoted, no doubt goes to a certain extent, to support the contention on behalf of the Respondents. But it does not fully meet the contention on the other side. For all that the learned Subordinate Judge there says is that long possession by itself is not sufficient in this case to raise any presumption of permanency. Has he then any where else in his judgment considered the combined effect of the length of possession that is proved and the instances of transfer and succession in supporting a presumption in favour of the permanency of the tenure? It was argued for the Respondents that the effect of the transfer and succession proved in the case has been separately dealt with, and they have been considered by the lower Appellate Court as being attributable to the friendly feeling subsisting between the parties and therefore not warranting any presumption in favour of the permanency of the tenure. But in the first place,

the part of the judgment dealing with these two matters, namely, the instances of transfer and succession, is not very clear, and, then, in the second place, what was necessary for the learned Subordinate Judge to have found was, whether, as a matter of fact, the instances of transfer and succession proved in the case together with the length of possession shown did not, as their combined effect, warrant a presumption in favour of the permanency of the tenure.

In saying this, we must not be understood as indicating in any way an opinion in favour of the tenancy being a permanent one. We cannot in second appeal do this, and we do not therefore indicate any opinion of ours in favour of one side or the other upon this question. But we think it necessary, that the case should go back to the lower Appellate Court in order that it may come to a finding, as to whether, the length of possession and the instances of transfer and succession taken together, are sufficient to support any presumption in favour of the tenancy being a permanent one.

Upon the second question also we think that the finding is somewhat defective; and the defect we find in the judgment of the learned Subordinate Judge upon the question of notice is, that the judgment does not say what time was granted by the notice. All that is found is, that the evidence showed that the Defendants Nos. 1 and 2 who were the real tenants, were served with reasonable notice to quit.

We may in this connection refer to the case of *Kishori Mohun v. Nund Kumar* (3)

(3) I. L. R. 24 Cal. 720 (1897).

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to show that the notice ought to be a six months' notice in order that it may be considered to be a reasonable one, whether the Transfer of Property Act applies to the case, or not. The case must therefore go back to the lower Appellate Court in order that it may dispose it of, after determining the two questions referred to above. The costs will abide the result.

MACLEAN, C. J.—I agree, though. I think that the case is very near the line. I only wish to add that I do not desire it to be understood by our judgment that we are expressing any opinion as to whether the evidence on the record justifies the presumption of the tenure being a permanent one. That is to be decided by the Court on the remand.

*Case remanded.*

S. C. S.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 236 OF 1899.

HILL, J.	METHURAM DASS,
HARINGTON, J.	Plaintiff, Appellant,
1901.	v.
26, July.	JAGGAN NATH DASS,
	Defendant, Respondent.

*Right of suit*—Words spoken in answer to a question put by a police-officer conducting an investigation, whether actionable—Criminal Procedure Code (Act X of 1882 and Act V of 1898.)

*A person who, in answer to a question put to him by a police-officer conducting an investigation under the provisions of the Criminal Procedure Code, stated that the Plaintiff was concerned in the commission of the crime then being investigated, cannot be made liable in an action for damages for words so spoken.*

QUEEN-EMPRESS v. GOVINDA PILLAI (1),  
GOFFIN v. DONNELLY (2), DAWKINS v. LORD  
ROKEBY (3) referred to.

This was an appeal preferred on the 24th of January 1899, against the decree of Babu Sarbessur Mazumdar, Additional Subordinate Judge of Zillah Julpaiguri, dated the 10th October 1898, reversing the decree of Babu Kanti Chandra Mookerjee, Munsif of Julpaiguri, dated the 11th of February 1898.

The facts of the case appear from the judgment.

*Babu Sarat Chunder Roy Chowdhury*  
for the Appellant.

*Moulvi Serajul Islam* for the Respondent.

THE JUDGMENT OF THE COURT WAS AS  
FOLLOWS:—

The sole question in this appeal is whether the Defendant who, in answer to a question put to him by a police-officer conducting an investigation under the provisions of Act X of 1882, stated that the Plaintiff was concerned in the commission of the crime then being investigated, can be made liable in an action for damages for words so spoken.

The learned Additional Subordinate Judge has held on the authority of *Queen-Empress v. Govinda Pillai* (1) that no action would under such circumstances lie, and we think that his decision is correct. A person, as was pointed out in that case, examined by a police-officer conducting an investigation under Act X of 1882, was bound by sec. 161 of the Act to answer truly all questions put to

(1) I. L. R. 18 Mad. 235 (1892).

(2) 8 Q. B. D. 307 (1881).

(3) L. R. 7 H. L. 744 (1875).

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him, and on that ground the learned Judges considered that he was entitled to the same protection as that extended to witnesses in a Court of Justice. This view derives support from the cases of *Goffin v. Donnelly* (2) and *Dawkins v. Lord Rokeby* (3). In the former the Court of Queen's Bench held that a person giving evidence before a Select Committee of the House of Commons, appointed to enquire into the circumstances attending the suspension of the certificate of the Plaintiff who was a school master was absolutely privileged in respect of the evidence he gave. "For the purposes of such enquiries" it was said, "committees are appointed and require the attendance of witnesses. If persons so required to attend did not attend, they would be committed for contempt. If they do attend they must answer the questions asked of them and may be examined on oath. The evidence given is, therefore, as much given under compulsion as in the case of a Court of law." So in *Dawkins v. Lord Rokeby* (3) it was held that statements made by a witness before a Military Court of enquiry were privileged in the same way as evidence given in a Court of Justice. Such a Court is not however a judicial body, nor can it administer an oath, but officers of the army are compellable to attend such Courts, if required to do so by competent military authority, and to give evidence, and it was upon this ground that the answer of the Judges to the question proposed to them by the Lord Chancellor and adopted by the House of Lords proceeded. The Lord Chief Baron in answer-

ing the question proposed, after referring to the immunity enjoyed by witnesses in Courts of Justice, in respect of statements by them disparaging to another and to the reason for the rule went on to say: "In the present case it appears in the bill of exceptions that the words and writing complained of were published by a military man bound to appear and give testimony before a Court of Inquiry; all that he said and wrote had reference to that enquiry: and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary Court of Justice." And the Lord Chancellor in summarising the circumstances of the case said: "Your Lordships have it in the bill of exceptions that it was an enquiry connected with the discipline of the army: it was an enquiry warranted by the Queen's Regulations and orders for the army: it was called for by the General Commanding-in-Chief in pursuance of these Regulations; and the Defendant in the action was called upon that enquiry as a witness, as a person who was required to make statements relevant to the enquiry which was then being conducted, and it was in the course of that enquiry that these statements were made."

In the present case the investigation was required by law: it was conducted under the provisions of the law, it was ancillary to the administration of justice: the Defendant was bound by law to answer all questions put to him by the police-officer conducting the investigation, and was punishable if he answered untruly and what was said by him had reference to

(2) 6 Q. B. D. 307 (1881).

(3) L. R. 7 H. L. 744 (1875).

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the matter under investigation. Virtually the only distinctions between his position and that of an ordinary witness arise from the fact that his statement was not made in a Court of Justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above, why public policy should not equally prevent an action being brought against him as against a witness in an ordinary Court of Justice.

We think accordingly that the suit was not maintainable and that the appeal fails and must be dismissed with costs.

*Appeal dismissed.*

S. C. S.

**PRIVY COUNCIL.**

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

LORD HOBHOUSE.	RAJA PADMANUND
LORD DAVEY.	SINGH and ors.,
LORD ROBERTSON.	Plaintiffs,
SIR R. COUCH.	Appellants,
1901.	v.
Heard, 19, June.	HAYES and ors.,
Judgment,	Defendants,
13, July.	Respondents.

*Hindu law—Estate for life—Grant of a moiety thereof to children of the grantee, effect of—Estate of inheritance—Person unborn at the time of execution of the grant—Equity—Specific performance—Construction.*

*A grant of the whole of an estate to a person for his life and as to a moiety thereof to his children and descendants after his death, with a restriction as to the power of alienation either by the grantee or his descendants, does not confer on the grantee an inheritable estate as to the latter moiety and an heir of the grantee*

*not in existence at the time of such grant is, in Hindu law, incapable of taking thereunder.*

**BHOOBUN MOHINI DEBIA v. HURRISH CHUNDER CHOWDHRY (1) distinguished.**

*The fact that for some time after the death of the grantee, the grantor treated his heir, who was not in existence at the time of the grant, as entitled thereunder, does not create an equity in favour of such heir and the latter is not entitled to specific performance of the agreement under which the grant was made.*

A Division Bench of the High Court composed of O'Kinealy and Rampini, JJ., had on appeal reversed the decision of the District Judge of Purneah and decreed to Plaintiff only one-half of the village in suit Alakjbhari while the District Judge had decreed the whole of it and Plaintiffs had in their amended plaint claimed the whole. The Plaintiffs thereupon preferred this appeal.

The facts were that that village and others were given by Raja Lilanund Singh, the Appellant's father, to his daughter Jogmaya Dai absolutely.

The Appellant on coming of age disputed the right of his father to make such gift of ancestral property and brought a suit to contest it. That suit was compromised in 1874, a *pattah* was granted of the village in dispute to Jogmaya Dai and she in the same terms executed a *kabuliyat*.

The terms of the *pattah* and *kabuliyat* were, *mutatis mutandis*, as follows:—

I, Kumar Padmanund Singh, also wish that the said Srimati Jogmaya Dai, my sister, and her children should be maintained and supported, and the said



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Dai also considering the right of me, Kumar Padmanund Singh, and with a view to compromise the suit, consented to relinquish her right which she had acquired under the said deeds sought to be set aside, and a compromise has been effected between us through the intervention of Mr. George Nelson Barlow, C.S.I., Commissioner of Zillah Bhagulpore, to the following effect, viz., the said Srimati Jogmaya Dai shall get an allowance of Rs. 6,000 per annum during her lifetime, and her descendants who may, under the Hindu law, become her heirs, shall get one-half thereof in perpetuity, and in lieu of the same whatever profits the mouzahs which are held by the said Mussamat Jogmaya Dai under the deeds sought to be set aside may yield annually over and above Rs. 6,000, being fixed as the *jumma* of those mouzahs, the said mouzahs shall be left in the possession of the said Jogmaya Dai, and on the death of the said Dai one-half of the said mouzahs shall permanently remain in the possession of her descendants, who may be alive at that time and may be (her) heirs according to the *Shastras* on a *jumma* equal to one-half of the said *jumma*. The person holding possession of the property shall never have any right to alienate, i.e., to effect any sale, gift or mortgage or permanent *mokurari* of the whole or a portion of the said properties. Therefore, we, the declarants, in effecting and enforcing the said compromise have, of our own free-will and accord, granted this *pattah* in respect to the said mouzah Duleri Alakjhari, a permanent jagir mehal in pergunnah Powakhali, Zillah Purneah, and the said mouzah Barapati Rahoa, other-

wise called Lalgunge, towzi No. 3524, and sudder *jumma* Rs. 820-3-2 pies within the jurisdiction of the Bhagulpore Collectorate, from 1282 Fusli on the annual *jumma* of Rs. 1,234, by taking a *kabuliyat*, to Srimati Jogmaya Dai, daughter of me Raja Lilanund Singh Bahadoor, and sister of me Kumar Padmanund Singh, on the conditions specified below, by cancelling the former settlement and deeds. It is required that the said lessee and her descendants should permanently remain in possession by carrying out the conditions given below, and that they shall never act contrary to this *pattah*.

"1. Srimati Jogmaya Dai, the lessee, shall remain in possession of the aforesaid properties during her lifetime and pay to us, the declarants and our representatives, Rs. 1,234, the annual *jumma* as per instalments given below, by taking receipts for the same. On the death of the said lessee, her descendants who may, according to the *Shastras*, become her heirs, shall permanently remain in possession of one-half of the properties mentioned in the *pattah* and pay the annual *jumma* of Rs. 617 year after year as per instalments given below to us the declarants and our heirs and representatives, and take receipts for the same. The remaining one-half of the properties mentioned in the *pattah* shall, from the time of the death of the said Srimati Jogmaya Dai, revert to the Raj, and the descendants of the lessee shall not get possession of the same.

"2. The lessee or her descendants, who may come into possession in the manner specified in the preceding paragraph, shall not have any power to trans-

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fer the property mentioned in the *pattah* by sale, gift, mortgage or permanent *mokurari* or in any other way, and such alienation shall not be valid, and the transferee shall not have any right to hold possession under such transfer.

"3. The amount of *jumma* which will have to be paid in the manner specified in paragraph 1, shall never be reduced or increased, and we, the declarants, and our representatives shall never interfere in the possession of the lessee and her heirs, who are or will be entitled under the conditions of this *pattah*; and with the exception of receiving the fixed *jumma* we, the declarants, or our representatives shall have no further right at all.

"4. If there be no descendants of the lessees, i.e., children born of her womb or their children, we, the declarants and our representatives, have and shall have power to resume and take possession of the remaining one-half of the said mouzahs which have been permanently settled for maintenance, and the properties mentioned in the *pattah* shall revert to the Raj. Be it known that this maintenance has been fixed only for the lessee and her *al-aolad* (descendants, i.e., children born of her womb) and their descendants, and that the husband of the lessee or step-son or step-daughter of the lessee and other persons, who are not included in the category of the descendants of the lessee as stated above, shall not be entitled to get the said mouzah. But those persons are included in the category of *al-aolad* (descendants) who are not even the descendants in the first decree, i.e., the descendants of children born of womb also are included in this category, and when there are several descendants,

such one or more of them who may be the nearest in relation according to the *Shastras*, anyone among them whom the lessee or the person holding possession may declare to be the rightful heir, shall be entitled to succeed. But the adopted son or *kurtaputra* is not and shall not be included in the category of descendants."

Raja Lilanund died in 1883. In June 1885 Jogmaya Dai executed a mortgage of the village in suit to Defendant, Dharm Chand, for an advance of Rs. 20,000 and gave him a lease for 10 years so as to secure to him possession. The lease was benami in the name of two of Dharm Chand's servants.

In 1877 the Respondent, Bholanath Jha, a minor grandson, (daughter's son) of Jogmaya was born.

Jogmaya Dai died in April 1889.

In 1890 the Appellant gave directions to his Patwari that he was to collect rents of  $\frac{1}{2}$  the mouzah which on the death of Jogmaya reverted to the Raj of Banali, that is, the Plaintiffs' Raj.

In 1892 notices were served on the mortgagee intimating that Plaintiffs had come to hear of the said mortgage and lease to Dharm Chand, that they were invalid and informing the mortgagee that they had no right to hold the village under such transfers by Jogmaya Dai. Not receiving satisfaction the present suit was at first instituted for a declaration of the Plaintiffs' title to a moiety of the abovenamed village and to recover possession thereof. But before any written statements had been filed, the Plaintiffs applied for leave to amend the plaint, so as to include the whole village, being advised "that in consequence of

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the death of Mussamat Jogmaya Dai, the Plaintiffs have become entitled to get possession of not only a moiety, but of the whole 16 annas of the *mokurari* property, because at the time when the said *mokurari* deed was executed in favour of Jogmaya Dai, Bholanath Jha was not born, and that according to the Hindu *Shastras* the said *mokurari* tenure could not continue to exist as valid on the death of the said Jogmaya Dai. The said Srimati Jogmaya had, under the terms of the said *mokurari pattah*, a life-interest only, and as Bholanath was not then in existence he could not acquire any right thereunder."

The District Judge held that the lady had no power to execute those documents and the Plaintiffs were not bound by them.

The High Court (O'Kinealy and Rampini, JJ.), on the Defendant Dharm Chand's appeal, referring to the said notice issued to the Patwari, said :—

"It will be seen from this document that the present Plaintiffs then declared that they were entitled to only eight annas of the rent of the village, and that the remaining eight annas belonged to the descendants of the lady who were bound to hold under the conditions of the lease entered into at the time when the family settlement took place, and to pay their rent into the Plaintiffs' cutchery. The Plaintiffs in that *perwana* to the Patwari pointed out clearly that from the month of Bysack of the current year, that is, from the beginning of the year, the Patwari should only collect eight annas of the rent due to them, and they directed the Patwari to remit that to the cutchery. They also pointed out

how the rent was to be entered in the receipts given to all raiyats, so as to show that the other eight annas belonged to the lady's descendants. This clearly shews that from Bysack, 1297, the Plaintiffs treated the old lease given by them to the lady as an existing lease under which they were entitled to have only eight annas of the rents of the village, and the remainder eight annas remained in possession of her descendants on payment of rent. The Plaintiffs have not contended that they have since then received any conveyance or lease of the remaining eight annas from the descendant of the lady then entitled under the lease."

And they conclude their judgment, which is virtually based on that document, as follows :—

"The Judge in the Court below gave the Plaintiffs possession of the whole village with mesne profits.

"It was argued at the Bar for the Appellant that as the Plaintiffs by their own conduct determined on carrying out the lease, and did carry it out so far as they could, Bholanath should receive eight annas of the rents; and the Plaintiffs not having based their claim on anything done since that year, the Judge in the Court below was wrong in giving them possession and *wasilat* of the whole 16 annas of the village. It was also argued that as Bholanath was admittedly entitled to eight annas share of the rent, the Plaintiffs could only get possession of the remaining eight annas share.

"On the other hand the Respondents replied by stating that the *pattah* and *kabuliyat* entered up in terms of the decree between the three relatives, could not,

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according to the Hindu law, pass the estate.

"The Respondents did not, nor could they, we think, deny that Bholanath had not, in terms of the agreement, an equity against the Plaintiffs to carry out the arrangement.

"We are of opinion that Bholanath, under the terms of the family settlement and the decree passed thereon, had a right to specific performance of the agreement, and to compel the Plaintiffs to give him a legal title, if they refused. But instead of refusing, the Plaintiffs acquiesced in Bholanath's right, treated him as legal owner and gave him possession, so far as they could, by the intimation they gave to the raiyats and servants in 1297. We think, therefore, that the Plaintiffs cannot succeed in getting a declaration that Bholanath cannot now hold the property as the legal owner or that they can dispossess him from his eight annas share.

"We, therefore, cannot agree with the Judge in the Court below in holding that the Plaintiffs are entitled to possession and *wasilat* of the whole sixteen annas of the property as against Bholanath and the persons connected with the mortgage transaction. We think, however, that they have a right to a declaration that, as against them, the mortgage made by the lady is not binding; and in modification of the decree of the lower Court, we direct that the Plaintiffs be put in possession of eight annas share of the property, with *wasilat*, according to the amount fixed by the lower Court. Each party to pay his own costs in both Courts."

In this appeal *Mr. Mayne* and *Mr. C. W. Arathoon* for the Appellants contend-

ed that such decision was erroneous, that on the death of Jogmaya Dai there was no one capable of taking having regard to the terms of the *pattah* and *kabuliyat*. The donee must be a person in existence capable of taking when the gift took effect, that condition was not fulfilled in this case. There was no vested interest conferred on anyone of Jogmaya's descendants until her death. Jogmaya Dai was only given a life interest, and there could be no ratification of what was void and not voidable, *Maharani Beni Pershad v. Dudhnath Roy* (2).

*Mr. Cowell* for the Respondents contended that upon a proper construction of those documents, so long as a lineal descendant of Jogmaya Dai was alive, the Appellants have no right to possession of one moiety of the village; she took an absolute estate of inheritance in that moiety defeasible only on the happening of events which did not occur.

He read passages from the *Tagore case* (3), cited *Bhoobun Mohini's case* (1) and *Rao Balwant Singh v. Rani Kishore* (4).

LORD HOBHOUSE to *Mr. Cowell*.—Is there any reason given by the High Court for disregarding the objection to Bholanath not taking because he was not alive in 1874. I can find none.

*Mr. Cowell*.—No, Bholanath has a legal title or nothing.

*Mr. Mayne* replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR RICHARD COUCH.—The question in this appeal is as to the construction of a

(1) L. R. 5 I. A. 188 (1878).

(2) L. R. 26 I. A. 216 (1899).

(3) L. R. I. A. Supp. Vol. 47 at p. 65 (1872).

(4) L. R. 25 I. A. 54 at p. 66 (1897).

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*pattah* (lease) made by Raja Lilanund Singh, the father of the Appellant Padmanund Singh, and by the latter on the 27th June 1874. After reciting two deeds of gift by which Lilanund Singh gave to his daughter Srimati Jogmaya Dai two mouzahs therein described for her maintenance and that of her descendant with power to alienate the properties, that the properties were ancestral and at the time of the gift his son the first Appellant was a minor, that a suit for setting aside the deeds had been brought on the part of Padmanund Singh on the ground of their being illegal and was pending decision, that with a view to compromise the suit Jogmaya consented to relinquish the right which she had acquired under the deeds and a compromise had been effected through the intervention of the Commissioner of Bhagulpore to the effect that Jogmaya "shall get an allowance of Rs. 6,000 per annum during her lifetime, and her descendants who may under the Hindu law become her heirs shall get one-half thereof in perpetuity and in lieu of the same whatever profits the mouzahs which are held by the said Mussamat Jogmaya Dai under the deeds sought to be set aside may yield annually over and above Rs. 6,000 being fixed at the *junma* of those mouzahs, the said mouzahs shall be left in the possession of the said Jogmaya Dai and on the death of the said Dai one-half of the said mouzahs shall permanently remain in the possession of her descendants who may be alive at that time and be [her] heirs according to the *Shastras* on a *junma* equal to one-half of the said *junma*. The person holding possession of the property shall never have any right

to alienate, i.e., to effect any sale, gift or mortgage or permanent *mokurari* of the whole or a portion of the said properties." The Raja and his son in effecting the compromise granted the *pattah* of the two mouzahs to Jogmaya Dai on the conditions specified by cancelling the former deeds. The conditions specified are that Jogmaya Dai should remain in possession of the properties during her lifetime and pay to the lessors Rs. 1,234 the annual *junma* and on her death her descendants who might, according to the *Shastras*, become her heirs should permanently remain in possession of one-half of the properties and pay the annual *junma* of Rs. 617, that the lessee or her descendants should not have any power to transfer the property and if there should be no descendants of the lessee, i.e., children born of her womb or their children the lessors and their representatives should have power to resume and to take possession of the remaining one-half and the properties mentioned in the *pattah* should revert to the Raj.

On the same 27th June Jogmaya Dai executed a *kabuliyat* (counterpart) in which the terms of the compromise are stated to be substantially, though not in the same words, the same as in the *pattah*.

The facts upon which the question in this appeal arises are these: On the 3rd June 1883 Raja Lilanund Singh died. In June 1885 Jogmaya Dai mortgaged one of the mouzahs in the *pattah* called Duleri Alakjhari to Dharam Chand Lal since deceased, now represented by the Respondents his executors and two other persons whose interests were afterwards acquired by him. She also gave a lease

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for ten years of the mouzah to Dharam Chand Lal in the names of two of his servants. Jogmaya died on the 9th April 1889 and on the 22nd March 1892 notice was given to the mortgagees and the lessees for 10 years to quit possession of the mouzahs. On the 7th April 1893 a suit was brought by Padmanund Singh and two other sons of Lilanund Singh minors by their guardian against Dharam Chand Lal and the other mortgagees and lessees and also against Bholanund Jha otherwise Bholanath, the grandson of Jogmaya Dai, a minor, in which the plaintiff asked that it might be held that the Plaintiffs were not bound by the mortgage and lease and that they might be put in possession of a moiety of the property without prejudice to their right to resume the other moiety in the event of there being no lineal descendants of Jogmaya Dai. On the 4th August 1893 before the Defendants had filed any written statement of their defence the Plaintiffs having learnt that Bholanath Jha was born after the death of Jogmaya Dai and being advised that as he was not in existence at the time of granting the *pattah* the disposition of the property so far as it would apply to him was void according to Hindu law, applied to have the plaint amended so as to claim the whole of the mouzah which was allowed. No appearance was put in on behalf of Bholanath Jha.

Upon these facts the District Judge of Purneah made a decree in the Plaintiffs' favour for possession of the whole of the mouzah in dispute with mesne profits for three years. Dharam Chand Lal appealed from it to the High Court which modified it by decreeing that the Defendants

should deliver to the Plaintiffs possession of one-half only of the mouzah. The present appeal is from this decree and the question is whether the whole of the mouzah has under the terms of the *pattah* reverted to the Raj. Mr. Cowell who appeared for the Respondents did not dispute that Bholanath was by Hindu law incapable of taking under the *pattah*, not being then born, but he contended that the *pattah* might be construed as giving one-half of the mouzahs to Jogmaya Dai for life and the other half to her for an inheritable estate, referring in support of his contention to *Bhoolun Mohini Debia and another v. Hurriah Chunder Chowdry* (1). That case is distinguishable from the present as no previous life-estate was given to the person who was held to take an absolute estate and there were no words against alienation. If Jogmaya Dai took an estate of inheritance in that half the restriction in the *pattah* of the power to alienate would be repugnant or an attempt to take away the power which the law attaches to that estate. Jogmaya Dai could in that case at any time have disposed of that half by deed or by Will. It was plainly not intended that she should have that power. According to the ordinary meaning of the words the gift of the half is a specific one to her descendants to take effect on her death.

In the appeal to the High Court Dharam Chand Lal was the only Appellant and the question between him and the present Appellants (then Respondents) was whether the death of Jogmaya Dai had put an end to the mortgage and accompanying lease and the Appellants

(1) L. R. 5 I. A. 133 (1878).

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had thereby become entitled to the whole of the mouzahs. With regard to the meaning of the *pattah* the Judges of the High Court only say it was agreed that Jogmaya Dai should remain on the property during her life on the annual *jumma* of Rs. 1,234, and that on her death her descendants would remain in possession of one-half of the property permanently on an annual *jumma* of Rs. 617 and the other half should revert to the Raj. They then refer to the mortgage and subsequent proceedings setting out at full length an order of 10th Bysack, 1297 (1890), issued by the Appellants to the Patwari the purport of which is that one-half of the mouzah had on Jogmaya's death become fit to be resumed and her direct heirs, i.e., the children of her womb, ought, according to the *pattah*, to hold possession of the other half and they say that the Plaintiffs had only revoked that portion of the lease to the lady which dealt with one-half of the property and they treated the then descendant of the lady as the owner of the other half whom they had as far as they could put in possession. The Judges further say that "the Respondents (present Appellants) did not nor could they, we think, deny that Bholanath had not in terms of the agreement an equity against the Plaintiffs to carry out the agreement," and they were of opinion that he had a right to specific performance of the agreement and to compel the Plaintiff to give him a legal title. Their Lordships have some difficulty in following or understanding the observation of the learned Judges. They can only say that they do not agree with it and indeed they think the idea that

Bholanath had any such equity is altogether erroneous. There was no ground for modifying the decree of the District Judge and their Lordships will humbly advise His Majesty to affirm it and to reverse the decree of the High Court ordering instead of it that the appeal to it be dismissed with costs. The Respondents will pay the costs of this appeal.

Solicitors: Messrs. T. L. Wilson & Co. for the Appellants.

Solicitors: Messrs. Gordon, Dalbiac and Pugh for the Respondents.

C. W. A. Appeal allowed with costs.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUITS NOS. 416 OF 1888 AND 45 OF 1889.

HARRINGTON, J.	{	SM. NOBIN KALLY DABEE
1901.		v.
21, March.		AMBICA CHURN BANERJEE
		and other causes.

*Arbitration—Award, application to set aside—Limitation Act (XV of 1877), Sch. II, Art. 158—Time from when limitation begins to run—Civil Procedure Code (Act XIV of 1882), sec. 516.*

*An application to set aside an award must be made within ten days from the time the award arrives at the Registrar's office for the purpose of being filed, and not from the time when it is filed.*

This was an application by the Plaintiff for judgment in terms of the award made by the arbitrators. The Defendant on the other hand applied to have the award set aside. The principal question raised was whether the Defendant's application was within time.

The award was transmitted to the Registrar by the arbitrators on the 22nd

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January. On the 30th January the award was filed, and on the 31st the Defendants applied for a copy of the award which they obtained on the 15th February. On the 20th February the Defendant gave notice of objection to the award and on the 22nd he filed his grounds of objection.

*Mr. Pugh* and *Mr. Mittra* for the Plaintiffs in some of the causes.

*Mr. Garth* and *Mr. Sinha* for the Defendants.

Nobin Kally Dabee was not represented by Counsel.

THE JUDGMENT OF THE COURT was as follows :—

HARINGTON, J.—This is an application by the Plaintiff for judgment in accordance with the terms of the award made by arbitrators. It is opposed by the Defendant who seeks to have the award set aside. The Plaintiff objects that the Defendant's application to set aside the award is barred by the Limitation Act which provides that an application of this nature shall be made within ten days from the submission of the award to the Court.

The material dates are these :—January 22nd on which the award was transmitted to the Registrar for the purpose of being filed.

January 30th when it was actually filed. January 31st when application was made by the Defendant for a copy of the award. February 15th when the copy was given. February 20th when notice of objection was given by the Defendant. February 22nd when the Defendant filed his objections.

For the purpose of this argument I will assume in favour of the Defendant that his application is to be taken as made on the earliest date he took any steps to dispute the award, that is, the 20th February, 29 days after the award was transmitted to the Registrar and 20 days after the award was filed.

Deducting from this period the 15 days which elapsed between the application for a copy of the award and the delivery of that copy to the Defendant, a period of 14 days is left if the time is to be reckoned from the transmission of the award to the Registrar: 5 days only if time is to be reckoned from the filing of the award.

The question therefore whether the Defendant is in time depends on whether the time is to be reckoned from the transmission to the Registrar, or from the actual filing of the award.

Art. 158 of the Limitation Act of 1877 provides that the 10 days limitation is to run, in cases of applications to set aside an award under the Code of Civil Procedure, from the period when the award is submitted to the Court. Sec. 516 of the Code of Civil Procedure provides :—

“When an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.”

It is to be observed that that section says nothing whatever about submitting an award to the Court, and the result of the language of the section is to make the meaning of the Legislature ambiguous;



SM. NOBIN KALLY DABER P. AMBICA CHURN BANERJEE.

consequently it becomes necessary to refer to the older Acts for the purpose of seeing what the law was when the Civil Procedure Code of 1882 was passed. The section, in the earlier Act of 1859 which corresponds to sec. 516 of the present Code, is in these terms :—"When an award in a suit shall be made, either by the arbitrator or arbitrators, or by the umpire, it shall be submitted to the Court under the signature of the person or persons by whom it may be made, together with all the proceedings, depositions, and exhibits in the suit."

That being the section which provided what the arbitrators were to do on completion of the award, there was passed the Limitation Act of 1871 and by Art. 155 of that Act it was provided that an application to set aside an award, under the Code, was to be made within 10 days from the time when the award was submitted to the Court, and notice of the submission had been given to the persons and in manner prescribed by the High Court.

Under the law as it stood previous to the passing of the Code in 1882 the time from which the 10 days had to be reckoned, depended upon the completion of the award by the arbitrators, their submitting it to the Court and the Court giving notice, and was independent of any act of the parties themselves.

That being the state of things, the present Limitation Act was passed in the same terms as the earlier Act except that all reference to notice being given to the parties is omitted.

Then comes the present sec. 516 of the Code which has altered the language of sec. 320 of the older Act. Was such

an alteration intended to alter the law as to the period from which time was to run?

I do not think there was any such intention and in my opinion the time must be reckoned from the arrival of the award in the Registrar's office for the purpose of being filed and not from the time when it is actually placed on the files of the Court.

In other words it must run from the time the arbitrators have completed their duty, and not from the time the parties have paid the fees necessary for placing the award on the files of the Court. I may observe that the notice issued from the Court to the parties states that the award has been submitted to the Court.

In my opinion that notice is correct. The transmission of the award to the Registrar's office for the purpose of being filed is equivalent to the submission to the Court under the earlier Act: the time therefore must run from that period.

The result is, that the Defendant is out of time, and the Plaintiff's objection to the Defendant's application must prevail.

*Mr. Mitter.*—Then the Court will confirm the award and pass judgment and decree in terms of the award.

THE COURT.—Yes.

*Mr. Pugh.*—And this application to set aside the award will be dismissed with costs.

THE COURT.—Be it so.

*Mr. H. C. Ghose* and *Mr. B. N. Bose*, Attorneys for the different Plaintiffs.

*Mr. S. C. Mitter*, *Mr. N. C. Bose* and *Mr. O. C. Gangooly*, Attorneys for the Defendants.

S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 1740 OF 1898.

SHAMA PROSAD GHOSE

MACLEAN, C. J. Plaintiff, Appellant,  
BANERJEE, J.

1901. TAKI MULLIK and ors.,

29, June. Defendants,  
Respondents.

*Civil Procedure Code (Act XIV of 1882), secs. 39, 560—Rehearing of appeal, heard ex parte—Limitation—Amendment—Landlord and tenant—Landlord bound to put tenant into possession—Vakalatnama, acceptance of, in writing by pleader not necessary.*

*An application for rehearing of an appeal presented originally within the period of limitation but returned for amendment and presented after amendment after the period of limitation, cannot be rejected as being out of time.*

*A landlord is bound to put the tenant into possession of the land let to him and unless and until he does this he is not entitled to the rent.*

HURISH CHUNDER KOONDOL v. MOHINEE MOHUN MITTER (1) referred to.

*Per BANERJEE, J.—The appointment of a pleader must be in writing and filed in Court, but his acceptance of the vakalatnama need not be in writing.*

This was an appeal preferred on the 25th of August 1898, against the decree of Babu Balloram Mullick, Subordinate Judge, 1st Court of Zillah 24-Pergunnahs, dated the 16th of May 1898, modifying the decree of Babu Mohini Mohun Dutt, Munsif, 3rd Court of Diamond Harbour, dated the 7th of September 1897.

This appeal arose out of a suit for recovery of arrears of rent of a *jumma*

alleged to be 11½ bighas in area and to bear a yearly rental of Rs. 48-14 annas on a registered *kabuliyat*, the arrears claimed being in respect of the years 1300 to 1303, B. S. There was a prayer for ejectment of the Defendants for non-payment of rent. The defence was that out of 11½ bighas of land 2 bighas were in possession of another person, that out of the remaining 9½ bighas, 4 bighas were not fit for cultivation and that the Plaintiff had contracted to bear the expenses of bringing the land into cultivation but had not performed the contract and could not therefore get the rent of this land.

They also pleaded payment and contested their liability to ejectment. The material portion of the *kabuliyat* was as follows :—

“We promise by executing this *kabuliyat* that we will pay the whole amount of the said rent from Kartik to Falgun. Out of 11½ bighas of the said land 7½ bighas have been cleared at your expense and about 4 bighas have been found unfit for our use. That whatever cost will be required for clearing the said 4 bighas we shall receive from you and clear the whole plot within 3 months from this date. If after receiving the expenses from you, we do not bring the whole land under cultivation within 3 years and do not pay rent regularly, you will be able to eject us at once from our *jote* and enter into *khas* possession, when we shall raise no objection. If the whole land be brought under cultivation within the six years' time, you have agreed to confirm us at the expiration of the term in our *jote* by making a second settlement at full rate at a reduction of annas eight per bigha at *mathan* rate in the vicinity of the said land. After

SHAMA PROSAD GHOSE v. TAKI MULLIK.

making settlement on the said conditions we will execute *kabuliyat* in your favour, if we do not do so, you shall be able to let out to other tenants or bring it under your *khas* possession, when we or our heirs will be debarred from raising any objection."

The first Court found that the 2 bighas of land, as alleged by the Defendants, were in possession of another person but that the Defendant was not liable for the rent of 4 bighas inasmuch as Plaintiff failed to prove his advance of money or the reclamation of the land by him. The first Court therefore gave a decree for rent for  $7\frac{1}{2}$  bighas of land. Against this decision Plaintiff filed an appeal and Defendant filed a cross appeal. Plaintiff's appeal was decided *ex parte* and a decree was made on the 18th March 1898. An application to set aside the *ex parte* decree was made by the Defendant on the 23rd April 1898. It was returned for amendment and the order passed was as follows:—

The application is bad in law. It does not bear the signature of the applicant. It is true it has been filed by a pleader but he never accepted a *vakalatnama* and none is filed in this proceeding.

Ordered:—That the application be returned for amendment and re-presentation within a week with costs Rs. 4.

The application which had been returned for amendment was presented again after amendment long after the period of limitation. The lower Appellate Court was of opinion that for the purposes of limitation an amended application could be taken to have been filed on the date of the original application. On rehearing the appeal was dismissed

but the cross appeal was allowed. Plaintiff preferred this second appeal.

Dr. Ashutosh Mukerjee for the Appellant.

Babu Shyama Prosunno Majumdar for the Respondent.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—This is a rent-suit. Three points have been raised on the appeal before us. The first point is that the learned Subordinate Judge ought not to have heard the appeal *de novo* at the instance of the Respondent, against whom an *ex parte* decree had been already passed: in other words, that he ought not to have allowed the matter to be re-opened. I, however, think, that the Subordinate Judge was right in acting as he did. The point made by the present Appellant is, that the application for a retrial was out of time; and that, being out of time, the Court could not and ought not to have entertained it. But was it out of time? The *ex parte* decree was made on the 18th of March 1898, and the application to set it aside was made on the 28th of the same month, so that it was clearly within time, if the application were good in itself. The application was not rejected, it was returned for amendment and re-presentation, and we are told that the Court directed it to be served on the other side, and that it was in fact so served. Though irregular in certain details, the Court did not reject it, but directed its amendment. Under these circumstances it would be difficult to say that the application was out of time. The first ground of appeal then fails.

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I now pass to the second point, viz., whether the tenant is bound to pay rent for the two bighas of land of which the landlord never put him into possession, and of which he has never got possession. I think the contention of the Respondent must prevail. The landlord is bound to do something more than merely sign the lease, and then say he is entitled to the rent. He is bound to put the tenant into possession of the land let to him and, unless and until he does this he is not entitled to the rent.

The last point relates to the rent of 4 bighas, the contention of the Appellant being that, under the lease, the tenant is bound to pay the rent for these bighas, whether the landlord had or had not found the money necessary to reclaim them, which he contracted to do. The tenant says he is not bound to pay this rent until the land has been reclaimed and that the reclamation of the land, at the landlord's expense was a condition precedent to the payment of the rent. This question turns upon the construction of the lease, and, I think, the Appellant's view is the sound one. There is a clear contract on the part of the tenants to pay Rs. 48-14-0 annually to the Plaintiff, and to my mind this covenant is not in any way qualified by any after part of the lease.

It is true the landlord was to provide the funds for the reclamation of the 4 bighas, and the tenant was to reclaim them within three years from the date of the lease. But there is nothing to indicate that the tenant was only to pay the rent after the land had been reclaimed. If this is what parties to this class of contract mean, they generally say

so. On this part of the case the Appellant must succeed.

The result, then, is that the decree of the lower Appellate Court must be varied by directing the Respondent to pay the rent due in respect of the 4 bighas; and in other respects the appeal will be dismissed. As the victory is divided each party will pay his own costs of the appeal.

BANERJEE, J.—I am of the same opinion. I only wish to add, with reference to the first point urged before us on behalf of the Appellant, that I do not think that the application for a rehearing under sec. 560 of the Code of Civil Procedure, which was returned for amendment, was bad in law by reason of the pleader by whom it was filed not having accepted the *vakalatnama* authorising him to act for the Respondent. The law, sec. 39 of the Code of Civil Procedure, no doubt requires that the appointment of a pleader should be in writing and shall be filed in Court, but it does not require that the acceptance of a *vakalatnama* by a pleader must be in writing. It is true that the practice has been for a pleader to signify his acceptance of a *vakalatnama* in writing; but the absence of acceptance in writing cannot be said to vitiate the authority to act, if the pleader is authorized by the *vakalatnama* filed in Court to act for a party. And with reference to the second point, I would add, that the view we take that the mere execution of a *kabuliyat* is not sufficient to entitle the landlord to demand rent from the tenant, but the landlord must show that he put the tenant in possession, is in accordance with that

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taken in the case of *Hurish Chunder Koondoo v. Mohinee Mohun Mitter* (1).

*Appeal dismissed.*

S. C. S.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 95 OF 1900.

GOVIND PRASAD PANDAY,

PRINSEP, J.

Petitioner,

STANLEY, J.

1900.

THE EMPRESS, on the

27, March.

prosecution of G. L.

Garth, Opposite Party.

*Penal Code (Act XLV of 1860), secs. 471, 499, 500—Defamation—Dishonestly using a forged document, charge for—Conviction for defamation when no charge framed for such an offence—Irregularity—Prejudice—Criminal Procedure Code (Act V of 1898), secs. 232, 423 (b) 423 (2)—New trial, power of Appellate Court to order—Stay of further proceedings.*

*To constitute an offence of defamation it is not necessary that there should be evidence to shew that the complainant has been injuriously affected by such alleged defamation; it is sufficient that there should be an intent that the person who makes or publishes any imputation should do so intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person.*

*Under sec. 232 of the Criminal Procedure Code the Appellate Court has power to order a new trial of a case in making an order on appeal.*

*Quere—Whether an Appellate Court has power under sec. 423 (b) to order a new trial.*

This was a rule granted on the 29th January 1900, against the order of the Joint Magistrate of Dacca, affirmed on appeal by the Sessions Judge of Dacca.

The facts of the case material to this report were these:—A complaint was lodged by Mr. G. L. Garth before the Magistrate of offences under secs. 499 and 471, I. P. Code, *i.e.*, of defamation and of dishonestly using as genuine a forged document, against the Petitioner Gobinda Pershad Pandey. The alleged forgery consisted in affixing a false signature to a letter on which the charge of defamation proceeded. At the trial the evidence was principally directed to the charge under sec. 471, I. P. Code, but at the close of the trial, the Magistrate convicted the accused of defamation, although there was no charge of that offence before him.

On appeal, the Sessions Judge of Dacca found fault with the proceedings of the Magistrate and after considering the irregularity in the trial from the absence of any charge of defamation, he held that it had seriously prejudiced the accused and had in fact resulted in a failure of justice. He further found that there was no evidence to shew that the complainant had been injuriously affected by such alleged defamation and that the evidence on the record was not sufficient to establish that offence. He thereupon held under sec. 423 (b) of the Code of Criminal Procedure that he had authority to order a new trial and passed an order accordingly.

Thereupon the Petitioner obtained the present rule, and on his behalf it was contended that the Appellate Court had no general power under sec. 423 (b), Cr.

## GOVIND PRASAD PANDAY v. THE EMPRESS.

P. C., to order a new trial, that when that Court found that the evidence was not sufficient to establish the offence, it ought to have acquitted the accused, and lastly that this Court should stay further proceedings in the matter, as no valid charge could be preferred against the accused.

*Mr. P. L. Roy*, with *Babu Dwarka Nath Mitter*, for the Petitioner.

*Mr. C. R. Das*, with *Babu Ganendra Mohun Das*, for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

The Magistrate had before him a complaint of defamation as well as of dishonestly using a forged document under sec. 471, I. P. C. The alleged forgery consisted in affixing a false signature to a letter on which the charge of defamation proceeded. At the trial, the evidence was no doubt principally directed to the charge under sec. 471, and it appears that, at the close of the trial, the Magistrate suddenly turned round and convicted the accused of defamation, having no charge before him of that offence. On appeal the Sessions Judge very properly found fault with such proceedings. He seems, however, to have followed the Magistrate into an error regarding the evidence necessary to prove the offence of defamation, for he points out that there is no evidence to show that the complainant has been injuriously affected by such alleged defamation. That, however, is not necessary to constitute an offence of defamation, as defined in sec. 499, I. P. C. The law requires merely that there should be an intent, that the person who

makes or publishes any imputation should do so intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person. The Sessions Judge, after considering the irregularity in the trial from the absence of any charge, seems to have held that it seriously prejudiced the accused so as to have in fact occasioned a failure of justice and he also seems to have considered that the evidence on the record was not sufficient to establish that offence. He thereupon under sec. 423 (b), Cr. P. C., held that he had authority to order a new trial and he accordingly passed an order to that effect. We are inclined to think that sec. 232, Cr. P. C., applies to this case rather than sec. 423. It may be doubted, but on this point we express no opinion, whether an Appellate Court has under sec. 423 (b) general power to order a new trial. In our opinion, sec. 232 applies completely to the present case and we think that under it the Sessions Judge was competent to direct a new trial. But it remains for us, on this rule, to consider whether, under sec. 232 (2), we should not order further proceedings to be stayed, because we are not shown that any valid charge could be preferred against the accused. We have heard the letter in which the defamation is alleged to be contained and we cannot find that there is anything which can reasonably be held to amount to such an offence. We, therefore, direct that further proceedings be stayed.

*Rule made absolute ;*

*further proceedings stayed.*

H. P. C.

## - [CIVIL REVISIONAL JURISDICTION.]

RULE No. 2780 OF 1900.

MACLEAN, C. J. )  
 BANERJEE, J. ) PARESH NATH SINGHA  
 AMEER ALI, J. ) and anr., Petitioners,  
 RAMPINI, J. )  
 PRATT, J. ) NOBOGOPAL CHATTO-  
 1901. ) PADHYA and ors.,  
 31, July. ) Opposite Parties.

*Civil Procedure Code (Act XIV of 1882), sec. 310A—Bengal Tenancy Act (VIII of 1885), sec. 174—Mortgagee of a tenure or holding—Sale in execution of decree for arrears of rent—Right of such mortgagee to set aside such sale under sec. 310A, Civil Procedure Code—Benamidar, right of, to apply under sec. 310A, Civil Procedure Code—Simple mortgage—Mortgage by conditional sale—Interest of mortgagee of immoveable property, if itself immoveable property—Order setting aside sale under sec. 310A, effect of, on the rights of the parties—Sec. 310A, Civil Procedure Code, scope of—General Clauses Act (I of 1863), sec. 2, cl. 5.*

THE FULL BENCH (RAMPINI, J., dissenting).—A mortgagee, whether by a simple mortgage or a mortgage by conditional sale, of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it, is a "person whose immoveable property has been sold" within the meaning of sec. 310A, Civil Procedure Code, and is entitled to make an application under that section.

HAMIDUL HUQ v. MATANGINI DAS, (1) approved.

NITYANANDA PATRA v. HIRA LAL KAR-MOKAR (2) overruled.

A benamidar of a person whose immoveable property has been sold has a right to apply under sec. 310A.

BASI PODDAR v. RAM KRISHNA PODDAR (7) approved.

Per BANERJEE AND PRATT, JJ.—The interest which a mortgagee has in immoveable property is itself immoveable property.

Per RAMPINI, J. (contra).—A mortgagee is only the owner of an interest in immoveable property and such interest is not an immoveable property.

DEBENDRA KUMAR MANDEL v. RUP LALL DASS (10) referred to.

Per BANERJEE, J.—Whether a mortgagee can apply under sec. 310A, Civil Procedure Code, depends upon the nature, not of the mortgage, but of the execution sale. The mortgagee is entitled to apply if the sale is free from the mortgage, but not if it is subject to the mortgage.

An order under sec. 310A setting aside a sale does not determine any question as to the relative rights of the parties to the property sold. Those rights remain as they were before.

Per AMEER ALI, J.—The words "any person whose immoveable property is sold" in sec. 310A include every person who has an interest in the property in question, whether qualified, partial or absolute.

This case arose out of an application by the Petitioners under sec. 310A, Civil Procedure Code, for setting aside a sale of a tenure or holding sold under the Bengal Tenancy Act under the following circumstances. On the 13th June 1899, a holding or *jama* belonging to one Prosunno Kumar Singh was sold in execution of a decree for arrears of rent due in respect of it and was purchased by the opposite parties to this rule. On the 10th July, that is, within the time fixed

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(7) 1 C. W. N. 185 (1896).

(10) I. L. R. 12 Cal. 546 (1886).

## PARESH NATH SINGHA v. NOBOGOPAL CHATTOPADHYA.

by law, the present Petitioners deposited the amount due under the decree with costs and a sum equal to five per cent. of the purchase-money under sec. 174 of the Bengal Tenancy Act read with sec. 310A, Civil Procedure Code, and applied under those sections to have the sale set aside. They alleged that they had a simple mortgage over the holding sold. The lower Court refused the application on the ground that there was no evidence of the consideration for the alleged mortgage having passed and that the mortgage was accordingly a mere *benami* transaction. The Petitioners thereupon moved the High Court and obtained a rule calling upon the auction-purchasers (the opposite parties) to show cause why the order of the Munsif should not be set aside.

Upon the rule coming on for hearing before Maclean, C. J., and Banerjee, J., their Lordships on the 8th March 1901 referred the matter to the Full Bench with the following order of reference:—

“One of the questions arising in this rule is, whether a mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it, is entitled to make an application under sec. 310A of the Code of Civil Procedure as being a ‘person whose immoveable property has been sold’ within the meaning of that section.

“Upon that question there is, we think, a conflict between the cases of *Hamidul Huq v. Matangini Dasi* (1) and *Nityananda Patra v. Hira Lal Karmokar* (2). In our opinion it makes no difference whether the mortgage is a simple mort-

gage or is one by conditional sale, the real point for consideration being, whether the mortgagee is a person whose immoveable property has been sold, within the meaning of the section.

“There being this conflict of decisions, the question stated above must be referred for determination to a Full Bench; and as the question arises in a rule the whole rule must be so referred.”

*Babu Dwarka Nath Chakravarty* for the Petitioners.

I submit that the question referred by the Full Bench does properly arise. The objection to the reference is that upon the findings the applicant is a *benamidar* but it has been held that the *benamidar* has a right to make an application under sec. 311. See *Basi Poddar v. Ram Krishna Poddar* (7). Then the question referred by the Full Bench, namely, whether a person who holds a simple mortgage is, within the meaning of sec. 310A, a person whose immoveable property has been sold, arises for determination in this rule. The case of *Hamidul Huq v. Matangini Dasi* (1), when the judgment of the case is examined, shows that a simple mortgagee is competent under sec. 310A to apply and is therefore directly in point and supports my contention, but on the other hand the case of *Nityananda Patra v. Hira Lal Karmokar* (2) is also directly in point and is against my contention. The question is which of these two cases was rightly decided.

In this case a holding upon which the applicant holds a simple mortgage was sold for arrears of rent. The mortgagee

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(7) 1 C. W. N. 135 (1896).



PARESH NATH SINGHA v. NOBOGOPAL CHATTOPADHYA.

applied to set aside the sale under sec. 310A, which in this respect is the same as sec. 311, C. P. C. ; and provides that "any person whose immoveable property has been sold" may apply to set aside the sale. Is the applicant a person whose immoveable property has been sold. I submit he is. Sec. 58, Transfer of Property Act, defines a mortgage.

Therefore the mortgagee whether he holds a simple or other mortgage is a transferee of "some interest in immoveable property." Upon this two questions arise for consideration. First, is the interest in immoveable property which is transferred to the mortgagee in itself an immoveable property ; secondly, was the immoveable property sold by the sale in question.

As to the first question : Is such an interest in immoveable property itself immoveable property ? The Transfer of Property Act does not define what an immoveable property is, but sec. 6 shews indirectly that the word is not confined to the entire interest in some specific immoveable property. Sec. 2, cl. (5) of Act I of 1868, the General Clauses Act which governs the interpretation of sec. 310A includes in the term immoveable property "benefits to arise out of land." After an immoveable property is mortgaged, both the mortgagee and the mortgagor have an interest in it, on the other hand the bundle of rights called ownership belongs to the two. As one increases the other diminishes, sometimes, the mortgagor's interest vanishes altogether in value. The Allahabad High Court has gone so far as to say that the equity of redemption of the mortgagor is not property, see *Mata Din*

v. *Kazim* (12). See also *Kantiram v. Kutubuddin* (13). The decision in *Nityananda Patra's* case is based upon a differentiation of the rights of a simple mortgagee and a mortgagee with possession.

The definition in sec. 58, Transfer of Property Act, makes no distinction in the interest of a simple mortgagee and other mortgagees and there is none in principle. It has been held so in *Rakhal Chunder Bose v. Dwarka Nath Misser* (3). The unreported judgment in Rule No. 770 of 1900 and the case of *Srinivasa v. Ayyathorai* (4) are in support of my contention.

Sec. 310A does not limit the right of application to the owner in the popular sense of the word as the judgment in that case indicates. \*

As to the second question—whether the interest of the mortgagee has been sold, the purchaser has the right to annul the mortgage ; therefore the interest of the mortgagee has been legally affected thereby and in such a case it has been observed by Sir Comer Petheram in the case of *Asmutunnissa v. Ashruff Ali* (5) that the person so affected is a person whose immoveable property has been sold. As all the requirements of sec. 310A have admittedly been complied with, I submit the sale should be set aside.

*Babu Nalini Ranjan Chatterjee* for the Opposite Party.

I submit a simple mortgagee's interest is not immoveable property. He has got a mere right to sell the property for a debt, see Macpherson on Mortgage,

(3) I. L. R. 13 Cal. 316 (1886).

(4) I. L. R. 21 Mad. 416 (1897).

(5) I. L. R. 15 Cal. 488 (1888).

(12) I. L. R. 13 All. 482, 474 (1891).

(13) I. L. R. 22 Cal. 33 (1894).

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p. 270. In the case of *Sri Raja Papamma v. Sri Vira Pratapa* (6), the Privy Council observed that in a simple mortgage "there is no transfer of ownership." I rely upon the observations of Pigot, J., in the case of *Fadu Jhala v. Gour Mohun Jhala* (11), in which the distinction between immoveable property and an interest in immoveable property has been recognised. Sec. 16, C. P. Code, also observes this distinction. The lien of a simple mortgagee has been held not to be immoveable property within the meaning of sec. 274, C. P. C., see *Debendra Kumar Mandel v. Rup Lall Dass* (10); see also *Kasi Nath v. Sada Siv* (14). The mortgagee is not the owner of the property and therefore his immoveable property has not been sold. The purchaser has bought the holding and he has a right to annul incumbrances which he may or may not exercise and until then the mortgagee's interest is not affected. I further submit that the finding by the Munsif is that no consideration from the mortgage was paid and therefore the applicant acquired no interest. In this case the mortgagor made an application opposing the application of the so-called mortgagee. The case of *Hamidul Huq v. Matangini* (1) is altogether different because in that case the *benamidar* made the application for the real owner. The rule should therefore be discharged with costs.

*Babu Dwarka Nath Chakravarty* in reply.

The observation of the Judicial Com-

(1) 2 C. W. N. cclviii (1898).

(6) I. L. R. 19 Mad. 249 (1896).

(10) I. L. R. 12 Cal. 546 at p. 550 (1886).

(11) I. L. R. 19 Cal. 544 at p. 562 (1892).

(14) I. L. R. 20 Cal. 805 (1893).

mittee of the Privy Council in *Sri Raja Papamma v. Sri Raja Vira Pratapa* (6) refers to the peculiar circumstances before them and does not relate to the question arising for decision here.

Their LORDSHIPS' JUDGMENTS were as follows :—

MACLEAN, C. J.—The question submitted to us, which arises upon the present rule is, "whether a mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it, is entitled to make an application under sec. 310A of the Code of Civil Procedure, as 'being a person whose immoveable property has been sold' within the meaning of that section." The reference has been made owing to a conflict between the cases of *Hamidul Huq v. Matangini Dasi* (1) and *Nityananda Patra v. Hira Lal Karmokar* (2). It is clear that, in a sale under these circumstances, the mortgagee, unless he can come in under sec. 310A, runs a very serious risk of losing the benefit of his security, as the auction-purchaser is entitled to annul it. Here the mortgage was a simple mortgage, and, under sec. 58 of the Transfer of Property Act, "a mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money." That the mortgagee has or at least may have a very substantial interest in the tenure sold is obvious, for if the tenure were mortgaged up to its full value, the whole interest would virtually be his. A mortgagor, whose tenure has been mortgaged up to the

(1) 2 C. W. N. cclviii (1898)

(2) 5 C. W. N. 63 (1900).

(6) I. L. R. 19 Mad. 249 (1896)

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hilt, would have no interest in defending the suit, or resisting the sale, and if the mortgagee cannot intervene, his security would probably be lost. Nor, on the other hand, is the auction-purchaser or the decree-holder in any wise prejudiced by the deposit being made by the mortgagee, for it can make no difference to either of them whether it is made by the mortgagor or by the mortgagee. These considerations lead me to think that the language of the section ought to be liberally construed.

The opposite party is reduced to the position that the words in question refer to the judgment-debtor alone. This can hardly be so, for, if this had been intended, it is difficult to suppose that the Legislature would not have used the expression the judgment-debtor instead of the wider and more general expression which we find in the section. And if persons other than the judgment-debtor are included in the language "any person whose immoveable property has been sold," it is not very reasonable to say that the mortgagee of the tenure sold in execution of a decree for arrears of rent does not come within the category. If it apply to persons other than the judgment-debtor, but not to a mortgagee of the tenure, we have not been told to whom the words can apply. A simple mortgagee, as in the case here, has undoubtedly an interest in the tenure sold: to the extent of that interest it may fairly be said within the meaning of the section that it is his immoveable property which has been sold. Do the words of the section compel us to say that it is only the owner of the whole interest in the pro-

perty sold who can apply under it? I think not. Apart from authority, I should have been prepared to hold that such a mortgagee, as we find in the present case, is entitled in a sale such as the present to apply under sec. 310A.

I will refer briefly to the authorities. In *Rakhul Chunder Bose v. Dwarka Nath Misser* (3) the mortgagee was held entitled to apply under sec. 311 of the Code, the language of which is identical, on this point, with sec. 310A. There, no doubt, the mortgagee had obtained a decree for foreclosure, but as it had not been made absolute, at the time of the application under sec. 311, I do not think that circumstance can, in principle, differentiate the case from the present. In the case of *Hamidul Huq v. Matangini Dasi* (1), it was expressly decided that the mortgagee could apply, and the same view was held in Rule No. 770 of 1900, decided on the 27th July 1900, but unreported. In the case of *Srinivasa Ayyangar v. Ayyathorai Pillai* (4), a similar view was held. On the other hand reliance is placed upon the case referred to in the reference, and reported in 5 C. W. N. 63. This is a clear decision the other way and opposed to the mortgagee being allowed to apply. That is the only decision precisely in point in support of the opposite party's view. The case of *Asmutunnissa Begum v. Ashruff Ali* (5) was not a case under sec. 310A, nor did it deal with the precise point now under discussion. There the applicant ought perhaps to have applied, and could have

(1) 2 C. W. N. cclviii (1898).

(3) I. L. R. 13 Cal. 346 (1886).

(4) I. L. R. 21 Mad. 416 (1897).

(5) I. L. R. 15 Cal. 488 (1888).

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got the relief she sought, under the claim sections of the Code (sec. 278 *et seq.*). Here the mortgagee has no remedy save under sec. 310A. Cases have been cited to show that a simple mortgagee is not the owner of the mortgaged property, and that the words in sec. 310A mean and apply to the owner only. Reliance has been placed upon certain observations in the Privy Council case of *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Rama Chandra Rau* (6), especially upon that where their Lordships say 'that in such a mortgage (*i.e.*, a simple mortgage) there is no transfer of ownership' (p. 252), an observation which must be read, I think, in connection with the particular point then under discussion, and in a case to which the provisions of the Transfer of Property Act had no application. It is again unreasonable to suppose that if the Legislature intended to confine the right of application to the owner and to the owner alone, it should not have said so in so many words. On the best consideration I can give to the question, it ought, in my opinion, to be answered in the affirmative. As the whole rule is before us it must be made absolute with costs here, and before the Division Bench—for if the mortgage were *benami* the *benami-dar* could apply under the section: see *Basi Poddar v. Ram Krishna Poddar* (7); if it was not *benami* then the mortgagee could apply. I desire to make it clear that my observations apply only to the case of such a sale as we have here, *viz.*, the sale of a mortgaged tenure under the Rent Law. If it had been

merely the sale of the equity of redemption, different considerations would obviously apply. We assess the hearing fee for both Courts at three gold mohurs.

BANERJEE, J.—This case arises out of an application by the Petitioners under sec. 310A of the Code of Civil Procedure, for setting aside the sale of a tenure or holding under the Bengal Tenancy Act. The Petitioners claimed to be simple mortgagees of the property sold. The Court below, finding that the mortgage was a *benami* transaction, rejected the application; the Petitioners then moved this Court and obtained a rule calling upon the opposite party to show cause why the order of the lower Court should not be set aside or such other order made as to this Court might seem fit. At the hearing of the rule the learned vakil for the Petitioners contended that even if they were *benamidars* for the judgment-debtor, their application ought to have been granted, and the Court below in rejecting it had really failed to exercise a jurisdiction vested in it by law, so as to bring the case under sec. 622 of the Code of Civil Procedure; and in support of this contention *Basi Poddar v. Ram Krishna Poddar* (7) was cited. On the other hand it was argued for the opposite party that the order of the Court below rejecting the application was right, not only for the reasons stated in the order, but also for the further reason that the Petitioners, who were on the face of their application only simple mortgagees of the property sold, were, according to the decision in *Nityananda Patra v. Hira Lal Karmakar* (2) incomp-

(6) 1 L. R. 19 Mad. 249 (1896).

(7) 1 C. W. N. 135 (1896).

(2) 5 C. W. N. 63 (1900).

(7) 1 C. W. N. 135 (1896).

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petent to apply under sec. 310A of the Code. In answer to the latter branch of this argument the Petitioners relied upon the case of *Hamidul Huq v. Matangini Dassi* (1). There being a conflict between the two cases just referred to, on the question whether a mortgagee of immoveable property can apply under sec. 310A of the Code of Civil Procedure for setting aside a sale of the same, the case has been referred to a Full Bench.

It is, as it must be, conceded that according to the authorities, *Janardhan Ganguli v. Kali Kristo Thakur* (8) and *Bungshidhar Halder v. Kedar Nath Mondal* (9), sec. 310A applies to sales under the Bengal Tenancy Act. I am further of opinion, that accepting the finding of the Court below that the mortgage is a *benami* transaction, the Petitioners, according to the principle of the decision in *Basi Poddar v. Ram Krishna Poddar* (7), the correctness of which I see no reason to doubt, were competent to apply under sec. 310A of the Code. That being so, and there being no dispute as to the sufficiency of the deposit or as to its having been made within the time allowed by law, the case turns upon the determination of the question, whether the Court below was bound to reject the application without enquiry, on the ground that the Petitioners on the face of their application were only simple mortgagees of the property sold, and as such incompetent to apply under sec. 310A.

The answer to that question must depend upon the construction of sec. 310A. That section provides that "any person whose immoveable property has been sold" under Chapter XIX of the Code, may, within a limited time, apply to the Court for setting aside the sale. Is a simple mortgagee of a tenure or holding then a person of whom it can be said that his immoveable property has been sold at a sale of the tenure or holding for arrears of rent? I am of opinion that the question should be answered in the affirmative. For immoveable property as defined in sec. 2, clause (j) of Act I of 1868, the General Clauses Act in force when sec. 310A of the Code was enacted, includes benefits to arise out of land; and a mortgage of any kind including a simple mortgage, is, according to sec. 58 of the Transfer of Property Act, the transfer of an interest in specific immoveable property. So that the interest of a simple mortgagee in a tenure or holding mortgaged is immoveable property. And as the purchaser of a tenure or holding at a sale for arrears of rent due in respect thereof, by sec. 159 of the Bengal Tenancy Act, takes it with power to annul incumbrances (except those that are called "protected interests" and with them we have nothing to do now) a mortgagee's interest in such tenure or holding must be deemed in effect as sold at such a sale.

Against the above view it is argued in the first place, that an interest in immoveable property which is all that a simple mortgagee can have in the mortgaged property is not immoveable property. And in the second place it is

(1) 2 C. W. N. cclviii (1898).

(7) 1 C. W. N. 135 (1896).

(8) I. L. R. 23 Cal. 393 (1895).

(9) 1 C. W. N. 114 (1896).

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argued that as the purchaser of a tenure or holding at a sale for arrears of rent, only takes it with power to annul incumbrances, and the law (*see* secs. 159 and 167 of the Tenancy Act) requires that the power must be exercised, if at all, within a limited time and in a particular manner, the mortgagee's interest cannot be said to have passed to the purchaser by the sale. As to the first argument, it is enough to say that an interest in land like that of a mortgagee comes within the definition of immoveable property referred to above, which includes "benefits to arise out of land." For if it be not within that definition it must be moveable property under sec. 2, cl. 6 of the General Clauses Act, a conclusion which cannot be accepted as correct.

And as to the second argument, I would observe that it is the sale for arrears of rent that passes the mortgagee's interest to the auction-purchaser, though the latter may lose the benefit of that interest if he omits to proceed in a certain way within a certain time, just as he may lose the entire benefit of his purchase if he omits to take possession within a certain time.

The view I take is in accordance with the spirit as well as the letter of the law. A tenure or a holding may be so heavily encumbered, that the mortgagor's interest is almost nothing, while that of the mortgagee absorbs the whole value of it; and in such a case, it is but right and proper that the mortgagee should be allowed to avail himself of a remedial provision like sec. 310A. Indeed if the Legislature had not intended to allow a mortgagee to come in under

that section, it is difficult to say why they should have used the general expression 'any person whose immoveable property has been sold' instead of the term judgment-debtor. It is said that the mortgagee has ample provision made for the protection of his interest by sec. 171 of the Tenancy Act, which provides that he may deposit the amount of the decree to prevent a sale of the mortgaged property. I do not think that is so. Sec. 171 enables a mortgagee to prevent a sale by a deposit made before sale; but if a mortgagee who did not make any such deposit, expecting that the sale would fetch adequate price and he would be paid out of the surplus sale-proceeds, finds that by reason of material irregularity in the conduct of the sale or for any other reason the property has sold for an inadequate price and he has sustained material injury, there is no reason why he should be deprived of the remedy provided by sec. 310A.

It remains now to consider the cases chiefly relied upon in the argument before us.

The case of *Rakhal Chunder Bose v. Dwarka Nath Misser* (3) cited by both sides, can hardly be said to determine the question now before us one way or the other. It relates to the construction of a provision of the Code, namely, sec. 311 in which the same words "any person whose immoveable property has been sold" occur, and it is relied upon on behalf of the Petitioners as showing that a mortgagee comes within the meaning of those words, and that the reason for the decision which is stated towards the

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conclusion of the judgment, will apply as well to a simple mortgagee as to a mortgagee by conditional sale whose case was then before the Court. But it must be conceded that the importance attached to the fact of the mortgage there having been foreclosed would show that the decision leans in favour of the view maintained by the opposite party.

The decision in *Asmutunvissa v. Ashrujf Ali* (5) cited for the Petitioner, though bearing only indirectly upon the present question, contains an important observation which favours the view I take. Sir Comer Petheram in delivering the judgment of the Full Bench says, after referring to sec. 311 of the Code, "We think that this means that the substantial injury must be the direct result of the irregularity and that this could only be the case when the property of the person applying had not only been put up for sale or knocked down, but had been sold in the sense that the applicant's interest had been legally affected by such sale."

The case of *Sri Raja Papumma Rao v. Sri Vira Pratapa* (6) is cited by the opposite party as showing that in a simple mortgage there is no transfer of ownership. But the words of their Lordships which are relied upon, must be taken in connection with the question before them, which was whether a decree erroneously giving possession to the Plaintiff in a suit to enforce a simple mortgage, could have the effect of a foreclosure decree; and the case is no authority for the proposition that the interest of a simple mortgagee in the

mortgaged property is not immoveable property.

Turning now to the cases which are more directly in point, I find that *Hami-dul Huq v. Matangini Dasi* (1) the judgment in which is not given in 2 C. W. N. cclviii, is clearly in favour of the view I take; and so is the unreported judgment in Rule No. 770 of 1900. The case of *Srinivasa v. Ayyathorai* (4) is also in favour of the same view. As against these cases there is the case of *Nityananda Patra v. Hira Lal Karmokar* (2) which is no doubt directly in point. But for the reasons given above, I would respectfully dissent from the view there taken, that a simple mortgagee cannot apply under sec. 310A.

The answer to the question whether a mortgagee can apply under sec. 310A, depends, in my opinion, not upon the nature of the mortgage, but upon the nature of the execution sale. If the sale is not subject to but is free of the mortgage, the interest of the mortgagee, which is immoveable property as defined in the General Clauses Act, is sold in the sense that it is affected by the sale and passes to the auction-purchaser upon his taking certain steps; and the mortgagee, whether the mortgage is a simple mortgage or one by conditional sale, is, as he ought to be, entitled to come under sec. 310A.

It might be said that if a sale under the Bengal Tenancy Act is set aside in the manner we are asked to do, it may give rise to future complications. I do not see that. An order under sec. 310A,

(5) I. L. R. 15 Cal. 488 (1888).

(6) I. L. R. 19 Mad. 249 (1896).

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(4) I. L. R. 21 Mad. 416 (1897).

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setting aside a sale, does not determine any question of the relative rights of parties to the property sold. Those rights remain as they were before the sale.

I would accordingly answer the question referred to us in the affirmative, and hold that a simple mortgagee of a tenure or holding sold for arrears of rent under the Bengal Tenancy Act, can apply under sec. 310A of the Code of Civil Procedure for having the sale set aside; and I would make the rule absolute, set aside the order of the lower Court confirming the sale, and set aside the sale complained of under sec. 310A. The Petitioners are in my opinion entitled to their costs.

AMEER ALI, J.—The question referred for the consideration of the Full Bench is whether a mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect thereof, is entitled to make an application under sec. 310A of the Code of Civil Procedure as being a “person whose immoveable property has been sold” within the meaning of that section.

The identical question came before my learned brother Pratt, J., and myself in the case of *Hamidul Huq v. Matangini Dasi* (1), and in coming to the conclusion that a mortgagee was so entitled, we gave our reasons at some length. The report of the case in 2 Calcutta Weekly Notes cclviii is not quite accurate, for there the mortgage is represented to have been by way of a conditional sale, whereas we dealt with the case upon the finding of the Munsif that the transaction upon the basis of which the

application was made under sec. 310A was a simple mortgage.

As a different view has since been taken in *Nityananda Patra v. Hira Lal Karmokur* (2) by another Division Bench of this Court, it becomes necessary to examine the grounds upon which we come to our conclusion in *Hamidul Huq's* case (1).

It appears that on the 13th of June 1899, a holding or *jama* belonging to one Prosunno Kumar Singh was sold in execution of a decree for arrears of rent, and was purchased by the party showing cause against the rule now before us. On the 10th of July and within the time fixed by law, the applicants alleging themselves to be the mortgagees of the land deposited the amount due under the decree with costs and a sum equal to five per cent. of the purchase-money under sec. 174 of the Bengal Tenancy Act, read with sec. 310A of the Civil Procedure Code and applied to have the sale set aside. But the Munsif rejected their application on the ground that the mortgage was a *benami* transaction. The applicants thereupon moved this Court and obtained a rule calling upon the auction-purchasers to show cause why the order of the Munsif should not be set aside or such other order made as to this Court may seem proper.

The present reference is due to the conflict between the two cases mentioned above. The learned pleader showing cause contends that even assuming the applicants' allegation to be true, as simple mortgagees, they are not entitled to any relief under sec. 310A. Secondly he

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(1) 2 C. W. N. cclviii (1898).



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urges that as *benamidars* they have no *locus standi*.

As regards the right of the applicants to claim the benefit of the section under discussion, it seems to me that there is a fallacy underlying the learned pleader's arguments. Although he has not formulated it in precise terms he evidently seems to be under the impression that the right to apply under sec. 310A is confined to persons actually in possession of the property sold.

Now, in judging of the question raised in this somewhat vague form, we must bear in mind that the word "property" is not limited to things existing in substance; incorporeal rights are as much the subject of property as things tangible and corporeal. The Indian Legislature in defining the words "moveable and immoveable property" followed the distinction recognised in the civil law; and has in terms declared that all rights issuing from or connected with or attached to immoveable property fall within the same category.

Again, absolute ownership consists of an aggregate of rights, each capable of being owned and dealt with separately; and the owner is entitled to parcel out his rights in a particular property among different individuals. As owner he has also the power of borrowing upon its security money from another, and giving to him the right of treating the property as his security for the debt.

Sec. 58 of the Transfer of Property Act (IV of 1882) defines a mortgage to mean the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of

loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

According to Dornet mortgage is "a right which a creditor acquires in immoveables appropriated to him by his debtor although he be not put into possession of them."

Whether it is a right or whether it is an interest which a creditor acquires in the property hypothecated, the legal consequence is the same.

Under sec. 58 mortgagees are classified under three heads. Their remedies for the satisfaction of their debts are different, and a different procedure is provided in each case for the enforcement of the remedy; but so far as the interest or right is concerned they are grouped in one category. And a simple mortgagee is entitled to pursue the property in the hands of all subsequent takers for the satisfaction of his debt. As a logical consequence of the right vested in him by the act of the owner, and the transfer to him of the particular interest, the property in the somewhat loose language of the section, is as much his as that of the owner. It is not suggested that it is only the absolute owner in possession of all the rights in a particular immoveable property, who can claim the benefit of sec. 310A. It has been conceded that a mortgagee in possession under a conditional sale is so entitled; if the idea be that the right to apply is based upon the fact of actual possession, it would follow that a termor, however short his term might be, would be able to come in under the section but not the owner of the reversion, although his interest may be far more valuable

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and although in fact it is his property that has been sold in execution of the decree. If the argument is well-founded an *ijardar* or a *mokurardar* may get the property sold, and the owner cannot invoke the benefit of sec. 310A. A mere statement of the logical consequence following from such a contention, if given effect to, shows its untenability. It seems to me clear, therefore, that the right to apply under that section was never intended to be limited to persons actually in possession of any particular immovable property that has been sold.

Nor is that right restricted to the person having an absolute interest, in other words the judgment-debtor. If that were the intention, the Legislature would have declared so in express terms as it has done in sec. 174 of the Bengal Tenancy Act. To construe the section as applicable only to the judgment-debtor or absolute owner would exclude from its benefit a mortgagee by conditional sale, a lessee, an executor in possession of the property, &c., but that is obviously absurd. The question then arises, does a simple mortgagee who is unquestionably the transferee of an interest in the immovable property in question, come within the category of persons entitled to apply to have the sale set aside. To this, in my opinion, there can be but one answer. A particular property may be mortgaged up to the hilt, as the expression goes; it may be the interest of the mortgagor to have it sold; it may be of the utmost importance to the mortgagee to save the property, and yet if the contention of the pleader for the opposite party be correct, he cannot save the property by invoking the special relief provided for under sec. 310A.

In my opinion the words "any person whose immovable property is sold" include every person who has an interest in the property in question whether qualified, partial or absolute.

An executor has only a qualified interest; a member of a joint Mitakhshara family, a lessee, a mortgagee, a *mokurardar*, an owner of a reversion, &c., have partial interests. In my opinion they all come within the intent and meaning of the section.

I have not referred to the cases cited at the Bar as they have been fully discussed by the learned Chief Justice with whose observations I desire to express my entire concurrence.

But it is said that in the particular case before us, the property sold is a holding or *jama*, and is therefore subject to the provisions of Chap. XIV of the Bengal Tenancy Act; and as the sale does not *ipso facto* avoid the incumbrance held by the applicants, they are not affected by it and consequently have no right to apply under the section. It has also been said that a mortgagee may guard himself against the annulment of his mortgage by means of a registered and notified document under the provisions of sec. 159 of the Bengal Tenancy Act. This latter argument is purely hypothetical, and does not arise upon the facts of the case, for it is not suggested that the present mortgage is a protected interest within the meaning of sec. 159 and as it cannot be touched by the purchaser, the incumbrancer is not affected by the sale. As regards the first argument based on sec. 167 of the Bengal Tenancy Act, it is to be observed that the purchaser acquires the holding or

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tenure with the power to cancel incumbrances, it depends upon his option to do so or not, wholly independent of the will of the incumbrancer. He has that power for a year whereas the right to have the sale set aside under sec. 310A comes to an end on the expiration of a month from the date of sale. It is obvious from these considerations that the right of the mortgagee to look to the satisfaction of his debt from the property hypothecated is materially affected by the sale. To say that his right to apply under sec. 310A can only arise when the purchaser seeks to annul the incumbrance would be to declare that he has no right at all. However sec. 310A gives the right to apply to have the sale set aside, to every person whose property is sold. If the application is granted, the sale is set aside in its entirety. The section does not say that a person who has a partial interest in the property may apply to have the sale cancelled so far as his interest is concerned. The fact that a person has under the provisions of sec. 159 of the Tenancy Act protected his interests from annulment by the purchaser has, in my opinion, nothing to do with his right to apply to have the sale set aside. As the holder of a "protected interest" he may not think it worth his while to seek the relief under sec. 310A. But the property which is sold is his *quoad* the interest he holds and there is no reason that I can see in principle or in law to debar him from invoking the benefit of the section in question. His right comes into existence upon the sale of the property to which his right is attached.

For all these reasons, I am of opinion

that the question referred to the Full Bench should be answered in the affirmative.

As regards the second question I am of opinion, that if the transaction upon which the applicant bases his right is not real, the property is still in the judgment-debtor and he is in fact the latter's *benamidar*, and that under the ruling in *Basi Poddar v. Ram Krishna Poddar* (7) he is entitled to maintain this application. I therefore agree in making the rule absolute.

RAMPINI, J.—This is a reference made to a Full Bench in a rule issued to the opposite party to show cause why an order of the Munsif of Serampore, dated 22nd August 1900, refusing to set aside a sale of a *jama* or holding held in execution of a rent decree on the 13th June 1899 should not be set aside. The application to set aside the sale was made under sec. 174 of the Bengal Tenancy Act and sec. 310A of the Civil Procedure Code, at the instance of two persons who alleged that they had a simple mortgage over the holding sold. The Munsif refused the application on the ground that there was no evidence of the consideration of the alleged mortgage having passed, which led him to the conclusion that the alleged mortgage was a mere *benami* transaction.

The Bench before whom the rule came for hearing has referred to the Full Bench the question whether a mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it is entitled to make an application under sec. 310A of the Civil Procedure Code, as being a "person whose immove-

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able property has been sold" within the meaning of that section. The referring Bench were also of opinion that there was a conflict between the cases of *Hamidul Huq v. Matangini Dasi* (1) and *Nityananda Patra v. Hira Lal Kar-mokar* (2). In their opinion it made no difference whether the mortgage is a simple mortgage or one by conditional sale, the real point for consideration being whether the mortgagee is a person whose immoveable property has been sold within the meaning of the section.

I am of opinion that the question propounded to us by the referring Bench does not properly arise in this rule in consequence of the Munsif's finding that there was no evidence of the payment of the consideration for the alleged mortgage, on which ground he says it is a *benami* transaction, but which I think means that in his opinion there was no mortgage at all. The Petitioners are therefore not simple mortgagees. They have no real mortgage over the holding. They can have no right to apply under either sec. 174, Bengal Tenancy Act, or sec. 310A of the Civil Procedure Code. The finding of the Munsif to this effect has, it is to be noted, not been set aside by the referring Bench. The learned pleader who appears in support of the rule relies in answer to this objection on the case of *Basi Poddar v. Ram Krishna Poddar* (7), in which it has been ruled that a *benamidar* of a person whose immoveable property has been sold has a right to apply to have the sale set aside under sec. 310A of the Code of Civil

Procedure. I feel grave doubts as to the correctness of this ruling. I do not see how a *benamidar* of a person whose immoveable property has been sold can fairly be held to represent him, except in circumstances in which the beneficial owner will be bound by his *benamidar's* proceedings. But it is unnecessary for me to consider this point, for the ruling in *Basi Poddar v. Ram Krishna Poddar* (7) would seem to have no application to the present case, in which it has not been found that the applicants are the *benamidars* of the judgment-debtor or represent them in any way, but in which it has been found as a matter of fact, in consequence of the absence of proof of the passing of the alleged consideration, that the alleged mortgage is not a real mortgage, but a sham and fictitious one. I would therefore discharge the rule for this reason.

But however this may be, I would observe in dealing with the merits of the question referred for our decision that it would seem, at first sight that there is no direct conflict between the cases of *Hamidul Huq v. Matangini Dasi* (1) and *Nityananda Patra v. Hira Lal Kar-mokar* (2), as the former case, according to the report in the Calcutta Weekly Notes, is a case of a mortgage by conditional sale while the latter is a case in which the applicant was a simple mortgagee. But on referring to the judgment in the case of *Hamidul Huq v. Matangini Dasi* (1) it appears that the Munsif under whose order the sale took place decided that the mortgage in question was

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(7) 1 C. W. N. 135 (1896).

(1) 2 C. W. N. cclviii (1898).

(2) 5 C. W. N. 63 (1900).

(7) 1 C. W. N. 135 (1896).

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nothing but a simple mortgage and his decision of this point was not set aside or its correctness impugned. Hence, there no doubt is a conflict of decisions between the two cases. It follows that what we have to consider now is the question of the nature of the rights of a mortgagee by simple mortgage, when there is a sale in execution of a rent decree of the tenure or holding over which he has a lien. Our decision on any other question would be an *obiter dictum*. But the matter is not of much importance as I now am of the same opinion as the referring Bench that there is no difference between the case of a mortgagee by conditional sale and that of a simple mortgagee in respect of their rights under the provisions of sec. 310A. The question for our consideration in this rule accordingly is—Is a mortgagee a person whose immoveable property has been sold within the meaning of sec. 310A of the Civil Procedure Code?

It would seem to me that the answer to this question should be in the negative for the following reasons:—(1) That the interest of a simple mortgagee is not “immoveable property”; (2) that a simple mortgagee is not the “person whose immoveable property is sold” at a sale in execution of a decree for arrears of rent, and (3) that at such a sale, the interest of a mortgagee is not sold and does not pass to the purchaser.

On the first point, I would observe that a simple mortgagee is not the owner of immoveable property. He has, according to the definition of a mortgage contained in sec. 58 of the Transfer of Property Act, but “an interest in specific immoveable property.” It has been said

that under the definition of “immoveable property” contained in the General Clauses Act (I of 1868) a mortgage, or an interest in immoveable property, is immoveable property. I am unable to see that this is so. In Act I of 1868, immoveable property is defined as including “land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.” It is said that a mortgage is “a benefit to arise out of land.” In my opinion it cannot be properly so described. By the expression “benefits to arise out of land” in sec. 2 (5) of the General Clauses Act are meant *profits à prendre*, rights of fishery and the like. It is only in my opinion by an undue straining of the meaning properly to be attached to these words, that they can be held to apply to a mortgage, and in *Debendra Kumar Mandal v. Rup Lal Dass* (10) it has been expressly decided by this Court that a debt secured by a mortgage by a lien upon immoveable property, more especially when the mortgagee is not in possession, is not immoveable property within the meaning of sec. 174 of the Code of Civil Procedure. Hence, according to my view a mortgagee is only the owner of an interest in immoveable property, which is a different thing from immoveable property. The difference between an interest in immoveable property and immoveable property would seem to me to have been recognized not only in sec. 58 of the Transfer of Property Act, but by the Courts as is apparent from O’Kinealy, J.’s judgment in the case of *Fadu Jhala v. Gour Mohun Jhala* (11). Secondly, it would appear to

(10) I. L. R. 12 Cal. 546 (1886).

(11) I. L. R. 19 Cal. 544 (1892).

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me that whether or not the interest of a mortgagee is immoveable property, a mortgagee is not a person whose immoveable property is sold at a sale held in execution of a rent decree. What is sold at such a sale is the tenure or holding on which the arrears accrued. This is too certain a proposition to require any demonstration or argument. The words "the person whose immoveable property has been sold" in sec. 310A, when applied to a sale held in execution of a rent decree, must, therefore, mean the tenure-holder or raiyat whose tenure or holding has been sold. It cannot, in my opinion, mean anything else. That is what is specified in the proclamation of sale issued under sec. 167 of the Bengal Tenancy Act and in the sale certificate issued after the sale. The mortgage lien is not mentioned in either document as about to be sold or as having been sold. The words "whose immoveable property has been sold" cannot, therefore, in my opinion, apply to a mortgagee who has merely a lien over the property sold. And the same conclusion follows from a consideration of a mortgagee's position and rights as regards the tenure or holding. He is not the owner of it. He has no right of ownership in it. [(See Macpherson on Mortgages, p. 270), *Mata Din Kasodhan v. Kazim Husain* (12) and *Papamma Rao v. Rama Chandra Razu* (6)]. He cannot deal with it in any way. All that a simple mortgagee can do is to realize his debt by a sale of it. And unless the tenure or holding is a transferable one, he cannot even do this.

Thirdly, the rights of a mortgagee are not sold and do not pass to the purchaser at a sale of a tenure or holding held in execution of a rent decree. A mortgage of a tenure or holding is an "incumbrance," as defined in sec. 161 of the Bengal Tenancy Act. If the mortgagee takes the precaution of registering and notifying his incumbrance to the landlord under sec. 176, his mortgage lien not only is not sold at a sale of the tenure or holding held in execution of a rent decree but may never even be affected by such a sale. His mortgage lien may remain intact for ever. If the mortgagee has not taken this precaution, still it would seem to me his rights are not sold and do not pass to the purchaser. They remain unaffected by the sale. But the purchaser can within a year of the date of sale take steps to annul the incumbrance. He may do so or not, as he pleases. If he does not do so, the rights of the mortgagee subsist in him as before. If the purchaser annuls the incumbrance, the mortgagee's rights are avoided, or extinguished. It may be said that in these circumstances the mortgagee's rights may be affected by a sale in execution of a rent decree. This is, however, not the case. They may be affected, not by the sale, but by some act which may or may not be done, subsequently to the sale. Now it has been decided in *Asmutunnissa Begum v. Ashruff Ali* (5) that a person whose rights are not affected by a sale is not a person entitled to apply under sec. 311, C. P. C., to have the sale set aside. But even supposing that the mortgagee's rights may be affected by the sale, which in my opinion

(6) I. L. R. 19 Mad. 249, 252 (1896).

(12) I. L. R. 13 All. 482, 474 (1891).

(5) I. L. R. 15 Cal. 488 (1888).

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it is not correct to say that they are, it cannot be predicated of them that they are sold or pass to the purchaser. What may happen to them is that they may be "annulled."

It may here be pointed out that a mortgagee who has not registered and notified his mortgage lien under sec. 176 can always prevent the possibility of his rights being affected by the sale of the tenure or holding by paying in under sec. 171 the decretal amount before the sale actually takes place, and he has then an additional mortgage over the tenure or holding for the amount paid by him, which bears interest at 12 per cent. per annum which takes priority over every other mortgage and which entitles him to be put in possession of the tenure or holding. A mortgagee has thus provided for him by the law two means of protecting his interests.

It may be said that we are here concerned only with the provisions of sec. 310A as applicable to a sale of a tenure or holding. But the provisions of the Tenancy Act I have adverted to apply to all sales held in execution of decrees for arrears of rent. Such sales are held in accordance with the procedure prescribed by Chap. XIX of the Civil Procedure, of which sec. 310A is one of the sections. But sec. 310A is applicable only after the sale has taken place and in no way prevents the operation of the provisions of Chap. XIV of the Tenancy Act.

Then it has been asked, if the words "a person whose immoveable property has been sold" in sec. 310A do not include a mortgagee, whom, other than the judgment-debtor, do they include? They

must include, it is urged, some person other than the judgment-debtor, otherwise the provisions of sec. 310A of the Civil Procedure Code would have no wider operation than those of sec. 174 of the Bengal Tenancy Act. Even if this were so, this would not, in my opinion, lead to the conclusion that the words referred to must include a mortgagee, for sec. 174 was framed in 1885 and sec. 310A in 1894. When the latter section was added to the Code, it was never contemplated that it would be held applicable to sales under the Bengal Tenancy Act. It was not till the decision of the case of *Janardhan Ganguli v. Kali Kristo Thakur* (8) that they were considered to apply to such sales. But the case of *Janardhan Ganguli v. Kali Kristo Thakur* (8) and the cases in which it has been followed, show the character of the persons other than the judgment-debtor to whom the provisions of sec. 310A may apply. In *Janardhan Ganguli v. Kali Kristo Thakur* (8) the person who applied to set aside the sale was an unregistered co-sharer to the extent of 8 annas. In *Bungshidhar Hal-dar v. Kedar Nath Mondal* (9) the applicant under sec. 310A was a purchaser from the tenant who is described as being a co-sharer in the tenure sold, but whose interest did not amount to an incumbance or to a protected interest which would not be affected by the sale. In Rule No. 1643 of 1895 referred to in the note to *Janardhan Ganguli v. Kali Kristo Thakur* (8) the applicant was an unregistered transferee of the whole holding, and in Rule No. 2269 of 1895,

(8) I. L. R. 23 Cal. 393 (1895).

(9) 1 C. W. N. 114 (1896).

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cited in the same page, the applicant was a person who professed to pay in the decretal amount on behalf of the judgment-debtor, but who appeared to be really a purchaser from him.

Then, it has been urged that to hold that a mortgagee may be included within the words "a person whose immoveable property has been sold" in sec. 310A, even if straining the strict meaning of these words, is merely to extend a privilege, which extension can do no harm to anyone. But I conceive it is my duty to interpret the law and not to extend it, and further, I apprehend that an extension of the provisions of sec. 310A to mortgagees may do harm; the purchaser in this case considers it will do harm to him, otherwise he would not have opposed the rule. It is said, however, that he will be compensated by the allowance of 5 per cent. on the price paid by him prescribed by the provisions of sec. 310A. In the present case the compensation offered to the opposite party is the small sum of Rs. 5 and as the sale took place on the 13th June 1899 and Rs. 100 were paid for the holding, the purchaser will have lost the use of his money for more than 2 years, for which and for the expenses incurred in making the purchase the sum of Rs. 5 may well be an adequate compensation. But the object of a purchaser of a tenure or holding would seem to be either to establish himself as an agriculturist in a village or to acquire some land contiguous to his own, if he has already established himself there. It will be seldom, I think, that 5 per cent. on the purchase-money will console him for the loss of his purchase. Then the extension of the pro-

visions of secs. 174 and 310A must increase the uncertainty attending sales and must diminish the chance of the full value of tenures or holdings being bid for them at sales. This cannot fail to be harmful to judgment-debtors. Finally, it must increase the risks of litigation which to a greater or less extent attach to all Court sales. This is greatly to be deprecated in the case of sales of agricultural holdings, for it tends to throw land out of cultivation. The holding in this case was one of 19 bighas. The dispute as to whether the sale of this land is to be set aside or to stand has continued for two years. We do not know what has become of the land in the meantime. But the uncertainty as to its ultimate ownership that must have prevailed during these two years may well have left it fallow and destroyed the chances of the landlords ever recovering any rent for it. Tens of thousands of holdings are annually sold in this way in the province.

In conclusion, I would say there seems to me to be no authority for the view contended for by the learned pleader who appears in support of the rule. The case of *Rakhal Chunder Bose v. Dwarka Nath Misser* (3) on which he relies is, no doubt, a case in which, though under sec. 311 of the Civil Procedure Code, the meaning of the words "a person whose immoveable property has been sold" were considered, and in which it was held that a mortgagee by conditional sale who had obtained a decree for foreclosure had such an interest in the property sold as entitled him to make an application for the setting aside of the sale. The ratio



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*decidendi*, however, was that after a foreclosure decree, it would be difficult to hold that the property belonged solely either to the mortgagee or to the mortgagor and that therefore either would be entitled to apply under sec. 311 to have the sale set aside. This would seem to me to be putting an unduly liberal and a not strictly legal interpretation on the terms of sec. 311. For, the foreclosure decree would not affect the rights of the mortgagor and the legal estate would remain in him until the period for redemption had passed without his redeeming the mortgage. Further, the sale in that case was one under the old rent law and the tenure on which the arrears had accrued is said to have passed free of incumbrances. The rights of the mortgagee, therefore, were affected by the sale.

Reference has also been made in the course of the argument before us to Civil Rule No. 770 of 1900, decided on the 27th July 1900, in which a mortgagee was regarded as a person whose immoveable property has been sold within the meaning of sec. 310A. I have satisfied myself by a reference to the petition of the Appellant to the Munsif, dated 6th December 1899, that he was a mortgagee by conditional sale. This, however, does not make any difference, and therefore I can only say that I am constrained to dissent from the decision of this rule. Finally, there is the case of *Srinivasa Ayyangar v. Ayyathorai Pillai* (4) in which it was decided that a mortgagee who was a party to the suit could apply under sec. 310A to have a sale set aside. But in this case the

mortgagee, being a party to the suit, was himself apparently a judgment-debtor under the decree. Then, the sale was not under the Bengal Tenancy Act, a sale under which law does not, in my opinion, in any way affect the rights of mortgagees.

For all these reasons I would discharge this rule.

PRIATT, J.—The question which we are called upon to decide is whether a mortgagee of a holding sold in execution of a decree for arrears of rent due in respect of it, is a person whose immoveable property has been sold within the meaning of sec. 310A of the Code of Civil Procedure.

The first question which arises is whether a mortgagee's interest is or is not immoveable property. A mortgage is defined in sec. 58 of the Transfer of Property Act as "the transfer of an interest in specific immoveable property" for the purpose of securing the payment of a loan, etc.

The General Clauses Act says that "immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth" and "moveable property shall mean property of every description, except immoveable property." It seems to me impossible to hold that a mortgage can be moveable property; rather I would regard it in the nature of a benefit to arise out of land, for though this expression is usually applied to what is known as "*profits à prendre*," there is no reason why it should be entirely restricted to them.

(4) I. L. R. 21 Mad. 416 (1897).

Let us next consider what passes at

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the sale of a holding in execution of a rent decree.

I would exclude from consideration the case of a holding at fixed rates put up to auction under sec. 164 of the Bengal Tenancy Act, subject to registered and notified encumbrances, because in such a case the mortgagee's interest must necessarily remain unaffected by the sale, and the mortgagee could therefore have no right to make a deposit under sec. 310A of the Code of Civil Procedure.

In the case before us no doubt the holding itself was sold, but the holding comprises two separate rights, *viz.*, that of the mortgagor and that of the mortgagee, the latter being, to use the language of sec. 161 of the Bengal Tenancy Act "a right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein." The one right is complementary of the other, and the two rights in combination constitute the property that is sold. And here I may observe in passing that as the mortgagor's right is necessarily immoveable property, its complement, or the mortgagee's right cannot in the nature of things be anything else than immoveable property.

As then the mortgagee's interest passes to the purchaser at the auction-sale, and that interest is itself immoveable property, I conclude that the mortgagee is a person entitled to make an application under sec. 310A of the Code of Civil Procedure.

I have confined my arguments to the case of the sale of a tenant's holding, because that is what seems to have been sold in the particular case under reference. But the same reasoning will apply when a tenure is the subject of sale.

In my opinion the question under consideration is not practically affected by the contingency that the purchaser may fail to annul the encumbrance within the prescribed period of one year. The tenure or holding is sold free of encumbrances, and the purchaser has only to comply with the provisions of sec. 167 in order to reap the full benefits of the transaction. The mortgagee ought not to be denied the right to protect his interest under sec. 310A of the Code of Civil Procedure, simply on the contingency that the purchaser's future inaction may make the exercise of that right superfluous.

*Rule made absolute.*

S. R. D.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 1147 OF 1898.

E. J. ROOKE,

GHOSE, J. Plaintiff, Appellant,  
PRATT, J. v.  
1901. BENGAL COAL COMPANY,  
4, January. LIMITED, Defendants,  
Respondents.

*Landlord and Tenant Act (X of 1859), sec. 23—Suit for rent upon a lease for purposes other than agricultural or horticultural—Building and mining purposes and the like.*

*A suit for recovery of rent upon a lease for mining purposes and for purposes of building, making roads, and so forth, the land not being demised for agricultural or horticultural purposes, is not a suit for rent under Act X of 1859 and a Revenue Court has no jurisdiction to entertain it.*

This was an appeal preferred on the 13th of June 1899, against the decree of F. B. Taylor, Esq., Judicial Commis-

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sioner of Zillah Chota Nagpore, dated the 7th of April 1898, affirming the decree of Babu Prasunno Koomar Das Gupta, Deputy Collector of Gobindpur, dated the 28th of September 1897.

This was a suit under sec. 23 of Act X of 1859 for recovery of arrears of rent said to be due from the Defendant Company for 50 bighas of land held in mouzahs Amenda and Murabag.

The Company entered appearance and filed a written statement denying their liability to pay the rent claimed.

The suit came on for trial before the Deputy Collector of Gobindpur and the first issue framed was whether the Revenue Court had jurisdiction to try the suit. This issue was framed on the assertion of the Defendant Company that as they held the land in question for mining purposes they could not be sued in the Revenue Court. The Deputy Collector held that he had no jurisdiction to try the suit and he therefore dismissed the same. The material portion of his judgment was as follows:—

It is clear from the statement of the Plaintiff's agent recorded on the 5th July and the terms of the *pottah* (Ex. A) which is a document over 30 years old and the custody of which has been proved, that the lease which the Defendants Company hold is chiefly, if not absolutely, for mining purposes. The Company acquired and exercises surface rights also in the land covered by the lease. But that seems to be only an attendant circumstance and not the original purpose for which the tenure was created. Now the question is whether land used or intended to be used for mining purposes is land coming within the purview of Rent Law. The point appears to have been considered by their Lordships of the Bengal High Court a number of times and their decisions are clearly in the negative. The most recent case which is exactly similar to the one before me to which I have

been referred is reported in *Raniganj Coal Association v. Jadoo Nath Ghose* (1). The terms of the lease discussed in that case are so very similar to those of the lease produced in this case that the latter may be said to be a reproduction. The Plaintiff was unable to refer to any ruling which modified or set aside the principle of law propounded in this case that land used for mining purposes is not land coming within the provisions of Rent Law, and therefore within the cognizance of the Revenue Courts. Then the question to be considered is "does the fact that the lease is for surface rights as well help the Plaintiff in any way?"

This has also to be answered in the negative (*vide* Weekly Reporter, Vol. XVIII, page 235, and Weekly Reporter, Vol. XI, page 400). The rent being indivisible, whatever may be the other uses to which the land might be put, cannot be the subject of a suit under sec. 23 of Act X of 1859, when we have it that that at least a portion of the rent (in fact the chief portion) is for the exercise of other than agricultural rights.

With these authoritative rulings before me it is impossible for me to proceed further with the case. I find that this Court has no jurisdiction to try this suit and the result is that it is dismissed.

On appeal the Judicial Commissioner of Chota Nagpore dismissed the appeal and affirmed the decree of the Deputy Collector.

The Plaintiff then preferred this second appeal.

The question which was raised in this appeal was whether a suit for recovery of rent upon a lease for mining purposes and for the purposes of building and making roads is cognizable by the Revenue Court as a suit for recovery of rent under Act X of 1859. The lease was as follows:—

This *mokurari pottah* is executed to the effect following:—

Mouzah Murabagh appertaining to Purgana

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Parrah is our revenue-paying *debottar* property ; and it is enjoyed and held in possession by us To enable you to carry on business in coal and other articles as also to construct buildings and make roads, etc., we grant you settlement in respect of the under ground coal and *dhaoot*, etc., which are now in existence and will be discovered hereafter within the four limits of the said village and of Mat Amla and Chand Kooli, appertaining thereto, as also of the *danga-patit* and jungle lands on the surface, at a rent of company's rupees 50 fifty per annum. You shall uniformly pay us according to (the stipulated) instalments the said amount of rent year after year ; and if you become defaulter on the expiry of any *kist* you shall pay interest according to law. If you make any plea in connection with the mines or (your) business or the construction of buildings and roads, etc., you shall get no remission. By making excavations under and constructing buildings and roads, etc., on the aforesaid *danga* and jungle lands of the said mouzah and by digging up coal, etc., from under the said lands and stacking and carrying them (from one place to another) you shall, with power to make transfer from one hand to another, enjoy and hold possession, and go on with your business. If you require to make excavations or construct buildings and roads, etc., on the paddy lands of tenants which are left to our *khas* possession you shall do so in your own way, and pay us rent in respect of the said agricultural lands according to the current rate ; and we and our heirs will receive the same, and all objections taken by both parties or their heirs and representatives against the same shall be rejected. Let it be stated here that the sum of Rs. 8-8 annas, which we have been receiving as rent on account of 4 bighas of land in the said Chand Kooli, formerly let out to you, and held in your possession, shall remain separate ; and we will get and you shall pay the said amount of rent year after year. We will not grant settlements in respect of the agricultural lands to parties other than yourselves. To the above effect we grant you this *pottah* on receipt of the *kabuliyat*, dated the 22nd Agra-hayan 1265, twelve hundred and sixty five.

*Babu Umakali Mukherji* for the Appellant.

*Dr. Rash Behari Ghose* and *Babu Dwarka Nath Chakravarti* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The only question which arises in this appeal is whether the Revenue Court had jurisdiction to entertain the suit that was brought for recovery of rent under Act X of 1859.

The lease with which we are concerned was a lease for mining purposes and for purposes of building, making roads, and so forth, the land not being demised for agricultural or horticultural purposes. Sec. 23, cl. 4, Act X of 1859, speaks of "suits for arrears of rent due on account of land either *kheraji* or *lakheraj*, or on account of any rights of pasturage, forest rights, fisheries, or the like." The word "land" as used in this section has been construed in various decisions of this Court (see, amongst others, *Raniganj Coal Association v. Judoo Nath Ghose* (1)) to refer to any land granted for agricultural or horticultural purposes, and not to land granted for purposes such as are mentioned in the lease upon which the suit is founded. In this view of the matter it is obvious that the suit could not be taken cognizance of under Act X of 1859.

The learned *vakil* for the Appellant has, however, contended that the words "or the like" in the section would include rights such as those that were demised by the lease in question. We are, however, unable to accept that view.

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Those words must be taken *ejusdem generis* with the right spoken of in the said section, and it could hardly be contended that the right of taking coal from the land demised, and such other rights demised, was covered by the words "or the like" in the section in question.

The appeal is dismissed with costs.

S. C. S. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICTION]

REV. NO. 274 OF 1901.

GHOSE, J. TAYLOR, J. 1901. 31, May.	}	In the matter of RAJANI KANTO PAL, Petitioner, v. THE EMPEROR, Opposite Party.
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*Penal Code (Act XLV of 1860), secs. 353, 225B—Assaulting a public officer in execution of his duties—Resisting or obstructing public officer in discharge of his duties as such—Warrant, execution of, by person not authorized—Warrant of arrest, issue of, in execution of a Civil Court decree—Notification of contents of warrant, if necessary—Lawful arrest.*

*To make an arrest under a warrant issued in execution of a Civil Court decree valid it may not be necessary to shew the warrant to the person to be arrested, but it is the duty of the bailiff to acquaint the person with the contents of the warrant at the time he arrests him and that he was authorized to arrest him, and if the accused then wants to see the warrant it would be the duty of the bailiff to shew it to him.*

*When a warrant is not shewn to the person arrested nor are the contents of the warrant notified to him, before or at the time of the arrest, there is no lawful arrest.*

This was a rule granted against the order of one of the Presidency Magistrates for the town of Calcutta.

The facts of the case appear from the judgment.

*Mr. Henderson*, with *Mr. P. L. Roy* and *Babu Kally Nath Mitter*, for the Petitioner.

No one appeared to shew cause.

The JUDGMENT OF THE COURT was as follows :—

GHOSE, J.—This rule was granted on the application of one Rajani Kanto Pal, who had been convicted by one of the Presidency Magistrates of Calcutta under secs. 353 and 225B, I. P. Code.

It appears that, in execution of a certain decree obtained by one Chadylal Agarwala against the Petitioner Rajani Kanto Pal, a writ of arrest was issued by the High Court against that individual. On the 25th of November last, a bailiff of the Sheriff by name Hurdeo, two peons, and a certain person Umesh Chandra Acharjee who accompanied them for the purpose of identifying the Petitioner, Rajani Kanto Pal, went either to the house of the accused or to a certain shop in which he was then standing. And the case for the prosecution is that the warrant of arrest was put into the hands of the accused by Hurdeo, the bailiff, the accused read it and threw it away, saying that it was Sunday and, therefore, he could not be arrested; and he then tried to escape; the bailiff and the two peons thereupon arrested him but, immediately afterwards, two other persons, namely, Durga Churn Pal, and Aswini Coomar Pal came in with a large number of people, assaulted (and the

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Petitioner joined in the assault) the bailiff and the two peons, and rescued him (the Petitioner).

The Presidency Magistrate has acquitted Durga Churn Pal and Aswini Goomar Pal upon the ground that he was not prepared to accept the evidence on behalf of the prosecution that these two individuals took any part in the row that took place; but he has convicted Rajani Kanto Pal of offences under secs. 353 and 225B, I. P. Code.

One of the grounds set out in the affidavit upon which the Petitioner obtained the rule now before us was that, while the Petitioner was examining certain witnesses in support of his defence, the Magistrate stopped his attorney saying that it was unnecessary to examine any other witness; and he also stopped the address that was being made by the said attorney; that the Magistrate then called upon the attorney for the prosecution to say what he had to say; and that so soon as he finished his address, the Magistrate delivered his order acquitting Durga Churn Pal and Aswini Goomar Pal and convicting Rajani Kanto Pal. This portion of the affidavit has not been contradicted by any counter-statement on the other side. In this circumstance there are but two courses left open to us, either to send back the case for a fresh trial, the Magistrate who held the trial having since retired on pension or to examine the evidence as it is upon the record, and to see whether any of the two offences of which the Petitioner has been convicted has been satisfactorily made out against him.

We have examined the evidence and it seems to us that it is extremely doubt-

ful whether the warrant of arrest was at all shown to the accused before he was arrested, or any attempt was made to arrest him. No doubt, the bailiff Hurdeo and the two peons who accompanied him say in their examination-in-chief that the warrant of arrest was actually placed in the hands of the accused, who read it and then threw it away, saying that it was Sunday and, therefore, he could not be lawfully arrested. But upon the cross-examination of Saligram, one of the two peons, we find that no such thing could have really happened. With reference to this matter he says as follows:—

“I saw the first Defendant at the threshold of the shop. His back was towards the street. He was speaking to 4 or 5 people in the shop. The first Defendant was arrested immediately after our arrival. There was no conversation after he was arrested. The first Defendant ran away into the shop.”

This seems also to be borne out to some extent by the evidence of another witness for the prosecution, Baijnath. He says: “Defendant No. 1 was examining a mechanic. The first Defendant was arrested 2 or 3 minutes after our arrival. When hand was laid on him, the first Defendant was still in the same place.”

The question thereupon arises if the warrant of arrest was not shown to the accused, or if the contents of the warrant were not notified to the accused, could there be a lawful arrest? It may be that the story as to the putting the warrant into the hands of the accused is untrue, but it may also be that the contents of the warrant were notified

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to the accused before he was arrested. There is however no suggestion on behalf of the prosecution, that this was so; no doubt, there is a witness called by the defence who, it may be said, supports to some extent this theory, namely, that the contents of the warrant were notified to him; but on referring to the evidence of that witness we find that it was not the bailiff nor either of the two peons who accompanied him who is said to have done so. What he says is this that the identifier or rather the person who is said to have accompanied the bailiff to identify the accused, went into the shop while the bailiff and the two peons were in the street, and that man told the accused that a warrant was out against him, and that thereupon the accused said that he could not be arrested on a Sunday. But that is a different story from that of the prosecution, and as I have already said it is no way suggested on behalf of the prosecution that the contents of the warrant were notified to the accused, but that the warrant itself was placed in his hands and he read it. With reference to this matter, we find it stated by one of the witnesses for the defence, who is an attorney of this Court, that some little time after this event had taken place, he had a talk with the bailiff Hurdeo, and the latter told him that he could not show the accused the warrant because no time was given to him to do so. If that statement is correct, it falsifies entirely the story of the prosecution. Then again the Magistrate has held that he is unable to accept the evidence for the prosecution so far as that evidence sought to implicate the Defend-

ants Nos. 2 and 3, namely, Durga Churn Pal and Aswini Churnar Pal. If that evidence could not be accepted as true, as shewing that Durga Churn and Aswini took part in rescuing the Petitioner, or assaulting the bailiff and the peons, it seems to me it would be rather risky to accept that portion of the evidence which goes to implicate the Petitioner as the person who on being arrested, after the warrant was shown to him, tried to escape, and while he was being rescued by the other two persons, he assaulted the bailiff and his peons. It may be that in order to make the arrest valid it was not necessary to show the warrant; but it seems to me that it was the duty of the bailiff to acquaint the Petitioner with the contents of the warrant at the time he arrested him, and that he was authorized to arrest him and if the accused then wanted to see the warrant it would be the duty of the bailiff to show it to him. But in the present case, as I have already said, the evidence as to the warrant being placed in the hands of the Petitioner or the contents of the warrant being notified to him by the bailiff who had been authorized by the Sheriff to make the arrest, being very unsatisfactory, it would not be right and proper to convict the Petitioner of either of the two offences of which he has been found guilty. It will be observed upon the evidence of Babu Ganesh Chunder Chunder, then the Deputy Sheriff, so far as one of the peons is concerned namely, Saligram, who, it seems, was rather severely assaulted by somebody or other in the crowd that he was not authorized to execute the warrant; so that we may take i

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that the only person who was authorized to execute the warrant was Hurdeo, but it is not satisfactorily proved that he showed the warrant to the Petitioner or notified the contents thereof to him, before or at the time of arrest, so that there was no lawful arrest.

In this view of the matter it is not necessary to order a new trial. The result is that the conviction and sentence will be set aside.

TAYLOR, J.—I agree in thinking that upon the evidence a valid arrest by the bailiff has not been established and I also agree in the order passed.

*Rule made absolute :*

H. P. C.                      Conviction set aside.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 225 of 1899.

RAMPINI, J.	ISMAIL KHAN MAHOMED,
GUPTA, J.,	Plaintiff, Appellant,
1901.	v.
30, August.	L. P. D. BROUGHTON,
	Defendant, Respondent.

*Landlord and tenant—Ejectment—Origin of tenancy—Permanent tenancy—Presumption as to permanent character of tenancy—Estoppel—Acquiescence—Compensation—Confusion of boundaries.*

*Where tenancies were created by kabuliyaats or pottas which did not contain any words of inheritance and which limited the tenant's right to the term of the landlord's possession who happened to be a mutwalli and there was no recognition of the incidents of old leases in the grant of new leases to new tenants, except payments of rents at unvaried rates for a very long period and the holdings having been the subject of several transfers and*

*the land having been always let out by the mutwalli in ijara :*

Held—*That these facts are not sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent, or was subsequently by agreement, converted into a permanent one, and that any presumption arising from long possession is negative where the origin of the tenancy is known.*

CASPERSZ v. KEDAR NATH SARBADHAKARI (2), DURGA MOHAN DAS v. RAKHAL CHUNDER RAI (3) distinguished.

*In order to raise an estoppel against the landlord, it must be shown that the landlord had purposely allowed or encouraged the tenant to build knowing that the tenant was building on the mistaken notion that he had rights beyond those of a mere tenant from year to year.*

*Where owing to the negligence of the tenant, the land demised becomes confounded with other lands, the tenant, unless he can ascertain the former, is bound to make good to the landlord the quantity of the land to which the latter is entitled.*

This was an appeal against the judgment and decree of Babu Karuna Das Bose, Subordinate Judge, First Court, 24 Pergunnahs, dated the 12th June 1899, dismissing the Plaintiff's suit.

The facts of the case are shortly as follows :—

The Plaintiff instituted this suit as the *ijardar* under the *mutwalli* of the Hooghly Imambara for ejectment of the Defendant from certain plots of land measuring about 10 *bighas* situate in Kidderpore in the suburbs of Calcutta and for possession thereof and for certain other reliefs, on the allegation that the De-

(2) 5 C. W. N. cclxxix, 858 post (1901),

(3) 5 C. W. N. 801 (1901).



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fendant was a tenant-at-will under the Plaintiff and that the tenancy had been determined by a proper notice to quit. The Defendant, as the representative of the tenant, Nawab Khas Mahal, in his written statement maintained that Nawab Khas Mahal had permanent interests in the lands and denied the right of the Plaintiff to eject him. The history of the various plots comprising the lands in suit is fully detailed in the judgment of the Court. The Plaintiff produced several *kabuliyats* executed by the tenants whose rights Nawab Khas Mahal had purchased and which showed the terms upon which the tenancies were created. One of such *kabuliyats* is given below :

To the High in dignity.

MOULVI SYED KERAMUT ALI SAHIB,

*Mutwalli of the Imambbara at Hooghly.*

This *kabuliyat* is executed by Meru Mistri to the following effect :—

Within pergunnah *kismat* Magura, mouzah Sonai, and in the Mahlul of the late Nanda Istriwalla there lies in the share of Golam Hyder, son of the said Nanda Istriwalla, 14½ cottahs of *kheraji* land bearing a *jumma* of 1 rupee 11 annas 4 pies and 2 karas, of which the *amla* and *aolad* were purchased by me, under an *istafa* (Deed of Relinquishment), signed by the aforesaid Durji and a petition signed by me on the 21st Bhadra of the current year; and in the Mahlul of the aforesaid Nanda Istriwalla there lies 2½ cottahs of *kheraji* land, the share of the said Golam Hyder bearing a *jumma* of 1 annas and 7½ pies the *amla* and *aolad* (whereof) was purchased by me under an *istafa* signed by the said Golam Kader, dated the 27th Srabun 1247, and a petition signed by me and bearing date and year, as above; and in the Mahlul of Seraj Khansamah there lies 1 bigha of *kheraj* land bearing a *jumma* of 1 rupee and 1 annas the *amla* and *aolad* (whereof) were purchased by me from Sheik Sheraj Khansama under an *istafa* signed by the said Khansama and dated the 2nd Chaitra 1247, B. S., and a petition signed by me on the same date and year; all these lands make a total of 1 bigha and 17 cottahs of lands; of

which I take a lease *potta* at an annual *jumma* of Rs. 3-4 three rupees and four annas. I shall pay the rent, year by year according to instalments, into your *sircar* (office), and shall keep intact the boundaries of the said lands. I shall not be competent to make objection, on the ground of the lands being found less on measurement or of the same being taken up by roads or on any other ground whatever. If on any measurement made by the *sircar*, the lands be found to be in excess, I shall pay proportionate rent for the same. If in future, the rate is enhanced in this mahal, I shall pay separate rent for the same. And I shall not be competent to erect new structures (*emarat*) on the lands in question without your permission. To this effect after obtaining a *potta* for the period of your possession I execute this *kabuliyat*.

The Plaintiff's suit was dismissed by the Court below which held that the Defendant had a permanent right in the lands. From this decision the Plaintiff appealed to the High Court.

• The Advocate-General (Mr. J. T. Woodroffe) with him Dr. Asutosh Mookerjee and Babu Charu Chunder Ghose for the Appellant.—This is a suit for ejectment of the Defendant from a piece of land, measuring 9 bighas 19½ cottahs, situate in Garden Reach in the suburbs of Calcutta. This land forms part of an area of 13 bighas formerly occupied by Nawab Khas Mahal whose representative the Defendant is. The land in suit consists of five holdings and, save with respect to one holding consisting of a comparatively small area, the origin of the tenancy with respect to these holdings is known inasmuch we have the *kabuliyats* or the *pottas*. We say that the land was not let out on a permanent lease and that in a case of this kind, where the origin of the tenancy is known, the inferences that would otherwise arise from long possession are entirely negatived and that there has been no ac-

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quiescence or standing by on the part of the landlord. It is true that there are several buildings on the land, but as is evident from the *kabuliyats* which have been produced those buildings were erected in defiance of the express injunctions of the landlord. On the question of acquiescence, see *Beni Ram v. Kundan Lall* (6), *Ramsden v. Dyson* (10), *Jugmohun v. Pallonjee* (5), *De Bussche v. Alt* (11), *Wilmott v. Barber* (12), *La Banque v. La Banque* (13), *Kunhammed v. Narayan* (14).

The lands in the present suit have always been let out in *ijara*, and that is a circumstance which has to be taken into consideration. See the case of *Krishna Kishore v. Mir Mahomed* (4). We tendered in the lower Court the several *ijara kabuliyats* showing that the mahal has, except on a few isolated occasions, been always let out in *ijara*, but the lower Court would not admit them in evidence. I submit they are admissible in evidence.

The lands in the present suit consist of five holdings and ever since the purchase of the holdings by the Nawab Khas Mehal, she has paid rents for the lands in the names of the old tenants and there has never been any mutation of names. It is also noticeable that in the *kabuliyats* the words *সন বসন* occur and these words have been held to constitute a tenancy

which is certain for the period of one year and which will continue beyond that period until it is properly put an end to by either party. See *Ramkoomar v. Brojohurree* (15). In this case the tenancy has been properly determined by a six months' notice to quit. This case is on all fours with the case of *Ismail Khan v. Joygoon* (1).

Mr. Pugh (with him Dr. Rash Behary Ghose, Babus Jogesh Chunder Dey and Bhogoban Chunder Mookerjee) for the Respondent.—The Appellant is trying to evict the Defendant from lands which have been the subject of numerous transfers extending over a very long period. The holdings have all along been treated as hereditary and permanent. If the conduct of the parties be examined, you cannot resist the conclusion that till now no body has thought of evicting the tenants from these lands. In this case, therefore, it is especially necessary to scrutinise the documentary evidence carefully. We have documents going back very near to the time of the Permanent Settlement. There have been numerous transfers and successions—son succeeding father and so on.

[GUPTA, J.—How does the transferability affect the permanency of the lease? There may be transfers of yearly leases.] I say that transfers are evidence of permanency. Each case must be judged by its own facts and the case of *Ismail Khan v. Joygoon* (1) is no authority in favour of the other side. I rely on *Dhunput Sing v. Gooman Sing* (16), *Ram Chunder*

(4) 3 C. W. N. 255 (1899).

(5) I. L. R. 22 Bom. 1 (1896).

(6) 3 C. W. N. 502: s. c. I. L. R. 21 All. 496; I. L. R. 26 I. A. 58 (1899).

(10) L. R. 1 H. L. 129 (1866).

(11) L. R. 8 Ch. D. 289 (1877).

(12) L. R. 15 Ch. D. 96 (1880).

(13) L. R. 13 App. Cas. 111, 118 (1887).

(14) I. L. R. 12 Mad. 820 (1888).

(1) 4 C. W. N. 210: s. c. 27 Cal. 579 (1900).

(15) 10 W. R. 410 (1868).

(16) 9 W. R. (P. C.) 7: s. c. 11 M. L. A. 433 (1867).

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v. *Jogesh* (17), *Caspersz v. Kedar* (2), *Durga v. Rakhal* (3).

I am able to show a long chain of title, payments of rents for a very long period at unvarying amounts, and recognition of transfers by the landlord. In a case of this nature the presumption is very strong that the holdings are permanent. See the cases *Juhooree Lall v. Dear* (18), *Lekhray v. Kunhya* (19), *Gopal v. Teluck* (20), *Suttosurrun v. Mohesh Chunder* (21), *Ram Ranjan v. Ram Nurain* (22). Further, I say that the Plaintiff is not entitled, to maintain the action. He is a lessee from the *mutwalli* of the Hooghly Imambara. The *mutwalli* cannot grant a lease of the present character under the Mahomedan law. The property being *wagf*, I question the right of the landlord to grant the *ijara* lease to the Plaintiff on the strength of which he is suing. The landlord in the present case is a *mutwalli* and under the Mahomedan law he cannot grant any lease for more than three years. The Plaintiff's lease is for a period of ten years with option of renewal for a further period of twenty years. See Wilson's Digest of Anglo-Mahomedan Law, p. 290; Ballie, p. 596; Ameer Ali, Vol. I, p. 379; *Shama Charn Roy v. Abdul* (23).

The Advocate-General in reply.

I say that the property is not *wagf*. It is only an accident that the manager

of the *mahal* is a *mutwalli*. The *mahal* is always spoken as *kharij tomlin*, i.e., outside the endowment. It is no part of the *wagf* property. The Plaintiff's lease is perfectly valid. The cases cited by the other side have no application as the origin of the tenancy in those cases was not known. On the question whether the land could not be identified as there was a confusion of boundaries by the tenant, see the notes to *Wake v. Conyers* (24), *Khemamayi v. Shushee* (8), *Dugappa v. Vidhia* (9). The Appellant is entitled to succeed in the present action.

The JUDGMENT OF THE COURT was as follows:—

RAMPINI, J.—This is a first appeal from a decision of the Subordinate Judge of the 24-Pergunnahs passed in a suit for ejectment brought by the Plaintiff, Ismail Khan, against the Administrator-General of Bengal. The Plaintiff is a lessee under the *mutwalli* of the Hooghly Imambara. The Defendant is sued as the representative of the estate of Nawab Khas Mahal, a Begum of the ex-King of Oudh, who died in 1894. The land from which the Plaintiff seeks to eject the Defendant comprises an area of 9 bighas 19½ cottahs. It forms part of an area of 13 bighas formerly occupied by the Nawab Khas Mahal. It admittedly appertains to estate No. 92 of the Hooghly Imambara. It is, however, situated at Garden Reach in the suburbs of Calcutta and within municipal limits. There is a two-storied building on the land and some smaller buildings used as out-offices, etc.

(8) 9 W. R. 94 (1886).

(9) I. L. R. 6 M. & D. 263 (1882).

(24) 1 W. & T. L. C. 175.

(2) 5 C. W. N. cclxxix, 858 post (1901).

(3) 5 C. W. N. 801 (1901).

(17) 12 B. L. R. 229 (1873).

(18) 23 W. R. 399 (1875).

(19) I. L. R. 3 Cal. 210 (1877).

(20) 10 M. I. A. 183, 191 (1865).

(21) 12 M. I. A. 263, 268 (1868).

(22) I. L. R. 22 Cal. 533 (1894).

(23) 3 C. W. N. 158 (1898).

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The Plaintiff seeks to eject the Defendant on the ground that the land was let merely on temporary leases; while the suit is resisted on the ground that the land was let on permanent leases, that it has been in the possession of the Defendant and the predecessors of Khas Mahal for a very long period of time, that the Defendant has with the acquiescence of the Plaintiff's lessor laid out large sums of money in the erection of permanent buildings on the land and that accordingly the Plaintiff is not entitled to evict the Defendant.

The Subordinate Judge has found in favour of the Defendant and has dismissed the suit. The Plaintiff now appeals, and traverses all the findings of the Subordinate Judge both of fact and of law. On his behalf it has been urged (1) that the land was never let on permanent but on temporary leases; (2) that the Defendant and his predecessors have not been in possession of the land for a long period of time; and (3) that there has been no standing by or acquiescence on the part of the *mutwalli* of the Hooghly Imambara to the erection of permanent buildings on the land.

The first two contentions relate to questions of fact. The last raises a mixed question of law and fact, which can only be decided after the facts of the case have been ascertained. We will therefore first consider the first two questions together and then discuss the third.

Now, as to the facts of the case, it is admitted that the Defendant does not hold the land under any lease. The Begum Khas Mahal has purchased on different dates the rights of the former tenants of the land, who held it not as

one plot, but as 5 small plots, and ever since her purchases of the former tenants' rights, she has paid rent for the land in their names and has never been recognised by the Plaintiff or his lessor as the tenant of the land.

The history of the five plots of land purchased by the Nawab Khas Mahal is very complicated. We must go into the details of each plot separately.

The first plot is a plot of 13 cottahs 10 chittaks of land, called, by the learned counsel for the Appellant, Sarnamayi's plot; for this plot, a *dowl potta* Ex. A52, dated 10th December 1862, has been produced by the Defendant, which seems a perfectly genuine document. It is signed by the *mutwalli*, and recites that on a consideration of the petition of Sarnamayi and an *istafa* (a notice of relinquishment) from Madan Mochi and others (heirs of Ram Lochan Mochi) a *potta* is granted to Sarnamayi of 13½ cottahs of land at a rental of Rs. 1-3-9 "limited to the term of the *mutwalli*'s incumbency." It is to be noted that the *istafa* referred to in this *potta* has not been produced. This *potta* is followed up by Exhs. A12 and A13, the latter of which is a deed of sale by Sarnamayi in favour of Nawab Khas Mahal, of the 13½ cottahs of land, and the former an *istafa* by Sarnamayi in favour of Khas Mahal for the same land, and dated the 30th April 1865. The Plaintiff objects to all the deeds produced by the Defendant as not coming from proper custody, and it must be said that there is no very definite evidence showing how each particular deed came into the possession of the present Defendant. Further, the *istafa* of the 30th April 1865, is especial-

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ly objected to on the ground that it is addressed to the *mutwalli* and must, if genuine, have been retained by him. If delivered to him, as it should have been, it is unexplained how it is now produced by the Defendant. There appears to us to be great force in this latter argument, and we think it cannot be gainsaid that if this *istafa* is properly produced from the custody of the Defendant, then there is nothing to show that it was ever delivered to, or seen by the Plaintiff's lessor, the *mutwalli*, and so cannot bind him. The question is of much importance, because the rent of Rs. 1-3-9 is described in the *istafa* as the annual *mokurari* rent of the land, and if it could be shown that the *mutwalli* had ever received it, it might be held to be evidence of knowledge on his part of the claim of the Defendant that the land was held on a *mokurari* tenure. In the deed of sale of the 25th April 1865 the land is described as being possessed under hereditary *potta*. But this is certainly a deed that does not bind the *mutwalli*; as he is not responsible for any recital made in a deed to which he is not a party. If the title of the Defendant to plot No. 1 rested on the 3 documents alone, it is clear the case of the Defendant must fail, for the *dowl potta* A52 certainly does not convey a permanent interest in the land, but only a temporary one, limited to the time of the executant's incumbency and that only was granted in favour of Sarnamayi, who is no longer in occupation. The mention in this *potta* of an *istafa* by Madan Mohan Mochi and the *istafa* A12 produced by the Defendant show that the land cannot be transferable without the consent of the landlord,

the *mutwalli*. It may be added that in the 4 rent receipts for this plot produced by the Defendant the name of the tenant is entered as Sarnamayi. This shows that Exhs. A12 and A13 can never have been shown to, or, at all events, never acted on by the landlord.

The Defendant, however, attempts to carry the history of this plot No. 1 much further back, and for this purpose has produced some documents purporting to be of much earlier date. The first of these is a *potta*, marked F5, for 14 cottahs of land in favour of one Safi Mistri at a rental of Rs. 1-4-0 per annum. This purports to bear date the 11th Ashwin 1115. This is said to be an error for 1195 which would correspond with the year 1788. No reliance can, however, in our opinion, be placed on this document, as it appears to us not to be genuine. It is apparently recently written on old paper. Moreover, it purports to be a copy certified to be correct by some unknown person named Hossein sheristadar, and the boundaries given in it are so vague that it cannot be connected with certainty with Sarnamayi's plot, now in the Defendant's possession. Then this *potta*, or rather copy of a *potta*, is followed up by A45, a deed of sale, dated 20th Baisakh 1220 (or 1813), purporting to be executed by Safi Mistri in favour of Hafizulla; A46, an *istafa* of the same date by Safi Mistri in favour of Hafizulla; a *potta*, Ex. F., dated 21st Baisakh 1220, in favour of Hafizulla; A44, a deed of sale, dated 1235 or 1828, by the heirs of Hafizulla in favour of Ram Lochan, Golak Das and Ram Kishore Mochi of 13 cottahs out of the 14 cottahs purchased by Hafizulla; A47, apparently

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a similar deed of sale bearing the same date and of the same land in favour of Mohesh Chandra Chowdhuri; Ex. F3, a *dowl potta* for 13 cottahs of land at a rent of Rs. 1-2-10, in favour of Ram Lochan Das; A53, a conveyance, dated 4th Assar 1257 (or 1850) by Golak Das and Nilmoney Das Mochi in favour of Ram Lochan Mochi transferring to him their shares in the 13 cottahs of land; A43, an *istafa* of the same date; A54, an *ekrar* of the same year by Nilmoney Das in favour of Ram Lochan Das, relating to the occupation of a house on the land; A51, a mortgage, dated 1265 or 1858, by Nobin Das Mochi in favour of Nazim Koyal of 13 cottahs of land; A48, a deed of sale, dated 19th Bhadra 1266 or 1859, by Madan Mohan Mochi, Nabin Chandra Mochi and Sreemutti Khema Sundari Dassi in favour of Sarnamayi of the 13 cottahs of land with the one-storied building standing on it; and A49, an *istafa* of the same year relinquishing the land in favour of Sarnamayi. The deed of sale, A48, is no doubt a perfectly genuine deed, and the *istafa* A49 may be so also; but if so, as it is produced by the Defendant, it can never have been shown to the landlord. The documents A51 A53, A54 may be genuine, but they in no way bind the Plaintiff or his lessor. A43 may also be genuine, but if so, it was never shown to the landlord, and never acted on, inasmuch as, first, it is now produced by the Defendant, and, secondly, it appears from A49, that the mutation prayed for by A43 never took place. But the others of these earlier documents we have no hesitation in rejecting as spurious. They are of the same description as Ex. F5, on which, as we have already explained, we can place no re-

liance. The document A47 is now nothing but a few shreds of paper perfectly undecipherable, and further it does not appear why there should be two deeds of sale of the same date for the same land.

The history of the next plot, designated by the learned counsel for the Appellant as Hassell's plot, is even more complicated. It is a plot of 5 bighas 13 cottahs, the rent of which is said to be Rs. 10-9-6. The Plaintiff produces a *kabuliyat* for this plot, Ex. 21, dated 5th August 1846, executed by Mr. N. P. Hassell in favour of the *mutwalli* of the Hooghly Imambara. It recites that the executant takes settlement of 5 bighas 13 cottahs of an annual *jumma* of Rs. 10-9-6. According to the *kabuliyat* this land was formerly held by Motiram Dhobi, who sold it to Mr. James Green who sold it to Mr. Hassell with "fixtures and structures" (*amla o aolat*) as per deed of relinquishment dated 2nd December 1845. The Defendant produces the corresponding *potta* A6, bearing the same date, but the deed of relinquishment referred to in the *kabuliyat* is not forthcoming, which is significant because, in this instance, mutation of names did take place, and Hassell's name was entered on the landlord's register. The *potta* A6 is in similar terms to the *potta* A52 for plot No. 1. It limits the rights of the lessee to the time of the grantor's incumbency. The rent is to be paid year by year. Then there is a conveyance A2 by Hassell to Messrs. George and John Allardice, coach builders in Calcutta, dated 14th February 1852, which purports to convey an estate in fee simple in 6 bighas 16 cottahs, that is the 5 bighas 13 cottahs bought fr

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Green plus 1 bigha 3 cottahs of *lukheraj* land which latter plot is no part of the subject-matter of this suit. The Allardices sold to Nawab Khas Mahal on the 19th April 1860 by a deed, Ex. 24, executed in Scotland and purporting to convey the 6 bighas 16 cottahs in perpetuity. But Nawab Khas Mahal never got her name registered as tenant. The 4 rent receipts produced with regard to this plot are all in the name of the old tenant Hassell. The *potta* A6 for this plot clearly conveys only a limited interest in the land, and there is nothing to show cognizance on the part of landlord of the terms of Hassell's conveyance to the Allardices or of the Allardices' conveyance to Khas Mahal. For this plot too, the Defendant produces earlier documents. The plot of 5 bighas 13 cottahs is said to be made up of 4 plots.

Thus :—

Motiram Dhobi's land	0	12	0
Dharmdas's land	0	6	0
Nachim Mandal's land	1	0	0
Sarup Khansamah's land	3	15	0
	5	13	0

In support of the Defendant's claim to long possession of this plot are produced A33, a deed of sale of 12 cottahs, dated 1793; Ex. F1, a lease, dated 1227 (or 1820), in favour of Motiram Dhobi of 12 cottahs of land; A29, a *kobala* of the same year conveying these 12 cottahs to Motiram Dhobi; A23, a *kobala* dated the 10th July 1838 of the same 12 cottahs of land to Mr. James Green; A24, a notice of relinquishment of the same date by Motiram Dhobi in favour of Mr. Green; and A26, a conveyance of 5 bighas 1 cottah plus 12 cottahs of land, dated 2nd December 1845, in favour of Mr.

Hassell. Then there are two deeds of sale by Sheikh Ashraf in favour of Nilmoney Pal, dated 25th Bhadra 1203 or 17th September 1796, the former of 1 bigha 3 cottahs of land (which does not appear to have any connection with the land in dispute) and of 6 cottahs of land which may be the 3rd part of this plot No. 2. Then there is A28, by which Nilmoney Pal conveys 1 bigha 3 cottahs of land to Keshub Chandra Poddar and A27 by which he conveys 6 cottahs to the same transferee. Then we have a *dowl potta* F2, dated the 3rd March 1837, granting to Mr. Green a lease of 6 cottahs which were formerly in the holding of Keshub Chandra Poddar.

The next document A36 is a deed of sale by Sarup Khansamah to Hafizulla of 3 bighas 1 cottahs of land which is followed by A18, a deed of sale dated 23rd Baisakh 1236 or 6th May 1829 of 1 bigha 15 cottahs of land by the heirs of Hafizulla in favour of Mr. Green. Finally, we have a *dowl potta* F4 purporting to be a lease, dated 26th Baisakh 1236, by the gomasta of the zemindar in favour of Mr. Green of 3 bighas 15 cottahs of land formerly held by Hafizulla and of one bigha of land, formerly the holding of Nachim Mandal at a total rental of Rs. 8-8-0.

Now of these deeds, Exhs. 21, 24, A6 A2 and A18 are doubtless perfectly genuine deeds, but they are either in favour of the Plaintiff's case or they prove nothing against him. The remaining deeds produced in connection with this plot are private deeds, which in no way bind the landlord and many of which are either of doubtful authenticity or are palpable forgeries. In the former

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may be placed F4 and in the latter, the so-called *pottas* F1, F2 and the deeds A33, A34 and A35. In particular, the last-mentioned document is most clearly spurious. It is newly written on old paper. The ink has sunk into the artificially softened paper and in particular in writing the word "mouzah" on it, the ink has spread over the paper.

The next two plots Nos. 3 and 4 are called Meru Mistri's two plots, the former of 1 bigha 17 cottahs held at a rental of Rs. 3-4 and the latter of 2 bighas 9 cottahs and 10 chittaks, the rent of which was Rs. 2 15-2. Meru Mistri's *potta* for the 3rd plot is G1, dated 15th September 1842. It limits the rights of the tenant to the time of the *mutwalli's* incumbency and prohibits his erecting any new buildings on the land. Ex. 22 is the corresponding *kabuliyat* executed by Meru Mistri, in which Meru Mistri expressly admits that the lease is only for the period of the grantor's possession and agrees to pay enhanced rent, if the rate is enhanced in the mahal. The Defendant produces A3 and A4, two deeds of the 19th July 1840 and 8th July 1840 relating to 14½ cottahs of land then acquired by Meru Mistri; A8, a mortgage deed dated 1864 of 17½ cottahs of land; Ex. A25, a deed of sale by Sheraj Khan-samah in favour of Meru Mistri for 1 bigha of land which is dated 2nd Chait 1247 or 14th March 1841; A37, a deed for the same quantity of land executed by Meru Mistri in favour of Subjan Bibi, and dated 11th Aughran 1262 or 1855; and A38, a similar deed dated 25th Srahan 1265 or 9th August 1858 in favour of Messrs. G. and J. Allardice. Ex. 24 (the deed executed in Scotland) shows

the purchase by Khas Mahal on the 19th April 1860 of 1 bigha from the Allardices at a rental of Rs. 1-4 while A15, dated the 7th June 1867, shows the purchase by Khas Mahal of the 15 cottahs 14 chittaks out of the remaining 17 cottahs of the plot from the heirs of Meru Mistri. A14 is an *istafa* by the heirs of Meru Mistri, for this 15 cottahs 14 chittaks of land which however seems never to have been acted on. There seems to be no ground for impugning the genuineness of any of these deeds. The *potta* G1 does not show the grant of any permanent interest. It is true that in a Persian endorsement, containing a précis of the contents of the deed written at the top of it, Golam Haider's 14½ cottahs of land are described as his paternal *mowasi jumma*, and Ghulam Kadir's 2½ cottahs are described as his paternal *mowasi jumma*, but these words do not occur in the operative part of the lease, which is in Bengali, nor yet in the corresponding *kabuliyat*, Ex. 22. But if these words be held to prove that 17½ cottahs of the 3rd plot were originally let on a hereditary lease, this lease and *kabuliyat* show that these 17½ cottahs were relinquished in favour of the landlord and a fresh lease for 1 bigha 17 cottahs was granted to Meru Mistri on perfectly different terms. In the other deeds there is nothing to bind the Plaintiff's lessor. Ex. G, dated the 23rd May 1840, is Meru Mistri's *potta* for the 4th plot of two bighas 9½ cottahs of *adlat* land, (i.e., trees and homestead land) formerly in the occupation of one Bajit Doctor. A7 is a deed of sale, dated 4th May 1839, for 3 bighas 9½ cottahs of Bajit Doctor's land executed by Green to Sherajuddin.



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but this does not show how this land came to Meru Mistri. A1 is a deed of sale, dated 6th January 1861, for 1 bigha 6 cottahs of this land executed by Meru Mistri in favour of Subjan. A10 is a mortgage deed, dated 7th February 1863, of 1 bigha 6 cottahs of land executed by Subjan Bibi in favour of one Alam Khan, and A16 is a registered deed of sale, dated 15th Kartic 1273 or 31st October, 1866, by Subjan Bibi in favour of Khas Mahal for 1 bigha 6 cottahs of land which it is said had been found on measurement to be only 1 bigha and 1 cottah. This is all of this plot that Khas Mahal seems to have become the owner of. The 5th plot is called Juraon Mistri's plot. It is 11½ cottahs in area, the rent being 6 annas. There is no *potta* or *kabuliyat* for this plot. But there are 4 receipts for rent produced which show that rent is still paid in the name of Juraon Mistri. The Defendant with regard to this plot produces A41, a deed of sale, dated 3rd Jeyth 1266 (or May 1859), for 11½ cottahs executed by Haroo Ostagar (apparently an heir or successor of Juraon Mistri in the land) in favour of Messrs. Eastman & Co., A50; an *istafa* of the same date in favour of Eastman & Co., which seems never to have been acted on, for no mutation of names took place, and Allardice's deed (Allardice being a partner in the firm of Eastman & Co.) in favour of Khas Mahal shows a transfer of 1 bigha 11 cottahs 8 chittaks of Haroo Ostagar's land in favour of Khas Mahal.

These appear to be all the deeds produced in this case, except A40, which is a *miras potta*, dated the 19th Ashwin 1265 (or 1858), granting lease of 3 bighas 5 cottahs of land for building

purposes executed by A. Gharmal, the general agent to the zemindar of Kidderpore in favour of Messrs. G. and J. Allardice. But this deed of sale does not relate to any of the 5 plots in dispute in this case.

The result of our examination of these documents is that in none of the deeds or *potas* which we find genuine do there occur any words importing a hereditary or permanent interest in the land; even in the deeds we have been obliged to reject as spurious, there are no such words. It has been argued in favour of the genuineness of these latter deeds, that if they were forgeries they would have contained such words conveying a permanent interest. But to this it may be replied that the documents appear to have been framed very ingeniously, more with the view of proving long possession from which the Courts have hitherto been ready to presume a permanent grant, and, secondly, they may have been copied from genuine deeds which contained no such words and it may have been thought that the insertion of an unusual clause conveying a permanent right would have excited suspicion.

The genuine deeds in this case show, first, that the *mutwalli* in granting leases always limited the tenant's rights to the term of his own incumbency; secondly, that when any change of tenant took place which he chose to recognise, he took care to grant a new lease to the new tenant and not merely one confirmatory of the old; thirdly, that the occupation of the Defendant's predecessors in the land does not go further back than about 1840—there is certainly no satisfactory evidence of possession by the Defendant's

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predecessors for 110 years, as the Subordinate Judge finds to have been the case—and, fourthly, that the Begum Khas Mahal, whom the present Defendant represents, was never recognised as a tenant by the landlord and has always paid rent in the names of the old tenants.

The Plaintiff would therefore seem to be entitled to eject the Defendant. In fact this case seems to be in all fours with the case of *Ismail Khan v. Joygoon Bibee* (1) in which the same Plaintiff obtained a decree for ejectment in very similar circumstances.

The Defendant, however, relies on the cases of *Caspersz v. Kedar Nath Sarbadhikari* (2), and *Durga Mohan Das v. Rakhal Chunder Roy* (3). The former of these cases was a perfectly different case from the present one. In the first place it was a second appeal, in which the learned Judges were bound by the findings of fact arrived at by the Court below. In the second place, it was a case in which the origin of the tenancy was unknown and in which, therefore, the Court was justified in the circumstances of the case in presuming a permanent grant. The present case is a first appeal in which it is our duty to deal with the evidence and in which the origin of the tenancy of each plot, except plot No. 5, is proved by the documents. Even with regard to plot No. 5, the Defendant has produced deeds which do not take its origin further back than 1838. The latter case relied on is also a second appeal in which the cause of action arose in the town of Barisal. The origin of the tenancy was unknown.

The case was remanded as the Subordinate Judge was thought not to have sufficiently considered the case whether the long possession and the instances of transfer and succession did not warrant a presumption in favour of the permanency of the tenure. This is no guide to the decision of this case in which the original tenancy in regard to 4 plots at least is known, and in which in regard to the 5th plot neither long possession nor numerous instances of transfer and succession have been proved.

The Defendant further argues that the land was granted to his predecessors not for building but for agricultural purposes, on which argument his counsel seems to base a claim, though he has not put it forward in so many words, to a right of occupancy in the land. But the only two deeds in which words implying that the leases were for agricultural purposes appear, viz., F5 and A35 have been found by us to be spurious documents. Furthermore, the other deeds in the case show the various plots to be plots of homestead land and they are all situated within suburban municipal limits where the provisions of the rent law have no application. The use of printed forms of receipt under the Bengal Tenancy Act in granting rent receipts proves nothing.

Having now dealt with the facts of the case, we will consider the further question whether there has been any acquiescence or standing by on the part of the landlord which can preclude the Plaintiff from obtaining a decree for ejectment. In this connection it is necessary to note the following facts: (1) that there is no direct evidence of knowledge on the part

(1) 4 C. W. N. 210 : s. c. I. L. R. 27 Cal. 570 (1900).

(2) 5 C. W. N. cclxix, 858 *post* (1901).

(3) 5 C. W. N. 801 (1901).

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of the *mutwalli* or of his *ijaradars* of the buildings erected by the Khas Mahal; (2) that the *mutwalli* resides at Hooghly about 30 miles distant from, and on the other side of the river to, the land in dispute; (3) that the land has been for a series of years granted in *ijara*. It was at first leased in *ijara* for 3 years, then for 3 again, then for 5 years, then 20 years and now for 30 years. The Plaintiff has produced these *ijara* leases. The Subordinate Judge has refused to receive them. But we think the Plaintiff is as much entitled to their admission in evidence as the Defendant to the admission of the documents, he alleges he found in the Begum Khas Mahal's boxes. We admit them accordingly. Fourthly, there is nothing to show that any of the buildings now on the land were erected by any of the former tenants. There was evidently a one-storied house on Sarnamay's plot. That seems to have disappeared. As to Meru Mistri's plot No. 4, he was expressly prohibited from making any new additions to the old buildings. Notwithstanding this, the two-storied building now on the land has been erected by the Nawab Khas Mahal in defiance of this prohibition of the landlord. Finally as to the facts, we would point out that in our opinion the value of the buildings now on the land has been grossly exaggerated. The Defendant's witness, Mr. Cotton, has valued it including the land at Rs. 60,000, but on cross-examination it was made apparent that this was but the vaguest guess on the witness's part, based on no materials and one which the witness could not substantiate by figures. The Subordinate Judge describes the building as a 'pala-

tial' one. This, in our opinion, is a most hyperbolical description of it, which would seem to be only an ordinary two-storied house in a, by no means, good state of repair.

In these circumstances, having regard to the evidence in the case, we consider, there has been no standing by or acquiescence on the part of the Plaintiff's lessor which can estop the Plaintiff from ejecting the Defendant. The Plaintiff's lessor gave no permission to build this house; on the contrary he expressly prohibited its construction. He is not shown to have been aware of its erection. From the distance of his residence and the fact of the land being given in *ijara* [see *Krishna Kishore Neogi v. Mir Mahomed Ali* (4)] no presumption of his knowledge of, or acquiescence in, the construction of building can arise. And even if there was knowledge of and non-interference with the erection of the building on the part of the Plaintiff's lessor, this would not in equity amount to an estoppel. [*Jugmohan Das v. Pallonjee* (5).] The most recent exposition of the law on this subject is contained in the Privy Council case of *Lala Beni Ram v. Kundan Lall* (6) in which it has been said:—"In order to raise the equitable estoppel which was enforced against the Appellants by both the Appellate Courts below it was incumbent upon the Respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had, by plain implication

(4) 3 C. W. N. 255 (1899).

(5) J. L. R. 22 Bom. 1 (1896).

(6) 3 C. W. N. 502: s. c. I. L. R. 21 All. 496; L. R. 26 I. A. 58 (1899).

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contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation." It is sufficient to say that the Respondent has been able to show in this case nothing which would justify the drawing of any such inference.

In the conclusion of his address, the learned counsel for the Respondent raised the startling argument that the land in dispute was *wagf* land, which could not be leased for more than 3 years, and that therefore the Plaintiff is not entitled to sue. If the learned counsel had wished to rely on such a plea as this, it would have been proper we think for him to have raised it in the beginning of his address to us rather than in its very end. A complete answer to this plea has, however, been given by the learned counsel for the Appellant who has pointed out (1) that such a plea was never raised in the lower Court and that there is no issue in the suit which covers it; (2) that the land in dispute is not *wagf* property. It is *towliut kharij* property of the same description as the property in dispute in *Ismail Khan v. Joyjoon Bibee* (1). In none of the documents filed in the case is the land described as *wagf* land. On the contrary in the rent receipts it is described as part of the "estate of the late Munnoo Jan Khanum." This lady was the sister of the founder of the endowment of the Hooghly Imambara, and her property is managed by the *mutwalli* of the Imambara along with the *wagf* property (though no part of it) under para. 4 of

Government letter of the 24th February 1876, which has been filed in this case.

We accordingly decree this appeal with costs in all Courts.

On behalf of the Respondent no claim to compensation for the value of the buildings has been made, and we think, looking at the rule laid down in *Sheikh Hossein v. Govardhone Das, Parman Das* (7) and *Jugmohun Das v. Pallonjee* (5), as well as to the fact that the principal building now on the land was erected in spite of the landlord's express prohibition, he is not entitled to any compensation. The Defendant may, however, remove the buildings on the land before the decree for ejectment is executed.

As Nawab Khas Mahal obliterated the boundaries of the various plots of land she purchased, the Defendant is bound to make good to the Plaintiff the quantity of the land to which the latter is entitled if he cannot point them out. See *Khemamaji v. Shushee Bhusan Ganguly* (8) and *Dugappa Chetti v. Vidhia Panna Tinthasami* (9).

C. C. G.

Appeal allowed.

# [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 210 OF 1899.

A. CASPERSZ, Plaintiff,  
Appellant,

MACLEAN, C. J.

BANERJEE, J.

1901.

12, July.

KEDAR NATH

SARBADHIKARI and  
others, Defendants,  
Respondents.

*Ejectment, suit for—Origin and nature of*

(5) I. L. R. 22 Bom. 1 (1896).

(7) I. L. R. 20 Bom. 1 (1895).

(8) 9 W. R. 94 (1888).

(9) I. L. R. 6 Mad. 268 (1892).

(1) 4 C. W. N. 210; s. c. I. L. R. 27 Cal. 570 (1900).

## A. CASPERZ v. KEDAR NATH SARBADHIKARI.

*tenancy not known—Evidence of mode of dealing with land demised, of acts and conduct of parties—Permanent tenancy, presumption of—Alternative plea of acquiescence by conduct on failure of proof of substantive defence as to evidence of permanent tenancy, if permissible—Acquiescence, whether a question of fact—Facts justifying inference of permanent tenancy.*

*The facts of long possession of a tenancy, by the tenants and their ancestors, and of the landlord having permitted them to build a pucca house which has existed for a very considerable time and which was added to by successive tenants and of the tenure having been from time to time transferred by succession and purchase in which the landlord acquiesced or of which he could not have been ignorant are sufficient to warrant the Court in presuming that the tenancy is of a permanent nature.*

BABOO DHUNPUT SINGH v. GOOMAN SINGH (3), GUNGADHUR SHIKDAR v. AYIMUDDIN SHAH BISWAS (4), PROSUNNA COOMAR CHATTERJEE v. JAGUNNATH BYASACK AND OTHERS (5), ISMAIL KHAN MAHOMED v. JOYGOON BIDEE (6) referred to.

*Where the question was as to whether a tenancy was permanent and the potta relied upon by the tenant was found to be false:*

*Held—That it did not prevent the tenant from setting up an alternative case that on the other evidence the tenancy was a permanent one.*

RANEE SURNOMOYEE v. MAHARAJAH

(3) 11 Moo. I. A. 433 (1876).

(4) I. L. R. 8 Cal. 960 (1882).

(5) 10 C. L. R. 25 (1881).

(6) 4 C. W. N. 210; s. c. I. L. R. 27 Cal. 570 (1900).

SUTTEES CHUNDER ROY BAHADOOR (1) referred to.

*The question of acquiescence is not a question of fact but of legal inference from facts and in a second appeal the judgment of the lower Appellate Court is not final.*

BENI RAM v. KUNDAN LALL (2) referred to.

This was an appeal preferred on the 20th of January 1899, against the decree of T. W. Richardson, Esq., Additional Judge of 24-Pergunnahs, dated the 30th September 1899, affirming a decree of Babu Sasi Bhusan Chaudhuri, Munsif of Alipur, dated the 22nd March 1898.

This appeal arose out of a suit brought by the Plaintiff, the Receiver to the Bhukailash estate, to eject the Defendants from certain premises in Kidderpur measuring 1 bigha of land and having a pucca building upon it, on the ground that the Defendants Nos. 1 and 2 (the Sarbadhikaris), who held the premises were merely tenants-at-will not having a transferable interest; and that Defendant No. 3 (Madhab Karmokar) obtained no rights under his purchase and was a trespasser who was not entitled to remain on the land. The Sarbadhikari Defendants did not appear and the suit was contested by Defendant No. 3, Madhab Karmokar, and on his behalf it was contended that the notice was invalid, that the tenancy of the Sarbadhikaris was a permanent one by express as well as by implied grant; and that the Plaintiff was estopped from asking for khas possession.

(1) 10 Moo. I. A. 123 at p. 149 (1864).

(2) 3 C. W. N. 502; s. c. I. L. R. 21 All. 496; L. R. 26 I. A. 58 (1899).

## A. CASPERSZ v. KEDAR NATH SARBADHIKARI.

The Sarbadhikari Defendants held the tenure as successors and heirs of Beni Madhub and Modhu Sudan Sarbadhikari, who, in their turn, inherited it from Jaggan Nath Sarbadhikari. For two generations the Sarbadhikaris had occupied the land as tenants of the estate paying a rent which was increased at irregular intervals. The Sarbadhikaris and their co-shareers had sold their rights to Defendant No. 3 at various dates and the latter had been in possession of the entire tenure since 1295, B. S.

To prove the origin and nature of the tenancy a *potta* was produced by the Defendant No. 3, but it was held to be not genuine but it appeared that a *pucca* house had been built upon the land by the tenant and that the building had been added to from time to time and that it had been standing on the land for a very considerable time.

The second issue framed which is material to this report was as follows:—

“Whether the Adhikaris held the tenure as a permanent one either by express or implied grant; if so, is the suit maintainable?”

The Munsif held that the tenancy was not a permanent one but that the conduct of the parties was such as to debar the landlord from evicting the Sarbadhikaris; that the landlord took *Bharatia kabuliyat* from them but allowed them to erect *pucca* structures on the land, which had been, even after the expiry of the term of the last *kabuliyat*, allowed to stand; and the Munsif, on these findings, dismissed the Plaintiff's suit.

On appeal the Additional District Judge of Alipur held that in the absence of all documentary evidence, the long

possession of the vendor Defendants, the Sarbadhikaris, and their ancestors, and the fact that the landlord permitted a *pucca* house to be built upon the land by the tenant which house had been standing for a considerable time, raised the presumption that the original grant was some kind of permanent building-grant; that the Defendant No. 3 could not be evicted from the land and that the suit had been rightly dismissed.

The present appeal was then preferred by the Plaintiff and the same questions as were raised in the Courts below were argued before the Court, and the further question was raised that as the Defendants in the first instance based their case upon a fraudulent *potta*, it was not open to them to set up the alternative case upon which they relied, *viz.*, of long possession and acquiescence and conduct to prove that the tenancy was of a permanent character.

*Mr. O'Kinealy* and *Babus Umakali Mukherji* and *Jay Gopal Ghosha* for the Appellant.

*Babus Nil Madhub Bose* and *Shib Chandra Palit* for the Respondents.

The JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—This is a suit for ejectment. The defence is that the Defendants are not liable to be ejected, as their tenure of the land in question is of a permanent nature. The matter comes before us on second appeal, and we are, therefore, bound by the findings of fact of the Court below.

In support of their case the Defendants first set up a *potta* which purported to show that the tenure was of a per-

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manent nature. That document has been found by both the Courts below not to be genuine. But then the Defendants say that, even if the *potta* be not genuine, they have been for a very long time in possession of the land in dispute, that it has been from time to time transferred by succession and purchase from one tenant to another, that *pucca* buildings have many years ago been erected upon it by successive tenants, and that that has been done with the permission and knowledge of the land lord, and that, upon these facts, the Court would be justified in inferring or presuming that the tenure was of a permanent nature. To which the Appellant replies that as the Defendants in the first instance base their case upon a fraudulent *potta*, it is not open to them to set up the alternative case upon which they now rely. I do not think this contention can properly prevail. When parties to a litigation set up a false document, as here, that circumstance no doubt induces the Court to view the evidence which they tender upon some other part of the case, with great care and possibly with some suspicion, but it does not prevent the parties from setting up such alternative case, nor prevent the Court from duly weighing and considering the evidence adduced in support of it. In this connection I may refer to the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Ranee Surnomoyee v. Maharajah Suttees Chunder Roy Bahadoor* (1). The passage I refer to is at page 149 and runs thus—"When false witnesses or forged documents are pro-

duced in support of a case, the fact naturally creates suspicion as to the case itself; and if the evidence on which their Lordships act depended in any degree for its credibility or weight on such witnesses, or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just cause, foolishly and wickedly attempted to be supported by false evidence." That disposes of the first point.

The second point is that, having regard to the language of para. 15 of the defence, this alternative case has not been sufficiently or properly pleaded. This, to my mind, savours of too much refinement, for it is reasonably clear that the Defendants intended to raise this case, and it is equally clear from the second issue in the first Court, which runs as follows:—"Whether the Adhikaris held the tenure as a permanent one either by express or implied grant; if so, is the suit maintainable?" that the Plaintiff was aware that this case was raised, and was in no wise misled by the pleading. Moreover, evidence was gone into on the question without objection, and the Appellants have not even raised this point as one of their grounds of appeal, and so it cannot be discussed without our permission. To my mind it is a mere after-thought, and there is nothing in it.

I now pass to the substantial question in the case, and, that is whether upon the facts found by the Court below, the Court was justified in presuming that the tenure was of a permanent nature. The Judge sums up the matter as follows:—"In the absence of all documentary evidence, I must hold that the long pos-

(1) 10 Moo. I. A. 123 at p. 149 (1864).

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session of the vendor Defendants and their ancestors, and the fact that the landlord permitted a *pucca* house to be built upon the land by the tenant, which house has stood for a very considerable time, raises the presumption that the original grant was some kind of permanent building-grant." I must also refer to one or two other passages in his judgment. He says "there can be no doubt on the evidence that the house on the land in dispute has been built by successive tenants," and a little earlier in relation to the question of transfer he says: "At any rate the landlord acquiesced, and it is admitted that, for at least two generations, the Sarbadhikaris have occupied the land as tenants of the estate paying a rent which was increased at irregular intervals from Rs. 5 in 1239 to Rs. 18-10 in 1291." I may point out in passing that acquiescence is not a question of fact but of legal inference from the facts found: and upon it the judgments of the Appellate Court are not final [see *Beni Ram v. Kundan Lall* (2)]. However, it has not been suggested that the inference *quâ* the question of acquiescence, was not in the present case well founded.

Upon these findings of fact it is urged that the Court below was not justified in presuming that the tenure was of a permanent nature: Now in substance what facts are found? We have the fact of the long possession by the Defendants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, that the house has been there for a very considerable time,

that it has been built (this probably means added to) by successive tenants and that the tenure has from time to time been transferred by succession and purchase, in which the landlord is found to have acquiesced, or of which he could not have been ignorant as he accepted rent from the transferees. In my opinion these facts are sufficient to warrant the Court in presuming that the tenure was of a permanent nature, and the authorities appear to me to support this view. I will first refer to the case of *Baloo Dhunput Singh v. Gooman Singh* (3) and the passage which I propose to read is at page 466. "And upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character it is almost impossible to suppose that a suit by the zemindar in the Civil Court to disturb the possession of the Respondent, could not be successfully resisted."

I now pass to the case of *Gungadhar Shikdar v. Azimuddin Shah Biswas* (4). This case in its circumstances is not dissimilar from the present, it is not suggested that the lands in the present case were let out for agricultural purposes, and the Court said—"In this case we think there was quite sufficient ground to justify the Court below in presuming a grant of a permanent nature in favour of the Defendant's ancestors. It is conceded that the land in question was never let for agricultural purposes. It was apparently let upwards of 60 years ago for building purposes, because it is found that after the grant (whatever it was), these buildings, which are of a substantial

(2) 3 C. W. N. 502; S. C. L. R. 26  
I. A. 58; I. L. R. 21 All. 496,  
(1899).

(3) 11 Moo. I. A. 433 (1876).

(4) I. L. R. 8 Cal. 660 (1892).



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character, were erected some 60 years ago by the Defendant's ancestors, and that they and their ancestors have lived there ever since. Under these circumstances, we think that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character." In the present case we have the element of *pucca* buildings built a very long time ago by the ancestors and predecessors in title of the Defendants and apparently added to by the successive tenants.

The case last cited virtually followed the case of *Prosunno Coomar Chatterjee v. Jagunnath Bysack and others* (5), where this passage occurs:—"No doubt if land is let for building *pucca* houses upon it or if the tenant with the knowledge of the landlord does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with a long continued enjoyment of the property by the tenant or his predecessors in title might justify any Court in presuming a permanent grant specially if the origin of the tenancy could not be ascertained." Here I pause to observe that the origin of the tenancy has not been ascertained in the present case. If there were any document a *potta* for instance, which showed the origin and nature of the tenancy, very different considerations would arise. "But the mere circumstance of a tenant occupying buildings upon property would not justify such presumption, unless it could be shown that they were erected by him or his predecessors, because a landlord might let property of that kind in the same

way as agricultural land, at will, or from year to year."

There is only one other case, a recent case, that of *Ismail Khan Mahomed v. Joygoon Bibee* (6), which I need refer to in this connection. That was a regular appeal, and the Court could go and did go into the evidence. There I find this statement of the law:—"When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally, constitutes the best and indeed the only evidence to prove the nature of the tenancy. If that had been the case, the evidence of the mode of dealing with the property such as we have here, might, perhaps, have been sufficient to raise the presumption of a permanent tenancy. But where as in this case, we know when and under what circumstances the tenancy was created, evidence such as has been adduced is not sufficient for that purpose. Indeed, the circumstances attending the creation of the tenancy positively militate against any inference that it was intended to be permanent." These authorities appear to me to establish that upon the facts found the Court below was justified in presuming that the tenure was of a permanent nature. I need not refer to the well-known case of *Ramsden v. Dyson* (7) and to the Privy Council case of *Beni Ram v. Kundan Lall* (8), which have been cited by the

(6) 4 C. W. N. 210 : s. c. I. L. R. 27 Cal. 570 (1900). \*

(7) L. R. 1 E. & I. A. 129 (1866).

(8) 3 C. W. N. 502 : s. c. L. R. 26 I. A. 58 ; I. L. R. 21 All. 496 (1899). \*

(5) 10 C. L. R. 25 (1881).

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Appellant, for we are not, in the present case, dealing with the point which was there decided.

In my opinion the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am entirely of the same opinion.

S. C. S. *Appeal dismissed.*

H. P. C.

C. C. G.

### CRIMINAL REVISIONAL JURISDICTION

MIS. NOS. 52 AND 53 OF 1901

GHOSE, J.	}	GYA SINGH and others,
TAYLOR, J.		Petitioners.
1901.		v.
24, July.		MOHAMED SOHMAN,
		Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs 526, 164, 342—Transfer of pending cases—Magistrate taking part during investigation by Police—Examination of accused by Magistrate preliminary to trial by way of cross-examination.*

*When a Magistrate was present at a search made by the Police during investigation and in all probability he came to know of some facts in connection with the case, it is expedient that the case should be tried by some other Magistrate.*

*During Police investigation the examination of an accused by a Magistrate by way of cross-examination is improper.*

(TAYLOR, J.)—*In the course of Police investigation a Magistrate is entitled to record under sec. 164, C. Cr. P., any voluntary statement made, by an accused person, but he is not entitled to examine him in respect of the facts of the case.*

*Sec. 342 of the Code only empowers a Court to examine an accused to explain evidence already recorded.*

This was a rule issued on the 6th of June 1901, to show cause why the proceedings which are pending against the Petitioner before the Sub-Divisional Magistrate of Barh for an offence under sec. 353, I. P. C., should not be transferred to the file of another Magistrate.

The facts of the case were as follows:—

One Enayet Hossein of the place owed the Petitioner, Gya Singh, Rs. 125 and the said Enayet and his uncle Kanhai Khangra being cooks in the employ of the local Sub-Inspector.

On the 22nd of May 1901 Kanhai Khangra lodged an information to the thana that Gya Singh and one Moha Singh had taken Enayet and his mother to his house and kept them seated in the verandah in order to realize the money due from them and had stolen one *thala*, one *lota* and one *gurguri* worth about 5 or 6 rupees in all from Enayet's house.

The Sub-Inspector of Police arrived soon after and wanted to search the house; upon Gya Singh asking the reason why he was arrested he was caught by the Sub-Inspector himself by the hand whereupon he shouted out and some men shoved and jostled the Sub-Inspector and Gya Singh escaped. The Sub-Inspector being further threatened he ordered his men to inform the District Magistrate and the District Superintendent of Police who were putting up in the Dak-bungalow at Mokameh.

On information being given to them the District Magistrate and District Superintendent of Police and the Sub-Divisional Officer of Barh, Mr. J. G. Monahan, arrived at the place and they continued searching the house but not a single article reported to have been stolen was found.

Gya Singh *v.* MOHAMED SOLIMAN.

Mohabir Singh, a brother of Gya Singh, was then sent for and arrested by the District Superintendent in the presence of the Sub-Divisional Officer and District Magistrate and first of all taken to the thanah and thence to the Dak-bungalow where the District Magistrate and the Sub-Divisional Officer and the Superintendent of Police were putting up. In the presence of the Police Superintendent, Mohabir Singh made a statement before Mr. J. G. Monahan, the Sub-Divisional Officer, which was recorded under sec. 164, Code of Criminal Procedure, and the usual certificate was given by the said officer.

Thereupon two criminal cases were instituted upon police-reports against the Petitioners, before the Sub-Divisional officer, *viz.*, one for theft and wrongful confinement, rioting and house-trespass under secs. 380, 348, 147, 451, I. P. C., in which Kanhai Khangra was the complainant and the other for rioting and assault under secs. 147 and 353, I. P. C., in which the Sub-Inspector was the complainant.

*Mr. Henderson and Babu Khetter Mohun Sen* for the Petitioners.

No one appeared to shew cause.

The JUDGMENTS OF THE COURT were as follows:—

GHOSE, J.—We have considered the explanations submitted by the Sub-Divisional Magistrate in connection with these rules, and it seems to us that it would be expedient for the ends of justice to transfer the cases that are now pending in his file to the file of any other Magistrate in the District whom the District Magistrate may appoint in that behalf.

It is not necessary that we should examine all the matters referred to in the affidavit of the Petitioner, and those in the explanation submitted by the Magistrate. It is sufficient to say that it does appear that the Sub-Divisional Magistrate took some part, or, at any rate, was present, on the occasion when the Police made the search, and in this connection he probably became aware of some of the facts in connection with the case. Then it appears that the Police brought up before him one of the accused for the purpose of his examination being recorded and such examination was recorded. We have examined the said examination, and it seems to us that it was an improper examination. The accused was examined on various matters (and the examination rather took the shape of cross-examination) which should certainly not have been done; and we think that in trying the case, the Sub-Divisional Magistrate could hardly disabuse his mind of the impression that was formed at the time of the examination, which, as we have already said, was improper.

In this view of the matter we think, without casting the slightest reflection upon the Sub-Divisional Magistrate concerned, that it is expedient that the case should be transferred from his file to the file of some other Magistrate in the District, whom the District Magistrate may appoint in that behalf.

TAYLOR, J.—I concur, and would further point out to the Assistant Magistrate that under sec. 164, C. Cr. P., in the course of a Police investigation, he is entitled to record any voluntary statement made by the accused person, but

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he is not entitled to examine the accused person in respect of the facts of the case.

That power is only given him by sec. 342, C. Cr. P., under which he may examine him in respect of evidence recorded against him for the purpose of explaining such evidence.

*Rule made absolute.*

H. P. C.

### PRIVY COUNCIL.

[ON APPEAL FROM THE MADRAS HIGH COURT.]

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

1901.

Heard, 6, 8, 26 and

28, June.

Judgment, 2, August.

N. A. SUBRA-

MANIA IYER,

Appellant,

v.

THE KING,

EMPEROR,

Respondent.

*Code of Criminal Procedure (Act V of 1898), secs. — Joinder of a multitude of charges—Irregularity—Illegality—Trial, illegality in the mode of, if curable—Power of Appellate or Revisional Court to cancel illegality and to appropriate verdict of jury only to what is legal.—Functions of Judge and jury.*

*Disobedience to the express provision of the law as to the mode of a trial cannot be regarded as a mere irregularity and as such is not curable under sec. 537 of the Code of Criminal Procedure.*

*The joinder, at one trial, of more charges than three for offences of the same kind and extending over a period longer than a year, contravenes sec. 234 of the Code of Criminal Procedure and is an illegality not curable under sec. 537.*

*When the course pursued at the trial was illegal, a Court of Appeal or Revision cannot amend it by arranging afterwards*

*what might or might not have been properly submitted to the jury and thereupon support the conviction or appropriate the finding of guilty to so much of it as was legal.*

*Meaning of the word irregularity discussed.*

SMURTHWAITE v. HANNAY (1) referred to.

ABDUR RAHMAN v. THE EMPRESS (2) disapproved.

This was an appeal against a decision of the High Court of Judicature at Madras under sec. 26 of the Letters Patent of 1865, which in modification of the verdict of the jury in a case tried at the First Criminal Sessions for the Town of Madras in 1900, and of the sentence pronounced in pursuance of such verdict by the presiding Judge, sentenced this Appellant to a term of two years' rigorous imprisonment and a fine of Rs. 5,000 and in default of payment of the fine to a further term of nine months' rigorous imprisonment.

The Appellant, N. A. Subramania Iyer, was Superintendent of the Military Accounts Department of Madras. John Lewis Philp D'Santos was Supervisor of the same Department subordinate to him.

On the 8th day of November 1899 the Chief Presidency Magistrate of Madras framed ten charges against the Appellant and the said D'Santos for offences under secs. 109, 161 and 384, of the Indian Penal Code, and committed them for trial on the said charges to the High Court of Madras.

(1) L. R. (1894) A. C. 494.

(2) 4 C. W. N. 657; S. C. I. L. R. 27 Cal. 889 (1900).

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The case came on for hearing at the First Criminal Sessions for the year 1900 when the Appellant and the said D'Santos were jointly charged under the said sections upon an indictment which contained seven counts.

The first count stated as follows:—

"That they, the said N. A. Subramania Iyer and the said John L. P. D'Santos, being public servants, to wit, respectively Deputy Examiner, Superintendent and Supervisor of the Accounts Branch of the Military Accounts Department, in or about the month of March 1896 did conspire and combine together, and thereafter until the month of November 1898 did continue so to conspire and combine, for the purpose of extorting money and obtaining illegal gratifications from clerks in the Accounts Branch of the Military Accounts Department for himself the said N. A. Subramania Iyer, in pursuance of and according to which said conspiracy and combination the said N. A. Subramania Iyer did obtain for himself through the said John L. P. D'Santos divers sums of money, to wit, from one Kalliana Chetty during the years '96, '97 and '98 sums amounting in the aggregate to Rs. 680; from one C. Balasundra Moodelliar the sum of Rs. 100 on or about August 27th, 1896, the sum of Rs. 50 on or about March 1st, 1897, and the sum of Rs. 100 on or about May 10th, 1897; from one K. Sreenivasa Charry the sum of Rs. 100 on or about October 2nd, 1898; and from one C. Vedachella Chetty the sum of Rs. 5 in August 1898, the sum of Rs. 5 in September 1898, the sum of Rs. 3 in October 1898, and the sum of Rs. 3 in November 1898, and that they have

thereby committed an offence punishable under secs. 109 and 384 and secs. 109 and 161 of the Indian Penal Code, and within the cognizance of the High Court of Judicature at Madras aforesaid."

The second, fourth and sixth counts charged the Appellant with having, on or about the 27th August 1896, the 1st March 1897, and the 10th May 1897, respectively, dishonestly induced one C. Balasundra Moodelliar to pay to himself through the said J. L. P. D'Santos the sums of Rs. 100, Rs. 50 and Rs. 100, the first and second of such acts being charged as an offence punishable under sec. 161 or 384 of the Indian Penal Code while the third is charged as an offence under secs. 109 and 161. The third, fifth and seventh counts charged D'Santos with having abetted the Appellant in the commission of the offences set out in counts two, four and six respectively, and as being thereby punishable under secs. 109 and 161 or 384.

On the 14th February 1900 the case came on for trial before Mr. Justice Boddam, when the Appellant's counsel took two objections to the indictment, *first*, that the first count was bad in itself under sec. 234 of the Criminal Procedure Code, and, *secondly*, that under the same section the union of the first count with the second, fourth and sixth made the whole indictment bad for misjoinder.

These objections were overruled by Mr. Justice Boddam who recorded the following reasons:—

"I see no objection to the first count. It charges one offence, *viz.*, the offence of a continuing conspiracy which has been carried out in the manner therein shown

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and thereby shown to be a continuing conspiracy and is punishable as abetment under sec. 109."

"I see no objection to the first count being combined with the rest of the indictment under sec. 230."

On behalf of the Crown an application was made that a conditional pardon might be tendered to the second accused. The learned Judge declined to consider the application until the second accused had pleaded to the charges preferred against him. He then pleaded guilty to the 1st, 3rd, 5th and 7th counts, and his plea was recorded.

Before the pardon was tendered the Appellant's counsel objected that such a tender would be *ultra vires*, *firstly*, because the offences in question were not exclusively triable by the High Court, and, *secondly*, because pardon could not be tendered to D'Santos as he had already pleaded guilty. The objection was overruled. The learned Judge then tendered to the second accused a pardon under sec. 338 of the Criminal Procedure Code, following the words of sec. 337, and he was then removed from the dock. The whole of this proceeding took place in accordance with a previous arrangement arrived at between D'Santos and the Government Solicitor, and the plea of guilty, however apparently voluntary, was in fact made in the hope of purchasing a pardon.

The jury was then empannelled and the trial proceeded upon the entire indictment, and evidence was given upon all the criminal acts charged in the first and subsequent counts. When the evidence of D'Santos was tendered, the Appellant's counsel objected to his being

sworn on the ground of the invalidity of his pardon. The objection was overruled.

The only evidence which is material in the present appeal is that bearing on the sixth count.

Balasundara Moodelliar, after speaking to the previous bribes which he said he had paid D'Santos at his request for the purpose of being paid to the Appellant, says that on the 30th April 1897 he received from D'Santos a letter marked B. "Before receiving this letter I had a conversation with D'Santos. He asked me to give Rs. 100 to the Iyer for having given me permanent promotion. I said I would speak to my father." From his father he procured two notes each for Rs. 50 which are identified as Nos.  $T_{73}$  32418 and  $T_{73}$  43491. These Balasundara gave on the 10th May to D'Santos in a cover. This cover, he says, D'Santos took into the Appellant's room and subsequently returned leaving the cover empty on Balasundara's desk. As he sat he heard the Appellant call Sivachandra Row and ask him to change some currency notes; Sivachandra was a clerk in the office; Balasundara says that there was no attempt at secrecy in getting the notes changed by Sivachandra, and that beside Sivachandra he had frequently seen peons and muchees take notes to change. It is proved that on the 10th May Sivachandra changed these two notes for a single note of Rs. 100, and that on the 26th May he purchased on behalf of the Appellant Government paper for Rs. 800, this note of Rs. 100 being part of the price paid. Sivachandra is not called for the prosecution. He is produced as a witness for the

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and swears that he received the two Rs. 50 notes from Balasundara and changed them into one for Rs. 100. That on the 25th May he received Rs. 100 from the Appellant to purchase Government securities and put them into his box; that the purchase was made on the 26th and that he paid in his own Rs. 100 note taking in its place small notes, part of those supplied by the Appellant.

D'Santos in his evidence threw the whole blame as to the demand for and the receipt of the bribes upon the Appellant. He admitted that about February a pardon was suggested in reference to which he says he went to the Government Solicitor, Mr. Barelay, and made a written statement. "It struck me I was likely to be convicted on the prosecution evidence. I was anxious to escape being convicted. I did not intend to stand my trial. Whether I am pardoned or not I am speaking the truth from strong moral grounds."

At the close of the evidence the jury found the Appellant guilty on the first, second and sixth counts, being advised by the Judge not to find a verdict of guilty on the fourth. By six to three they found that D'Santos had not spoken truth throughout. The Judge then ordered him to be placed in the dock, and sentenced the Appellant to three years' rigorous imprisonment with a fine of Rs. 8,000, and in default of payment to a further years' rigorous imprisonment. D'Santos was sentenced to three years' rigorous imprisonment.

Subsequently to this conviction and sentence the Officiating Advocate-General gave a certificate under sec. 26 of the Letters Patent for the High Court of

Judicature at Madras, the material clauses of which were as follows:—

"(a) That in my judgment the learned Judge who presided at the First Criminal Sessions of the High Court of Judicature at Madras for 1900 erred in law in deciding that it was competent to him to tender a pardon to D'Santos notwithstanding that none of the offences in respect of which the said N. A. Subramania Iyer was being tried was within the meaning of the Criminal Procedure Code, exclusively triable by the High Court and that therefore the learned Judge erred in law in admitting the evidence given by D'Santos as a witness for the Crown after pardon had been tendered to him and in placing the same before the jury.

"(b) That in my judgment the said learned Judge erred in law in not striking out the first count from the indictment but trying and convicting the said N. A. Subramania Iyer on it and in allowing evidence to be adduced by the Crown in respect of the first count as regards matters of alleged extortions of money and illegal gratifications therein specified other than those forming the subject-matter of the second, fourth and sixth counts and placing the same before the jury.

"(c) That in my judgment the learned Judge erred in law in trying the said N. A. Subramania Iyer on the first, second, fourth and sixth counts at one trial."

Upon this certificate the case was heard twice before the full Court of six Judges; first upon the question of law and next upon the facts.

On the questions of law all the Judges

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held that the offer of a pardon to D'Santos was illegal, but all with the exception of Davies, J., held that his evidence was still admissible.

As to the first count while the Chief Justice, Shephard and Boddam, JJ., held that it was good, Benson, Moore and Davies, JJ., held that it was bad.

All the Judges, except Boddam, J., held that whether it was good or bad its union with the remaining counts made the whole indictment bad for misjoinder. But all the Judges, except Davies, J., who gave a qualified opinion, thought that it was open to them to strike out the first count and deal with the evidence applicable to the remaining counts.

Upon the final hearing upon the facts all the Judges were of opinion that the Appellant should be acquitted on the second count. They also agreed in thinking that D'Santos was utterly untruthful and that no reliance whatever could be placed upon his evidence. As to the sixth count which alone remained all the Judges except Davies, J., were of opinion that after excluding the evidence of D'Santos and disbelieving as they did the evidence of Sivachandra, there was enough left to support the conviction of the Appellant on the sixth count. Davies, J., thought that the charge being laid as one of bribery, the evidence of Balasundara was the evidence of an accomplice, which according to the invariable practice of the Courts of India required corroboration. As to Sivachandra he said, "now whether this story be true or false it is no corroboration of Balasundara's story and brings nothing home to the first accused. I therefore find that there is no legal evidence upon

which the sixth count can be supported. Supposing again that I am wrong in appreciating the evidence, surely it was a case in which the jury might have doubts and might have given the accused the benefit of the doubt." Then he relied on the judgment of the Lord Chancellor in *Makin v. Attorney-General for New South Wales* (3) as showing that where the accused was entitled to the finding of a jury, it was not open to the Court upon different evidence from that which had been before the jury to pronounce that he was guilty.

The result was that in modification of the original sentence the Court sentenced the Appellant to a term of two years' rigorous imprisonment and a fine of Rs. 5,000, and in default of payment of the fine to a further term of nine months' rigorous imprisonment.

Mr. Mayne for the Appellant contended that the Court was wrong in holding that while the tender of pardon to D'Santos was illegal, his evidence given to earn a pardon was admissible; D'Santos was not a convicted person, he was an accused person under trial awaiting judgment. The tender of pardon was illegal. He referred to *Reg. v. Hanmanta* (4) and *Empress of India v. Asghar Ali* (5); Criminal Procedure Code, secs. 337, 338, 342 and 343; Evidence Act, sec. 24; Oaths Act, 1873, sec. 5. A trial does not necessarily come to an end with a plea of guilty, *Queen v. Chunna Parichi* (6); when the accused gave his evidence he was an incompetent

(3) L. R. (1894) A. C. 57.

(4) I. L. R. 1 Bom. 610, see 617 (1877).

(5) I. L. R. 2 All. 260 (1879).

(6) I. L. R. 28 Mad. 151 (1899).



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witness and an oath could not be lawfully administered to him.

Excepting the offence of conspiracy punishable under sec. 121A of the Indian Penal Code (waging war against the Queen) there was no offence of conspiracy as such under the Penal law of India. It is only otherwise indictable when it amounts to abetment; secs. 107, 108 and 109 were read; each offence abetted makes a separate offence of abetment and more than one such offence can be tried together only under the provisions of secs. 233 and 234, Criminal Procedure Code. Upon the charge of bribery he submitted that there was no evidence on which a conviction could take place excluding the evidence of D'Santos who had been unanimously disbelieved, sec. 167, Evidence Act. The High Court had no jurisdiction to substitute for the verdict of the jury their own verdict founded on evidence being the residue of the evidence before the jury. Their power was limited under sec. 26 of the Letters Patent. The High Court had no jurisdiction to amend the indictment by striking out the first count. He contrasted sec. 2 of XI and XII Vict., c. 87 (1848), which was followed in the New South Wales Criminal Amendment Act, 1883, and was the basis of the ruling in *Makin v. Attorney-General for New South Wales* (3) with secs. 25, 26, 27, 28 and 38 of the Letters Patent.

The trying of the four different counts together at one and same trial is illegal, see sec. 233, Criminal Procedure Code; the whole trial is inoperative if more than three counts are joined, sec. 234. *Queen-*

*Empress v. Nobodip Chunder Shaha* (7), *Re Luchminarain* (8), *Queen-Empress v. Fakirapa* (9), *Abdur Rahman v. The Empress* (2).

The following cases were also referred to :—

*Reg. v. Navroji Dadabhai* (10), *Queen v. Hurribole Chunder Ghose* (11), *Imperialtrix v. Pitambar Jina* (12), *Queen-Empress v. O'Hara* (13), *Wafadar Khan v. Queen-Empress* (14), *Makin v. Attorney-General, New South Wales* (3), *Regina v. Mellor* (15).

On the question of costs, see *Macleod v. Attorney-General for New South Wales* (16).

The LORD CHANCELLOR.—Your contention is, that the man has been tried contrary to law. It is not merely the proper or improper admission of evidence. *The New South Wales* case came under a particular statute.

*Mr. Phillips* then addressed their Lordships on behalf of the Crown.

The LORD CHANCELLOR.—You will have to deal with the fact that the offences were committed over a much greater period than 12 months and were all tried together. The question is whether the Appellant has not been tried for more offences than the law permits at one trial.

(2) 4 C. W. N. 657; s. c. I. L. R. 27 Cal. 849, 845-7 (1900).

(3) I. L. R. (1894) A. C. 57, 69.

(7) I. L. R. 14 Cal. 395 (1887).

(8) I. R. R. 14 Cal. 128, see 131 (1886).

(9) I. L. R. 15 Bom. 491, see 498 (1890).

(10) 9 Bom. H. C. R. 358, see 367 and 372 (1872).

(11) I. L. R. 1 Cal. 207, see 216 17 (1876).

(12) I. L. R. 2 Bom. 61 (1877).

(13) I. L. R. 17 Cal. 642 (1890).

(14) I. L. R. 21 Cal. 955 (1894).

(15) Dears and B. C. C. 468; 7 Cox. C. C. 454; 27 L. J. M. C. 121 (1858).

(16) I. L. R. (1891) A. C. 455.

(8) L. R. (1894) A. C. 57.

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*Mr. Phillips* rested his argument on sec. 335, Criminal Procedure Code; the whole series of acts were connected together so as to form one transaction. He commented on some of the decisions referred to by Mr. Mayne. He referred to sec. 537, Criminal Procedure Code, and urged that the order of the High Court had not occasioned any failure of justice, *Abdur Rahman v. The Empress* (2). Improper admission of evidence was not of itself ground for reversal of any decision under terms of sec. 167, Evidence Act, see *Queen v. Hurribole Chunder Ghose* (11).

The accused person mentioned in the sections of the Code to which Mr. Mayne drew attention meant the person who was to be tried.

The High Court has power to review the case, see sec. 26, Charter Act, and finally determine points of law and to alter the sentence, and pass such judgment and sentence as shall seem right.

**THE LORD CHANCELLOR.**—Can the High Court make the trial right by altering the record?

*Mr. Phillips.*—There must be a point of law, and that point must have been decided, then the Court may correct the decision and deal with the sentence.

**THE LORD CHANCELLOR** at the close of the arguments said:—Their Lordships would take time to consider their judgment.

**THEIR LORDSHIPS' JUDGMENT** was delivered by

**THE LORD CHANCELLOR.**—In this case the Appellant was tried on an indictment

(2) 4 C. W. N. 657: s. o. I. L. R. 27 Cal. 839 (1900).

(11) I. L. R. 1 Cal. 207, 216-217 (1876).

in which he was charged with no less than forty-one acts, these acts extending over a period of two years. This was plainly in contravention of the Code of Criminal Procedure, sec. 234, which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The reason of such a provision which is analogous to our own provisions in respect of embezzlement is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.

Their Lordships think that the course pursued and which was plainly illegal cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury.

Upon the assumption that the trial was illegally conducted it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the statute has been done. The effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written

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accusation as ought to have been submitted to the jury.

It would in the first place leave to the Court the functions of the jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.

Their Lordships cannot regard this as cured by sec. 537.

Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant.

The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity.

Some pertinent observations are made upon the subject by Lord Herschell and Lord Russell of Killowen in *Smurthwaite v. Hannay* (1). Where in a civil case several causes of action were joined Lord Herschell says that "if unwarranted by any enactment or rule it is much more than an irregularity," and Lord Russell of Killowen in the same case says, "such a joinder of Plaintiffs

is more than an irregularity; it is the constitution of a suit in a way not authorised by law and the rules applicable to procedure."

With all respect to Sir Francis Maclean and the other Judges who agreed with him in the case of *Abdur Rahman v. The Empress* (2), he appears to have fallen into a very manifest logical error in arguing that because all irregularities are illegal as he says in a sense and this trial was illegal that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike. But this trial was prohibited in the mode in which it was conducted, and their Lordships will humbly advise His Majesty that the conviction should be set aside. Their Lordships will make no order as to costs.

Solicitor: *R. T. Tasker* for the Appellant.

Solicitor: *India Office* for the Crown.  
*Conviction set aside.*

C. W. A.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 282 OF 1899.

THE COLLECTOR OF  
DACCA on behalf of the  
SECRETARY OF STATE  
FOR INDIA IN COUNCIL,  
Defendant, Appellant,

MACLEAN, C. J.  
BANERJEE, J.  
1901.

3, July.

v.  
JAGAT CHANDRA  
GOSWAMI,  
Plaintiff, Respondent.

*Bairangi or ascetic—Letters of administration, application for, by his preceptor's*

(2) 4 C. W. N. 657: s. c. I. L. R. 27  
Cal. 889 (1900).

(1) L. R. (1894) A. C. 494.

## THE COLLECTOR OF DACCA v. JAGAT CHANDRA GOSWAMI.

*preceptor—Succession—Custom, ancient and definite—Dyabhaga, Ch. XI, sec. 6, para. 35—Vyavastha Darpana, Ch. V, sec. 1, para. 144—Indian Evidence Act (I of 1872), sec. 42.*

*On the death of a Bairagi or an ascetic his preceptor's preceptor applied for letters of administration claiming that according to the custom prevailing in the sect of which he and the deceased disciple were, respectively, members, he, as the preceptor of the dead man's preceptor was entitled to his property :*

*Held—The custom set up was proved.*

This was an appeal preferred on the 1st of September 1899, against the decree of S. J. Douglas, Esq., District Judge of Zillah Dacca, dated the 15th of May 1899.

Jagat Chandra Goswami, the Petitioner (Respondent), applied for letters of administration in the lower Court. He alleged that he was the preceptor's preceptor of the deceased who was a Bairagi (an ascetic) and as such entitled to receive letters of administration. It was further stated in his petition that the deceased died leaving a *Bairagini* named Radhamani Baishnabi, one Lalita Dasi who alleged herself to be the sister, and Kokaram and Kanai Changa who alleged themselves to be the nephews (sister's sons) of the said deceased. The Petitioner claimed that according to law and custom prevailing in the country, the said persons had no right to the property left by the said deceased.

The Collector of Dacca on behalf of the Secretary of State for India in Council opposed the application and put in an objection stating that he did not admit the claim of the applicant as being the heir of the deceased, and that the

deceased had died without leaving an heir, and his estate escheated to Government.

The amount of assets likely to come to the Petitioner's hands was alleged by the Petitioner to be Rs. 279-13.

The lower Court found upon the evidence that such custom as set up had been made out and allowed the petition.

The Collector of Dacca preferred this appeal.

*Babus Ram Churn Mitter and Srish Chandra Chowdhury for the Appellant.*

*Babu Baikuntha Nath Das for the Respondent.*

THE JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is an application for letters of administration to the estate, which is very small, of one Gopal Das Bairagi, who died in the month of Magh 1303. He was a Bairagi, that is, an ascetic, and the Petitioner is his preceptor's preceptor, and as such claims to be entitled to such letters of administration. "His application is resisted by the Secretary of State who alleges that the deceased died without leaving any heir and that his estate has escheated to Government.

The base of the Petitioner is that, according to the custom which prevails in the sect of which he and the deceased disciple were, respectively, members, he, as the preceptor of the dead man's preceptor, is entitled to his property to which the Secretary of State replies that no such custom has been satisfactorily proved in this case.

In the observations I am about to make, I am dealing only with the concrete case now before us, namely, that

## THE COLLECTOR OF DACCA v. JAGAT CHANDRA GOSWAMI.

of a dead disciple who was initiated by a disciple who was the disciple of and was initiated by the preceptor who is now seeking letters of administration.

The question we have, in effect, to decide is whether the applicant has made out that under such circumstances he is entitled to letters of administration to the property of his disciple's disciple. The Court below has found in favour of the applicant, finding the existence of the custom set up and hence the present appeal.

Before I deal with the evidence I may, in passing, refer to Chap. XI, sec. 6, paragraph 35 of the *Dyagbhaga*, which lays down the general rule in matters of this class: "the goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil and the holy preceptor take. On failure of these, the associate in holiness or person belonging to the same order, shall inherit. Thus *Yajnyavalkya* says 'the heirs of a hermit, of an ascetic and of a professed student are, in their order, the preceptor, the virtuous pupil, and associate in holiness.'" And, upon the question of custom I may perhaps refer to Chap. V, sec. 1, paragraph 144 of the *Vyavastha Darpana*, where it is laid down, and the authorities for the proposition are given by the learned author, that "If a custom or usage has obtained in a country, district, village, nation, tribe, class or family and has been invariably observed from time immemorial or for many generations, it supersedes the general maxims or rules of the law." The question really is whether the applicant has made out the existence of this custom which the Appellant, the

Secretary of State, says must be ancient, definite and reasonable.

Upon this question there is a good deal of oral evidence, and a fair amount of documentary evidence. The oral evidence which has been laid before us is the evidence of the applicant himself and of the three witnesses he has called, and they give important and direct evidence upon the point, and there is no evidence the other way. To cite the language of the witness *Radha Ballabh Goswami*: He says, "Amongst us who are gurus, we obtain the properties left by our disciples or disciple's disciple on their death," and he gave various instances in support of this assertion, and some of the other witnesses give similar instances. Upon that evidence it is difficult to say that the custom is unreasonable nor, notwithstanding what the applicant said, "on my death my sons and grandsons will get and on failure of them the *thakoor*"—upon which the Appellant placed much reliance—can it reasonably be said, looking at his evidence as a whole, that it was indefinite.

But the documentary evidence is important. As to the antiquity of the custom the applicant says it has been in vogue for a long time and relies upon an attested copy of a *parawana*, dated the 16th September 1792, purporting to have been issued by a certain Mr. Douglas though who this Mr. Douglas was does not appear. This purports to be a very old document: if genuine it certainly supports the applicant's case for it refers distinctly to the property of a disciple of a disciple (*anusishya*) and would be relevant under sec. 42 of the Indian Evidence Act. Looking at the source from which the

THE COLLECTOR OF DACCA *v.* JAGAT CHANDRA GOSWAMI.

applicant obtained this document, *viz.*, from his father, some 20 years ago, and to the fact that there is no evidence to suggest that it has been fabricated I think we may fairly agree with the Court below and hold that it is genuine. In this view the custom would appear to be ancient.

There are, however, other documents which support the applicant's case. I refer first to the attested copy of a *rubokari* of the District Judge of Dacca, dated the 29th February 1848. There appears to have been a contest as to who was entitled to the property of a disciple of this sect on his death, and in the result it was determined that the preceptor's preceptor of the disciple was entitled to the property. The Government, however, was not a party to that proceeding.

Then it appears from an attested copy of a judgment of this Court, dated the 15th May 1865, that this Court held that the head of the sect is entitled to the property of the disciple of his immediate disciple. There is a distinction between that case and the present, for, there it was held that the head of the sect was entitled to the property: here it is contended that the preceptor of the disciple's disciple is entitled.

However, it appears from an attested copy of the decree of the Court of the Munsif of Naraingunge, dated the 1st August 1870, to which Government was a party, that a claim, similar to the present, was held good as against the Government. That decree was appealed against but the appeal was dismissed with costs, and Government did not think it worth while apparently to bring the case up to this Court.

Again it appears from an attested copy of a judgment of the 31st July 1883, to be found at page 23 of the Paper-book, that the same conclusion was arrived at. I am not referring to these judgments as constituting *res judicata*, but as evidence in the matter under sec. 42 of the Evidence Act. Upon these materials we may fairly say that the applicant has proved his case. The appeal then must be dismissed with costs. We assess the hearing fee at two gold mohurs.

BANERJEE, J.—I am of the same opinion. The applicant claims the property of the deceased as his preceptor's preceptor. A claim like that can only rest upon custom. The rule of Hindu law with reference to the property of an ascetic such as the deceased was, contemplates the succession only of the preceptor himself (*see Dyabhaga*, Chap. XI, sec. 6, para. 35). The custom which is set up is a custom applicable to the sect to which the parties belong. And the only question is whether that custom has been proved. It is unnecessary for me to go into the matter at any length, as I agree entirely in all that has been said in the judgment of the learned Chief Justice. I only wish to add a few words with reference to two of the objections that have been urged against the validity of the custom by the learned junior Government pleader, namely, that the custom is indefinite, and that it is unreasonable.

As regards the first objection, there is nothing indefinite in the custom as set up in the petition of the applicant. There what he says is that the Petitioner is the preceptor's preceptor of the

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deceased and as such is entitled to receive letters of administration to the estate left by him. That is a very definite statement of the right by custom set up. The indefiniteness which is imputed to the custom is one that may attach to it, if we take a certain statement of the applicant in his deposition literally, that statement being, that on the death of the applicant, his sons and grandsons will be entitled to the property of his disciples' disciples. But I do not think that that statement should be taken literally. It is susceptible of this interpretation, namely, that after the applicant, his sons and grandsons in their turn will be entitled to the property of their disciples' disciples in their own right as preceptor's preceptor and not merely by reason of their being sons and grandsons of the applicant; and if the statement is taken in that sense, there is nothing indefinite in the custom set up.

As to the second objection I have noticed above, that the custom is unreasonable, I need only say this: that though by this custom the right of the preceptor to inherit the property of his disciple is ignored and the preceptor's preceptor acquires a right to inherit such property, that of itself does not make the custom so unreasonable that we should refuse to recognize it. It may well be, (and some of the facts appearing from certain of the documents go to show that this is so) that by reason of the superior sanctity attaching to the family to which the applicant belongs, the right to succeed has been conceded to the members of that family in preference to the rights of the immediate preceptors of deceased disciples.

S. C. S.

*Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 60 OF 1899.

BIRAJ MOHINI DAS

and others, Defendants,

Appellants,

MACLEAN, C. J.

BANERJEE, J.

1901.

9, May.

SRIMATI CHINTA MONI

DASI, Plaintiff,

Respondent.

*Consent decree—Compromise—Civil Procedure Code (Act XIV of 1882), sec. 375—Jurisdiction—Appeal.*

*When a decree is passed by consent of parties, the question as to whether or not the compromise decree is valid cannot be gone into on an appeal against that decree.*

ASHUTOSH CHANDRA v. TARA PRASUNNO ROY (2) referred to.

BROJO DURLAB SINGH v. ROMA NATH GHOSH (3) distinguished.

This was an appeal preferred on the 16th of February 1899, against the decree of Babu Bulloram Mullick, Subordinate Judge, first Court of Zillah 24-Pergunnahs, dated the 15th of April 1898.

The facts of the case appear from the judgment.

Dr. Ashutosh Mukerjee and Babu Sarat Chunder Ghose for the Appellants.

Babus Golap Chandra Sircar and Hari Charan Sarkhel for the Respondent.

THE JUDGMENTS OF THE COURT were as follows:—

MACLEAN, C. J.—This is a partition suit which was instituted on the 25th of

(2) I. L. R. 10 Cal. 612 (1884).

(3) 1 C. W. N. 597: s. c. I. L. R. 24 Cal. 908 (1897).

## BIRAJ MOHINI DASÍ v. SRIMATÍ CHINTA MONI DASÍ.

September 1897, for the partition of certain properties of which the Plaintiff was entitled to one-half and the Defendant Biraj Mohini Dasi and her two minor children, who were also Defendants, are entitled to the other half. After certain intermediate proceedings the case came before the Subordinate Judge of 24-Per-gunnahs, on the 18th of February 1898, and it appears from the entries in the order-sheet that the suit was compromised on that day, and the compromise was sanctioned by the Court on behalf of the minors, and a decree was made in the terms of that compromise.

On the 15th of April 1898 the final decree was made in the suit. On the 18th of May 1898 the present Appellants, the Defendants in the suit, applied for a review of the above orders of the 18th February 1898 and the 15th April 1898, but that application was dismissed on the 18th of June 1898. The Appellants have now appealed against both the preliminary and the final decree, and under a recent ruling of a Full Bench of this Court in the case of *Khadem Hossein v. Emdad Hossein* (1) they claim to be entitled to challenge the preliminary decree of the 18th of February 1898. If the preliminary decree had not been a consent decree based upon a compromise and sanctioned by the Court, this contention would have been well-founded, but, as it was a consent decree, the Appellants cannot challenge it now upon the present appeal. They cannot, upon the present appeal, go into the question of whether or not the consent decree is or is not binding upon the parties; that is a new and

entirely distinct case raising new and distinct issues of fact, and may be of law, and which must be determined in a fresh and distinct proceeding. The Appellants must get rid of that consent decree: they must have it set aside, if a proper case for setting it aside be made out: they cannot effect this object by appealing against it. Apart from principle this would appear to be clear upon authority; for, in the case of *Ashutosh Chandra v. Tara Prosunno Roy* (2), it was laid down that for the purpose of setting aside a decree passed in pursuance of a compromise there are two modes of procedure available by suit, or by review of judgment. It is not for us to say which course the parties should take. We cannot upon this appeal go into the question of whether or not the compromise decree was valid and binding as against the present Appellant.

In this view it becomes unnecessary to go into the question of what are the powers of a vakil in relation to compromising suits of whether the compromise here was duly sanctioned by the Court. These are questions which must remain to be determined when they are properly brought before the Court. No other grounds of appeal have been suggested to us; consequently the appeal fails and must be dismissed with costs, five gold mohars.

BANERJEE, J.—I concur with the learned Chief Justice in thinking that this appeal must be dismissed.

The learned vakil for the Defendants Appellants contends that although sec. 375 of the Code of Civil Procedure makes a decree on a compromise final, yet they

(1) 5 C. W. N. 617 (1901).

(2) I. L. R. 10 Cal. 612 (1884).



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are entitled to appeal against the decree in this case so far as the appeal seeks to show that there was no valid compromise to support the decree ; and he relies upon the case of *Brojo Durlab Singh v. Roma Nath Ghose* (3) as supporting his contention.

It may be conceded that an appeal for that limited purpose may lie, as a matter of law, against a decree passed on a compromise, and having regard to the nature of the grounds urged in this case, I must hold that these are grounds which cannot be entertained by way of an appeal from a consent decree, whatever other remedy the Appellant may have for substantiating those grounds and obtaining relief against that decree.

The two grounds urged are, *first*, that the decree upon the alleged compromise is bad, because the pleader who entered into the compromise on behalf of the Defendants-Appellants, had no authority to enter into it ; and, *second*, that the Court, in sanctioning the compromise, so far as the minor Defendants were concerned, did not take into consideration the question of whether the compromise was for the benefit of the minors. The very first contention raised by the Appellants would go to show that an appeal is not the proper mode of having the question determined, for, in an appeal, the Court must deal with the case upon the materials which are on the record. It was urged for the Appellants that if they were willing to accept the risk of having the questions raised by them dealt with upon the materials on the record, without seeking for any opportunity of

putting forward further materials before the Court, there was no reason why they should be precluded from doing so. But this argument overlooks the other side of the question. The partial materials upon which the Court, in dealing with the appeal, must deal with the question, may be sufficient for the Appellants' purpose ; but they may not be sufficient for the Respondent's purpose, and the Respondent may well say, if the question that is now sought to be raised as to the authority of the pleader were raised in a proper proceeding, he would be prepared to show, by evidence, which he cannot do upon this appeal, that the compromise that was entered into was a perfectly legal one, and that there was no defect in the authority of the pleader to enter into it. The issue that is now sought to be raised is an altogether new issue which never arose in the case, and was never discussed in the Court below ; and it would be unfair to the Court below as much as to the Respondent to allow the question to be discussed now. It is in this view of the case that I think the question raised in this appeal ought not to be allowed to be raised and dealt with by way of appeal. In this view of the case, it becomes unnecessary to consider the question whether a pleader in this country has authority to compromise a case on behalf of his client. I would make only one observation with reference to that question. I fail to see any good reason for the distinction that is sometimes drawn in dealing with the question between the status of a pleader in this country and that of legal practitioners in other countries. The question ought to be dealt with on general

(3) 1 C. W. N. 597 : s. c. I. L. R. 24 Cal. 908 (1897).

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principles, irrespective of any peculiarities in the status of the legal practitioners in this country.

Upon the question as to whether the proper procedure for having a decree upon compromise set aside is to file an application for review or to bring a new suit, there has been some diversity of opinion disclosed in the reported cases. See the case of *Ashutosh Chandra v. Tara Prosunno Roy* (2); see also the case of *Sarat Chunder Ghose v. Kartick Chunder Mitter* (4) in which apparently without objection a suit was considered to be the proper mode of proceeding.

S. C. S. *Appeal dismissed.*

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2268 OF 1899.

GUDAR TEWARY and  
others, Defendants,

RAMPINI, J.

GUPTA, J.

Appellants,

1901.

23, May.

BRIJ NANDAN PERSHAD,  
Plaintiff, Respondent.

*Landlord and tenant—Enhancement of rent, suit for rent and for—Maintainability of suit—Civil Procedure Code (Act XIV of 1882), sec. 45—Onus—Raiyat at fixed rate.*

*A suit for both enhancement and arrears of rent at an enhanced rate is maintainable. The causes of action although separate, may be combined under sec. 45, C. P. C.*

*In a suit for enhancement of rent the onus is upon the Defendant to prove that he is a raiyat at fixed rate.*

This was an appeal preferred on the 20th of November 1899, against the

decree of Babu Atal Behary Ghose, Subordinate Judge, 2nd Court of Zillah Saran, dated the 7th of June 1899, affirming the decree of Mr. Ibrahim Ahmed, 3rd Munsif of Chupra, dated the 16th of July 1898.

The facts of the case appear from the judgment.

• • Babu Dwarka Nath Mitter for the Appellants.

Babu Jnanendra Nath Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the Subordinate Judge of Saran, dated the 7th of June 1899.

The facts of the case are these. The Plaintiff sued for enhancement of rent and also for arrears of rent at an enhanced rate.

The Munsif decreed the enhancement of rent prayed for, but dismissed the suit for arrears of rent at an enhanced rate. Apparently he believed in the Defendants' plea of payment. He said that the Defendants had proved that they had deposited rent at the old rate for the years in suit prior to the filing of the suit and he dismissed the Plaintiff's claim for the years 1303 and 1304.

The Subordinate Judge remanded the case for re-enquiry by the Commissioner as to whether the *raiya*t examined by him had rights of occupancy or not and whether they were of the same class of tenants as the Defendants. The Commissioner made a further report and the Munsif on consideration of that report decided that the *raiya*t examined by the Commissioner were occupancy *raiya*t.

(2) I. L. R. 10 Cal. 612 (1884).

(4) I. L. R. 9 Cal. 810 (1883).

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The case then went again before the Subordinate Judge, who dismissed the appeal.

The Defendants now appeal to this Court and three pleas have been raised by the learned pleader who appears on their behalf, *first*, that the Plaintiff's suit for both enhancement and arrears of rent at an enhanced rate is not maintainable; *secondly*, that the Commissioner rejected certain evidence which the Defendants wished to adduce after remand to show that they were *raiya*s holding at fixed rates, and, *thirdly*, that the onus of proving that the Defendants are *raiya*s holding at fixed rates has been misplaced on them.

We think that there is no force in any of these contentions.

There is no illegality in the suit being brought for enhancement as well as for arrears of rent. No doubt these causes of action are separate and distinct but they may be combined under sec. 45, C. P. C. As a matter of fact, however, the Plaintiff's suit for arrears of rent, either at an enhanced rate or at the old rate has been dismissed and his suit is now only for enhancement, and therefore the Defendants have in no way been prejudiced by the way in which the Plaintiff has brought his case.

Then, with regard to the second and third pleas, it appears to us that the Appellants are not entitled to take them, because neither of them was taken in the memorandum of appeal to this Court. And as for the second plea, namely, that the Commissioner has shut out evidence which the Defendants wished to adduce before him after remand, it appears to us that he could not have taken that

evidence in consideration of the terms of the order of remand. He was told to take evidence as to the status of the *raiya*s who held land in the neighbourhood and who say that the rates payable by them are higher than the rates payable by the Defendants. What the Defendants wished to adduce before him was evidence to show that they were *raiya*s, holding at fixed rates and that was not evidence which the Commissioner was entitled to receive.

Then, it appears to us that the onus of proving that the Defendants are *raiya*s, holding at fixed rates, has been placed rightly on the Defendants. It is found, as a matter of fact, that the Defendants are *raiya*s with rights of occupancy; and if they claim a higher status they should prove it.

There is therefore no defect in the judgment of the lower Appellate Court and we dismiss this appeal with costs.

*Appeal dismissed.*

S. C. S.

#### PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

	RAJA MOHAMMED
	MUMTAZ ALI
LORD HOBHOUSE.	KHAN, Plaintiff,
LORD MACNAGHTEN.	Appellant,
LORD ROBERTSON.	
SIR R. COUCH.	SAKHAWAT ALI
SIR FORD NORTH.	KHAN, Defendant,
1901.	Respondent,
13, June.	and
	another appeal.

*Oudh Land Revenue Act (XVII of 1876), secs. 161, 166 and 172—Court of Wards, power of, to alienate Ward's property—Award*

## RAJA MOHAMMED MUMTAZ ALI KHAN v. SAKHAWAT ALI KHAN.

beyond the terms of reference—Ultra vires award.

*The powers of a Court of Wards are those of a guardian supplemented by certain additional powers given by the statute, and it has no power to make a voluntary alienation of the Ward's real estate in perpetuity.*

*Sec. 172 of Act XVII of 1876 does not justify such an alienation where it is not for the benefit of the Ward's property or to his advantage.*

*An award that goes beyond the terms of reference to the arbitrators is to that extent ultra vires.*

These were consolidated appeals from a judgment of the Judicial Commissioner of Oudh, dated 19th May 1898, reversing certain decrees of the Civil Judge of Lucknow.

The suits raised the question of the title of the Respondents to the villages of Kasmora and Pura Mirza. The facts are these:—Rajah Riasat Ali was talukdar of Utraula in Oudh. He died in 1865 leaving him surviving a widow Dan Bibi. The Appellant is the posthumous son by that lady and was born in October 1865. On the Raja's death Dan Bibi got possession, but on 23rd August 1865 her title was challenged in a suit for possession of the estate instituted by one Mussammat Madaro as guardian of her sons, the Respondents, claiming title for them as the legitimate sons of the deceased Raja. She herself was a prostitute, but she alleged the Raja had married her. During the course of the litigation a reference was made on the 27th October 1865 to arbitrators to decide the following issue, viz.:—"Whether

the son, born of Dan Bibi, can be the sole heir to the entire property left under the custom of the country, or Farhat Ali Khan and Sakhawat Ali Khan, the two sons born of Madaro Bibi, can also be successors to the property? If they can, what is the portion to which they and Madaro Bibi would be entitled to?"

An award was made bearing date the 18th November 1865; and the arbitrators decided against the claims of Madaro Bibi and her sons to any "share in the inheritance." They then decided that Madaro Bibi was entitled to articles given her by the deceased Raja, and recommended maintenance for Madaro Bibi and her sons in the following terms:—"It is proper that Bibi Madaro should receive Rs. 60 per month in cash for maintenance and support during her life, on the proviso of keeping herself in the house with honour and good conduct. That the monthly stipend just proposed for the maintenance and support of children should continue for six years, after which time when the children become capable of receiving education in a Government School, the Government would then propose what they should get for their support.

"That when both these children are grown up and attain the age of discretion, they shall have villages separated for them, according to their stipend after deduction therefrom of the Government revenue.

"That the monthly stipend will be given as follows:—

Rs. 10 per month to Bibi Madaro.

Rs. 30 per month to Farhat Ali Khan.

Rs. 20 per month to Sakhawat Ali Khan."

RAJA MOHAMMED MUNTAZ ALI KHAN v. SAKHAWAT ALI KHAN.

Two of the arbitrators appeared on the 7th December 1865 before the Deputy Commissioner, in whose Court the case was pending, and he seems to have returned the award, for on the document is endorsed a further award made on the 17th December 1865, but signed by only two of the arbitrators. Up to the 21st December 1865 it had not been filed in Court, yet on that date the Deputy Commissioner proceeded to dispose of the case, and passed a decree in the following terms:—"I dismiss the claim for the estate, but decree maintenance to Plaintiff and the two sons Farhat Ali and Sakhawat Ali, on the terms of the award, viz.:—Plaintiff, Rs. 10; Farhat Ali, Rs. 30; and Sakhawat Ali, Rs. 20; total Rs. 60."

This decree was confirmed on appeal by the Commissioner of Fyzabad, on the 11th August 1866; and also by the Judicial Commissioner on the 2nd January 1867.

Payments by way of maintenance were made to the Respondents, but not the exact amounts decreed; and in consequence, in the year 1883, they claimed from the Deputy Commissioner, the estate still being under the management of the Court of Wards, a sum of Rs. 3,271 as arrears due to them. On the 25th May 1883 the Deputy Commissioner asked for orders, and wrote as follows:—"Their claim appears to me to be perfectly correct; and with your sanction I propose to make the payments at an early date. I also propose in accordance with the decree of 1866 (19th March) to put an end to the cash allowances for the future, and assign to them a village apiece for their maintenance. I would

choose for the elder Farhat Ali, a village which would give him an allowance of Rs. 500 or Rs. 600 per annum, and for the younger Sakhawat Ali, a village producing Rs. 350 or Rs. 400."

The Chief Commissioner sanctioned the proposals, and stated in his order of the 7th July 1883 that the Respondents, "be given, in lieu of the present monthly allowance, two villages, yielding a profit of Rs. 600 and Rs. 400 per annum respectively, after the payment of the Government *jama*."

On receipt of this order, the manager of the estate was required to report, and he, on the 19th August 1883, suggested the villages of Kasmora and Pura Mirza as suitable for the purpose. And on the same date the Deputy Commissioner directed the immediate delivery of possession to the Respondents, and the execution of "conveyance deeds," granting them a heritable interest.

No conveyances were ever executed, but the Respondents were at once given possession of the villages in suit, and had continuously received the profits, which are in excess of the amount sanctioned by Government.

On coming of age, the Appellant being informed of the nature of the Respondents' possession, refused to recognise it; but was ready and willing to allow them a cash maintenance of Rs. 30 and Rs. 20 per month as decreed to them. On their refusal to surrender possession, he instituted the present suits to obtain possession of those villages.

The Judicial Commissioner found as follows:—

The Defendants had certainly a claim to maintenance when the villages were

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made over to them, and it was for the benefit of the minor that such claims should be settled. Sec. 172, Act XVII of 1876, provided that the Court of Wards shall have power to give such leases or farms of the whole or parts of the immoveable property, under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors. If the Court of Wards, therefore, honestly thought it was for the advantage of the estate that the Defendants' claims should be settled by making over the villages to them, the Deputy Commissioner acted within his authority when he did so. Had there been no award or decree,—as the estate is one of considerable importance and the Defendants, as brothers of the talukdar, had a claim on him for maintenance,—I do not think it could be held that the grant of the villages to them, in lieu of their claims, was not proper, or that it was not for the advantage of the estate and its owner that a reasonable and suitable provision should be made for them in accordance with the custom of the family. Courts in fixing maintenance should have regard to the *status* in life of the Ward and the amount of his income (Trevelyan's Law relating to Minors, page 223), and the same considerations should guide the Court of Wards in settling claims to maintenance. There is nothing to indicate that the Deputy Commissioner, in making over the villages to the Defendants, had their interests in view, and not those of the Plaintiff. He did so presumably, because he thought the income of the villages

was a proper amount to be given for the support of the Defendants, having regard to the rank and circumstances of the parties."

On this appeal *Mr. Degruyther* for Appellant submitted that the limits of Respondents' rights were to receive Rs. 30 and Rs. 20 respectively per month for life only. That the practical effect of the Deputy Commissioner's order was to make a gift of the Appellant's property to the Respondents to which they had no right. That the Court of the Judicial Commissioner had erroneously considered that they had a right to maintenance.

The questions were :—Can a guardian deal with property to the disadvantage of the Ward and did the Court of Wards stand in a better position.

He submitted it did not, when such power is not given by statute.

He referred to Act XVII of 1876, secs. 161, 167, 170 and 172. He submitted that the Deputy Commissioner had not exercised a conscious judgment which he was bound to do, the minor's interest and the benefit of his property was never present to his mind. He had really given away the minor's property.

Further the Court of Wards was really the Chief Commissioner as the Deputy Commissioner was under his control and the order of the Deputy Commissioner was in violation or went beyond the sanction given by the Chief Commissioner.

Their LORDSHIPS' JUDGMENT was delivered by

SIR FORD NORTH.—The Appellant in these consolidated appeals is the talukdar of Utraula, or Bilaspur, a posthumous son of the Raja Riasat Ali Khan, who

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died in the year 1865. Before the Appellant was born Musammat Madaro, as guardian of her two sons, the Respondents, took proceedings on their behalf to recover the estates of the late Raja, alleging that her sons were his legitimate children. After the Appellant appeared upon the scene an agreement was drawn up, with the consent of the Court, by which it was left to arbitrators to decide an issue whether the Appellant could be the sole heir to the late Raja's entire property under the custom of the country; or whether the Respondents could also be successors to it; and, if so, what was the portion to which they and their mother would be entitled.

The arbitrators made an award dated the 17th December 1865, whereby they found that the Appellant and his mother Dan Bibi were according to the custom of the country proprietors and heirs of the entire estate and property of the late Raja, and the Respondents and their mother Bibi Madaro could not share in the inheritance; that the Respondents' mother should receive Rs. 60 per month for maintenance, to be allocated thus:—

Rs. 10 per month to Bibi Madaro,

Rs. 30 per month to Farhat Ali Khan,  
and

Rs. 20 per month to Sakhawat Ali Khan and that such payment should continue for six years, after which time the Government should propose what they should have for their support. And the arbitrators also awarded that when both the Respondents were grown up and attained the age of discretion they should have villages separated for them according to their stipend, after deduction therefrom of the Government revenue,

On 21st December 1865 the action came on again before Major Ross, the Deputy Commissioner of Gonda; and he, stating that the award appeared to him fair and equitable, dismissed the claim for the estate, but decreed maintenance to Bibi Madaro and the Respondents on the terms of the award, *viz.*, Bibi Madaro Rs. 10, Farhat Ali Rs. 30, and Sakhawat Ali Rs. 20, total Rs. 60. This order was affirmed by the Commissioner of the Fyzabad Division on the 11th of August 1866; and by the Judicial Commissioner of Oudh on the 2nd of January 1867.

It will be observed that the award went beyond the reference, so far as relates to the allotment of two villages to the Respondents. That portion of the award was not dealt with by the order of the 21st of December 1865; and the Commissioner on the appeal pointed out that the lower Court had rejected so much of the award as related to matters not referred to arbitration. This, however, cannot apply to the allowance of Rs. 60 per month for maintenance, which was expressly decreed by the order of the 21st of December 1865.

By reason of the infancy of the Appellant his estates were from the first under the management of the Court of Wards; and on the 25th of May 1883, while he was still a minor, but after the death of the Bibi Madaro, and the attainment of 21 by both the Respondents, the then Deputy Commissioner at Gonda, Mr. White, wrote to the Commissioner of the Fyzabad Division pointing out that certain arrears of maintenance were due to the Respondents. He also proposed to put an end to the cash allowances they had theretofore received, and

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to assign to them each a village for maintenance; choosing for the elder, Farhat Ali, one which would give him Rs. 500 or 600 per annum, and for the younger, Sakhawat Ali, a village producing Rs. 350 or 400 per annum. The writer stated that this would be in accordance with the decree of Mr. Reid, the Commissioner, dated the 19th March 1866, an extract from which he professed to give. There is not, however, any trace of such decision to be found; and the passage quoted is from the award itself. Mr. Reid was the Commissioner of the Fyzabad Division who on the 11th of August 1866 affirmed the decision of Major Ross of the 21st of December 1865; and a reference to his reasons and his formal judgment (both set out in the Record) show that the allotment of villages to the Respondents was not referred to.

By a Government order, dated the 7th of July 1883, the sanction of the Lieutenant-Governor and Chief Commissioner was given to the proposal that the Respondents should be paid the arrears of maintenance due to them, and that they should be given in lieu of the present monthly allowance two villages yielding a profit of Rs. 600 and 400 per annum respectively after the payment of the Government *jama*.

Further proceedings ensued before the Deputy Commissioner which resulted in the village Kasmora, the income of which was about Rs. 640, being allotted to Farhat Ali Khan; and the village Pura Mirza, the income of which was about Rs. 400, to Sakhawat Ali Khan. The Appellant's liability for the duty due to the Government in respect of those villages was, however, kept alive. By an

order of the Deputy Commissioner, dated the 27th of November 1883, conveyances were directed which were to contain provisions that the Respondents were always to remain well-wishers and obedient to the head of the family; and so long as they did not fail in their duty the property would remain, generation after generation, in their possession and occupation. The same order provided for payment of the arrears of maintenance, and immediate delivery of possession of the villages. This was done, and the Respondents have ever since been in receipt of the income therefrom; and from a *kabuliyat*, dated 18th June 1887, it appears that Farhat Ali Khan succeeded in leasing the mouzah Kasmora for five years at Rs. 800 a year, and the income has since further increased. The conveyances directed have not yet been executed; but this cannot prejudice the rights of the parties.

In October 1886 the Appellant attained 21, and in 1889 he commenced an action against each of the Respondents to recover possession of the village allotted to him. The two actions were tried together by consent, and the appeals have been consolidated; so the existence of separate actions need not again be referred to. The principal question in the Courts below was, and the only question here is, whether the allotment of the two villages to the Respondents was within the powers of the Deputy Commissioner of the Court of Wards, and is binding upon the Appellant. The Civil Judge at Lucknow on the 18th of July 1895 decided in his favour, *viz*, that he was entitled to recover possession, and to mesne profits; but this decree



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was on the 19th of May 1898 reversed in the Court of the Judicial Commissioner of Oudh, where the Appellant's claim was dismissed.

The Court of Wards has of course all the ordinary powers of a guardian over a Ward's property, supplemented by certain additional powers given by statute. By sec. 161 of the Oudh Land Revenue Act, 1876, it is provided that the Deputy Commissioners shall, subject to the control of the Commissioner and the Chief Commissioner, have the powers of a Court of Wards within their respective districts, for the superintendence of the persons and property of all persons who may become entitled as proprietors or under-proprietors, and who are disqualified for the management of their own estates; within which class minors are, by sec. 162, expressly included. Sec. 166 provides that the jurisdiction of the Court of Wards shall refer to the care and education, and management of the property, of persons subject thereto; and sec. 172 provides that "The Court of Wards shall have power to give such leases or farms of the whole or parts of the immoveable property under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property, and the advantage of the disqualified proprietors."

Their Lordships are of opinion that the allotment of the two villages to the Respondents cannot be supported. It is not authorised by any of the orders of Court made in the years 1865, 1866, and 1867; and the finding of the award on the subject was not within the reference to arbitration, and was not adopted by

the Court. It is not within the power of a guardian to make a voluntary alienation in perpetuity of his Ward's real estate, and it is open to the Ward on attaining 21 to challenge the validity of such a transaction. The letter of the 25th of May 1883, upon which the order of the 7th of July was based, contains a very misleading and incorrect account of what had taken place; and even that letter only proposed to provide the Respondents with "subsistence" or "maintenance;" not to hand over to them part of the Appellant's real estate, that should remain theirs from generation to generation. Nor can the assignment of the villages to the Respondents be justified under sec. 172 of the Act. Clearly it cannot, unless it comes within the final words, that the Court may do all such acts as it may judge to be most for the benefit of the property, and the advantage of the infant. It was not for the advantage of the Appellant, or the benefit of his property, that two considerable portions of his estate should be disposed of without consideration. And there is not any trace throughout the proceedings of any thought having been taken as to what was beneficial to him or his estate. The Respondent, Farhat Ali, gave evidence that he and his brother were going to sue for maintenance on the basis of the award of December 1865, and that the Deputy Commissioner replied that it was no use suing, as he would give them villages in lieu of maintenance according to that award. So that this *ultra vires* award was apparently the sole ground for the appropriation of these villages, if that evidence can be trusted.

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No question was raised here or in the Courts below as to any right of the Respondents to maintenance out of the Talukdari estate independently of their claims to the absolute ownership of the two villages, and their Lordships abstain from expressing any opinion upon it. If any such right exists, effect can be given to it by way of set-off against the liability in the execution proceedings in respect of mesne profits, and, as regards maintenance after the delivery of possession, by a suit.

Their Lordships will therefore humbly advise His Majesty that the judgment of the 19th of May 1898 should be reversed, and that of the 18th of July 1895 should be restored, and that the Respondents should be ordered to pay the costs of the appeal to the Judicial Commissioner. The Respondents must also pay the costs of this appeal.

Solicitors : Messrs T. L. Wilson & Co. for the Appellant.

C. W. A.

*Appeal allowed.*

### PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD  
HIGH COURT.]

LORD HOBHOUSE.	BATUL BEGUM,
LORD DAVEY.	Plaintiff, Appellant,
LORD ROBERTSON.	v.
SIR RICHARD COUCH.	MANSUR ALI KHAN
1901.	& ors., Defendants,
19, June.	Respondents.

*Foreclosure by a mortgagee by conditional sale—Pre-emption, suit for—Possession, physical, meaning of—Possession of undivided share of a zemindari, nature of—Limitation Act (XV of 1877), Sch. II, Arts. 10, 120 and 144—Time from which limitation commences.*

*In Art. 10, Sch. II of the Limitation Act "physical possession" means "personal and immediate" possession. The definition of "actual possession" given by Stuart, C. J., in JAGESHAR SINGH v. JAWAHAR SINGH (1) is correct and applies with still more certainty to "physical possession."*

*The vendee of a share of a zemindari tenure gets only formal possession and cannot get physical possession of the share purchased by him except by enforcing partition.*

*A suit for pre-emption by a co-sharer where the vendee has only obtained formal possession does not fall under Art. 10 of the Limitation Act, but under Art. 120 thereof.*

*Art. 144 of the Limitation Act does not apply to suits for pre-emption.*

*Where a mortgagee by conditional sale of a share of a zemindari has foreclosed, the period of limitation in a suit for pre-emption by a co-sharer, begins to run from the expiry of the year of grace after which the mortgagee's right of possession becomes mature.*

ALI ABBAS v. KALKA PRASAD (2) *approved.*

This was an appeal from a decree of the Allahabad High Court confirming a decree of the Sub-Judge of Gorakhpur.

The Appellant's suit was to enforce a right of pre-emption in respect of certain shares in villages named in the plaint.

Of the Defendants-Respondents Bhagwati Pershad alone put in a written defence in which he pleaded, *inter alia*,

(1) I. L. R. 1 All. 811 (1876).

(2) I. L. R. 14 All. 405 (1892).

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that the suit was barred by the statute of limitations.

Both Courts gave effect to such defence.

The Appellant contended that the suit was not barred by limitation.

The facts are, the Defendant Mansur Ali and his brother Zahur Ali owned  $\frac{2}{3}$  of three villages Pathringwa, Sen, duria and Pipra, in equal shares and the whole of a village named Parsa.

On 14th March 1868 Zahur Ali mortgaged by conditional sale his share in the four villages to one Surja Pershad now represented by the Respondent Bhagwati Pershad, the mortgagor remaining in possession.

The mortgage was foreclosed and the period of grace of one year expired on 20th January 1881, (Regulation 17 of 1806).

Zahur Ali died in 1876, and after his death his brother Mansur Ali brought a suit in 1881 for redemption of the mortgaged property. That suit was eventually dismissed by an order of Her Majesty in Council on 13th July 1886, on the ground that the mortgagor had not done what was necessary by the terms of that regulation to entitle him to redeem.

Afterwards the Respondent, Bhagwati Parshad, brought a suit for possession of the mortgaged property and mesne profits.

That suit was decreed finally by the High Court on 6th July 1893. Thereupon Bhagwati Pershad, Respondent, was put in formal possession of the shares of 4 villages, and on 27th November 1893 executed a *dakhilnamah* in the usual manner.

The present Appellant hearing of those

proceedings commenced the present suit on 4th July 1894, praying for a decree awarding possession of the property in suit on the basis of pre-emption, the condition of the *wajib-ul-urz*, the custom of the village, and the right of pre-emption under the Mahomedan law, by setting aside all the proceedings and the foreclosure decree on payment of Rs. 65,000, the consideration money, or such sum as the Court thought proper.

The Sub-Judge following the decision in the case of *Ali Abbas v. Kalka Prasad* (2) held that the suit was time-barred as it was instituted long after 6 years from the date of the expiration of the year of grace in the foreclosure proceedings.

The High Court, on appeal remanded the cause for trial of issue "Does the property in suit admit of physical possession?"

The Sub-Judge found that it did not.

The Division Bench thereupon referred the matter to a Full Bench.

The Full Bench pointed out that the judgment in the case of *Ali Abbas v. Kalka Prasad* (2) had been misunderstood by the Sub-Judge. They dissented from the decision in *Nath Prasad v. Ram Paltan Ram* (3). They could not see how a sale was any the less an absolute sale because it was not to take immediate effect and operation, and in their opinion the other conditions being present necessary to make Art. 10 applicable, that article could apply to a sale which in its inception was a mortgage by conditional sale but which either by the operation of Regulation 17 of 1806 or by the operation of Act IV

(2) I. L. R. 14 All. 405 (1892).

(3) I. L. R. 4 All. 218 (1882).

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of 1882 had become in effect an absolute sale with the right of redemption gone.

The judgment concluded as follows: -

"In the present case if the whole of the property sold was capable of physical possession being taken by the mortgagee-vendee, we should hold that Art. 10 of the second schedule of Act XV of 1877 applied. The question really turns, as we have said, on what is the meaning of 'physical possession,' as that term is used in Art. 10 of the second schedule to Act XV of 1877. It must mean something different from 'actual possession,' and it must mean something different from ordinary possession. In cl. (1) of sec. (1) of Act XIV of 1859, which was the clause prescribing the limitation in suits for pre-emption, the term used was 'possession' and limitation ran from the time of possession being obtained by the vendee. In *Gur-dhan v. Heera Singh* (4) a Full Bench of the Sadr Dewani held that the possession of Act No. XIV of 1859 must be an actual and not a constructive possession. In 1868 the question came again before a Full Bench, then of this Court, and in *Ganeshee Lal v. Toola Ram* (5) the Full Bench decided that the possession of Act XIV of 1859 included constructive as well as actual possession. It is probable that that decision led to the alteration of the wording of the article relating to Limitation in pre-emption suits in the next succeeding Limitation Act. In Art. 10 of the second schedule to Act No. IX of 1871 it was prescribed that limitation should run from the date when actual possession was taken under the

sale. Then came a Full Bench of this Court in 1876, *Jageshar Singh v. Jawahar Singh and others* (1), in which a majority of the Full Bench held that the actual possession of Act No. IX of 1871 was the same thing as the possession of Act No. XIV of 1859 and included constructive possession. The then Chief Justice of this Court, Sir Robert Stuart, in our opinion, was right in differing from the rest of the Full Bench. He held that the purchaser does not take actual possession of the properties sold to him until he takes physical and tangible possession. The next matter to which we have to refer is that when Act XV of 1877 was passed the legislature, still determined, in our opinion, to exclude constructive possession from the possession from which limitation should run under Art. 10, used the term 'physical possession,' and they added a different terminus of limitation in respect of property which did not admit of physical possession. As we have said, two of the villages here were of pure zemindari tenure, that is, they were villages in which the zemindars got no shares allotted to them by metes and bounds, but held fractional shares in respect of which fractional shares they received a proportionate amount of the profits of the village. It is said that the mortgagor used to receive direct from the tenants of the zemindari body his proportion of the rents payable by them. That, in our opinion, does not alter the case. In *Unkar Das v. Narain* (6) it was held that a share in an undivided zemindari mahal was not susceptible of

(4) S. D. A. N. W. P. 181 (1866).

(5) N. W. P. H. C. Rep. 376 (1868).

(1) I. L. R. 1 All. 311 (1876).

(6) I. L. R. 4 All. 24 (1881).

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physical possession in the sense of Art. 10 of the second schedule to Act No. XV of 1877. We adhere to that decision. The Legislature meant some limitation of the term 'possession' by the use of the term 'physical.' In our opinion, for instance, the owner of a house who has let the house to a tenant cannot be said to be in physical possession of that house so long as the tenancy subsists and his tenant remains in exclusive possession of the demised premises. In such a case the owner has parted with the physical possession to his tenant for the period of his tenancy and the tenant alone is the person who has physical possession. It appears to us that it would be straining the English language and going contrary to the obvious intention of the Legislature to hold otherwise. In this particular case Art. 10 cannot apply, because the whole of the property sold is not capable of physical possession within the meaning of that article, and no instrument of sale has been registered. The result is that Art. 10 not applying, Art. 120 must apply in this case. As Art. 120 applies we have got to see when the right to sue accrued to the pre-emptor. That point is concluded by the Full Bench ruling of this Court in *Ali Abbas v. Kalka Prasad* (2) which, in our opinion, was rightly decided, but which must always be regarded as deciding merely the point referred to the Full Bench, and not the question of limitation. This suit was barred by limitation when brought, and we dismiss this appeal with costs which will include fees on the higher scale."

(2) I. L. R. 14 All. 405 (1892).

*Mr. Ross* for the Appellant in contending that the above decision is erroneous urged that the suit is not barred by limitation because Art. 10 and not Art. 120 applied to this suit, and if Art. 10 did not, Art. 144 is the proper article to apply. And further that even if Art. 120 should be the governing article, the right to sue did not accrue and time did not begin to run until the final decree for possession was passed in favour of the mortgagee.

*Mr. Ross* referred to some of the decisions noticed in the Courts below. He further referred to Starling's Indian Limitation Act, pp. 109 to 111; Directions to revenue officers, N. W. P., Ed. 1858, p. 50; and *Forbes v. Ameeroonissa* (7).

No one appeared for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—The sole question in this appeal is whether the suit, brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is time-barred, six years having elapsed from the expiry of the year of grace after foreclosure; and the main controversy comes to be whether the Art. 120 of the second schedule to the Limitation Act of 1877 applies to the case. Admittedly it does apply, unless either Art. 10 or Art. 144 applies; and the real question is whether the Appellant is right in affirming that the case falls under Art. 10. There is however a subordinate question as to the period from which the six years run, assuming Art. 120 to apply.

(7) 10 Moore's I. A. 320 at p. 349 (1865).

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The Appellant is the wife of the nominal Respondent Mansur Ali Khan and she derives from him by gift a 6 pie share of his original interest in the villages now in dispute, the remainder of his interest being still vested in him. This Mansur Ali Khan and his brother Zahur Ali Khan at the date of the mortgage owned two-thirds of each of the villages of Pathringwa, Senduria and Pipra Kalan, each brother holding shares of 5 annas 4 pies; and the two owned the whole of the village of Parsa, each brother holding an 8 annas share. The brothers were Muhammadans. Two of the villages were of pure zemindari tenure, the others were imperfect pattidari.

On 14th March 1868 Zahur Ali Khan, in consideration of money lent, executed a deed of conditional sale to Saju Parshad now deceased (whose heir is the Respondent Bhagwati Parshad), of the whole of his shares in the four villages. It is unnecessary to set out this sale deed, as nothing turns on its particular terms. No change of possession took place on the execution of the mortgage. Zahur Ali Khan died in January 1876. In 1880 the mortgagee having also died, the Respondent Bhagwati Parshad, his heir, foreclosed (by proceedings taken under Regulation XVII of 1806), and the money was not paid within the year of grace, which expired on 20th January 1881. Some litigation ensued which is immaterial to the present question and the rehearsal of which would only obscure the narrative. In 1890, Bhagwati sued in the Court of the Subordinate Judge of Gorakhpur that he might "be put in proprietary possession" of a 5-anna 4 pie

share in each of Senduria, Pathringwa and Pipra Kalan and an 8-anna share of mouzah Parsa "by ejecting and dispossessing the Defendants or any of them who may be found in possession thereof and by declaring their right of ownership to be extinct," and he obtained a decree which on appeal was affirmed by the High Court on 6th July 1893. The terms of the decree were *inter alia*, "it is decreed and ordered that the claim of the Plaintiff for possession of the shares of the villages mentioned in the relief" "be decreed." On 27th November 1893, Bhagwati executed a *dakhilnama*, declaring that under the order of the Judge "Munshi Jamiat Rai, the Amin of the Court, has given formal possession to me the decree-holder through my Karinda (agent) over the shares of the villages detailed below," and the names of the villages and number of the shares are duly set out. Mutation of names was also obtained in respect to the shares. Bhagwati then attempted to take physical possession of the estate but he was successfully resisted by Mansur Ali Khan. Bhagwati therefore never had possession at all, unless the possession of Mansur Ali Khan or the possession of the tenants, or his own "formal possession" will suffice; and it has not been suggested that his legal rights entitled him to anything more, in the way of possession, than he actually obtained unless and until he had enforced a partition, which in fact never took place.

On 4th July 1894 the Appellant filed her plaint. She narrated the conditional sale, the foreclosure, the decree of possession, and the "delivery of possession." She described herself as a near co-sharer of the vendor (in the conditional sale),

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and asserted that under the condition of the *wajib-ul-urz* the usage and right of pre-emption under the Mahomedan law she possesses a preferential right of purchase. Her prayer, so far as material, was that a decree awarding possession over the mortgaged shares of the villages might be passed in her favour on the basis of pre-emption, the condition of *wajib-ul-urz*, the custom of the village, and the right of pre-emption under the Mahomedan law, by setting aside all the proceedings and the foreclosure decree on payment of Rs. 35,000, the consideration money, or of any other sum which might be determined by the Court. A written statement was filed by the Respondent, Bhāgwati, in which various grounds of defence were stated:—*inter alia*, limitation was pleaded, the validity of the gift to the Appellant which constitutes her title to claim pre-emption was challenged, and her alleged right of pre-emption was denied. Issues were settled on 19th September 1894, but of those the only one which has been tried and decided, and requires present notice, is that of limitation. For the purposes of the present question, therefore, the Appellant is to be assumed to have had a right of pre-emption, and the question is whether she had lost it by limitation before her plaint was filed.

On 28th November 1894 the Subordinate Judge dismissed the suit on the ground of limitation with costs. He held that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the six years' period of limitation prescribed by Art. 120, Sch. II of the Limitation Act begins to run against the pre-emptor from the expiration of the year of grace.

The Appellant appealed to the High Court, who on 12th November 1896 remanded the case for the trial of the following issue: "Does the property in suit admit of physical possession?" Evidence was taken and the Subordinate Judge on 11th January 1897 held that the property in suit does not admit of physical possession. On appeal the High Court, on 16th February 1898, dismissed the appeal with costs; and it is against that judgment that the present appeal has been taken.

The view of both Courts is that the Appellant's claim falls under the 120th Article of the second schedule of the Limitation Act, 1877, which is the final and residuary article including all suits not specially provided for, and fixing for all such suits the limitation of six years. It is for the Appellant to show which other article fits her claim; she points first to the 10th Article;—to this article most of the discussion has been directed, and this occasioned the remand. The 10th Article purports to apply to suits "to enforce a claim of pre-emption whether the right is founded on law or general usage or on special contract." One year is the period of limitation; and the time from which this period begins is "When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession when the instrument of sale has been registered." The interest of the Appellant to maintain the application of the 10th Article is that, if the subject is susceptible of possession, then possession has yet to be taken, for none has as yet been had.

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The "property sold," "the subject of the sale," was in this case the 5-anna 4 pie share of each of the three villages and the 8-anna share of the fourth. Various questions of more or less subtlety suggest themselves as to the relation of the holder of such a right to the possession of the estate. All those questions are however superseded by the extreme absoluteness of the language of the tenth article of the Limitation Act. What has to be considered is, as the High Court accurately formulated the question, does the property admit of physical possession? The word physical is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,—first in 1859 prescribing "possession," then in 1871 requiring "actual possession" and finally in 1877 substituting the word "physical" for "actual," it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C. J., in *Jageshar Singh v. Jawahar Singh* (1) in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession.

This being the sound construction of the tenth article of the second schedule to the Act of 1877, the facts completely

fail the Appellant, for the mortgagee's heir had no semblance of physical possession in the true and natural sense of the term. All that he had directly was the "formal possession" constituted by the *dakhilnama*, which was ceremonial, and on paper. The physical possession of the villages was with others and Bhagwati not having enforced a partition could not get physical possession of any definite portion of those lands and had no right to oust the existing occupiers. Accordingly their Lordships consider that the case does not come within the tenth article in so far as possession is concerned. This being so, the alternative stated in the third column relating to registration arises, but the Appellant did not argue upon it and no suggestion has been made that it affects the argument. The tenth article accordingly disappears from the case.

The alternative suggestion that Art. 114 applies cannot be supported. It applies to suits "for possession of immovable property or any interest therein not hereby otherwise specially provided for," and the 12 years of limitation are to begin "When the possession of the Defendant becomes adverse to the Plaintiff." Now it is perfectly clear that claims of pre-emption are specially considered in Art. 10, and although this particular claim of pre-emption does not (for the reasons already stated) fall within it, that does not affect the construction of Art. 144, as illustrated by Art. 10. A claim to enforce a right of pre-emption is, as Art. 10 shows, a claim impeaching another's right; and its primary object is to set aside the competing right. The circumstance that this claim has inverted

(1) I. L. R. 1 All. 311 (1876).



BATUL BEGUM *v.* MANSUR ALI KHAN.

the proper order and, instead of first asking the setting aside and then asking possession as the consequence has asked for possession "by setting aside" cannot alter the nature of the action.

If neither Art. 10 nor Art. 141 applies, then admittedly the 120th Article does; and the only remaining question is at what date does the period of six years begin; or, to apply the words of the Act, when did the right to sue accrue to the Appellant? It seems to their Lordships to be clear that the expiry of the year of grace is the time at which the pre-emptor's right arises. The mortgagee's right of property had then become mature and the mere fact that he had not enforced that right by a suit for possession does not affect the question. Their Lordships are satisfied of the soundness of the decision of the High Court of the North-West Provinces in *Ali Abbas v. Kalka Prasad* (2).

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellant.

C. W. A. *Appeal dismissed.*

### PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR RICHARD COUCH.

SIR FORD NORTH.

1901.

22, June.

*Burden of proof—Will.*

(2) I. L. R. 14 All. 405 (1892).

*The burden of proof lies upon the person who sets up a Will and not upon the person who is prepared to impeach it.*

The facts material to this report are fully stated in the judgment.

*Mr. Asquith, K. C., and Mr. J. S. Misra* for the Appellant.

*Mr. Branson and Mr. Leslie Degrayther* for the various Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is a consolidated appeal from the decision of the Court of the Judicial Commissioner of Oudh, setting aside three decrees of the Subordinate Judge of Unao.

The appeal comes before their Lordships under somewhat singular circumstances.

One Babu Ram Sahai, a wealthy talukdar owning non-talukdari as well as talukdari property, died on the 5th of July 1890. He left a widow, Krishna Dei, who is now dead, and two sisters-in-law, Ram Dei and the Appellant Sukh Dei, widows of two deceased brothers.

On his death his widow Krishna Dei took possession of his entire estate.

In the course of mutation proceedings consequent on the death of Ram Sahai Krishna Dei filed a petition alleging that her husband had left a Will dated the 4th of June 1890 and registered on the 27th of that month under which she was solely entitled to all her husband's estate. Afterwards through her vakil she stated that her husband had on the 26th of July 1876 made a Will in her favour and that she as owner and possessor of the said property under that Will claimed to have the property entered

## SUKH DEI v. KEDAR NATH.

in her name. An order in accordance with her claim was made by the Deputy Commissioner on the 25th of October 1890.

Thereupon three persons who claimed to be the reversionary heirs of Ram Sahai and who were or are represented by the three Respondents brought three suits to establish their title against Krishna Dei, Ram Dei and the Appellant Sukh Dei alleging that Ram Sahai had died intestate.

Krishna Dei in her written statement denied that Ram Sahai died intestate. She set up both Wills but she rested her title on the alleged Will of 1876 and declared that the Will of 1890 was a "useless" document "inoperative, null and void." The written statement of Ram Dei in effect supported the statement of Krishna Dei. The Appellant Sukh Dei filed no written statement. Against her the suits proceeded *ex parte*.

The Plaintiffs in their replication impeached the alleged Will of 1876 as a forgery. They claimed judgment against Krishna Dei and Ram Dei as to the alleged Will of 1890 on their own admissions in the pleadings. As against the Appellant Sukh Dei in regard to the alleged will of the 4th of June 1890 they asserted that they would prove "the spurious character of the said document and the circumstances attending its preparation and registration . . . if necessary."

In the result the Subordinate Judge found that the alleged Will of 1876 was a forgery. But as regards the alleged Will of 1890 which was said to have been lost he came to a different conclusion. He held that that Will was

established not upon the ground that the Defendants or any of them had proved its due execution for no proof of that sort was tendered at the trial but upon the ground that the Plaintiffs had declared that they would prove it to be spurious if necessary and that they had produced no evidence on the point. While they were "prepared to call it a forged document" they "did not dare" he said "to prove" that "assertion." The "pretermission" of the Plaintiffs was he held "an evident ground for the document in question being genuine."

On appeal to the Judicial Commissioner the Court agreed with the Subordinate Judge in thinking that the alleged Will of 1876 was not a genuine Will but differed from him as regards the alleged Will of 1890. The Court held that the learned Subordinate Judge was wrong in placing upon the Plaintiffs the onus of proving the Will of the 4th of June 1890 to be a forgery, and held further that no attempt had been made to prove the genuineness of the said alleged Will and that the same was a forgery.

From the decree of the Court of the Judicial Commissioner the Appellant Sukh Dei alone has appealed.

In the opinion of their Lordships the conclusion of the Court below that the alleged Will of the 4th of June 1890 was not proved is perfectly correct and it was not necessary for the Court to go so far as to declare that the document was a forgery. The story of the registration of the alleged Will and its subsequent loss is most suspicious as the Subordinate Judge himself held but it would have been quite enough for the Court of Appeal to say that the alleged Will was

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not proved. The burden of proof of course lies upon the person who sets up a Will not upon the person who is prepared to impeach it. Now Krishna Dei and Ram Dei threw over the alleged Will of 1890 in favour of the alleged Will of 1876 which has been pronounced by both Courts to be a forgery. The Appellant, Sukh Dei, took no part in the trial and of course offered no evidence in support of the alleged Will of 1890.

On the appeal to their Lordships the learned counsel for the Appellant said everything that could be said in support of the appeal, but there were no materials on which even a plausible argument could be based. The deceased it seems some four years before his death had a conversation with the Assistant Commissioner of the district, from which it might be inferred that he contemplated making a Will some day or other, and then when the Subordinate Judge, for his own satisfaction, enquired into the alleged loss of the alleged Will, some persons came forward and said that they had seen the Will somewhere, and it was argued by the learned counsel for the Appellant that the Plaintiffs might have cross-examined these witnesses. So they might, with the leave of the Subordinate Judge. But they were not bound to do so. Nor would they have been well advised to have taken such a course. They were perfectly justified in waiting until evidence in support of the Will was produced at the trial.

In their Lordships' opinion it is idle to discuss such flimsy evidence as that upon which the appeal was based. They will humbly advise His Majesty that the appeal must be dismissed.

The Appellants must pay one set of costs of the consolidated appeal, to be apportioned between the Respondents in the discretion of the Registrar in the event of their not agreeing.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Young, Jackson and Beard* and *Messrs. Lawfords* for the Respondents.

*Appeal dismissed with costs.*

C. W. A.

## [CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 149 OF 1901.

KEDAR NATH CHATTERJEE,

GHOSE, J.

Appellant,

TAYLOR, J.

v.

1901.

THE KING-EMPEROR,

9, July.

Respondent.

*Penal Code (Act XLV of 1860), secs. 24, 25, 467, 471—Forgery—Using a forged document knowing it to be forged—"Fraudulently" and "dishonestly," meaning of—"False document"—Suit upon a bond for enforcement of payment—Absence of intention to cause wrongful loss if any defence—Intention to deceive.*

*Intention to cause wrongful loss to another and a deception, actual or intended, are not the necessary ingredients of the intent to defraud.*

*There is a real distinction between the meaning of the terms "fraudulently" and "dishonestly" as used in the Penal Code; the former denotes an intention to deceive. The production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced, though may not be dishonest within the meaning of sec. 24 of the Penal Code, may yet be fraudulent within the meaning of sec. 471 of the Code.*

## KEDAR NATH CHATTERJEE v. THE KING-EMPEROR.

QUEEN-EMPRESS v. ABBAS ALI (1),  
LALIT MOHAN SARKAR v. QUEEN-EMPRESS  
(2), *In re DHUNUM KAZEE* (3) *referred to*.

QUEEN-EMPRESS v. SHEO DOYAL (4)  
*dissented from*.

This was an appeal preferred on the 22nd of February 1901, against the order passed by the Sessions Judge of Beerbhumi, on the 14th of January 1901.

Mr. P. L. Roy and Babu Nalini Ranjan Chatterjee for the Appellant.

Babu Atulya Charan Bose for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellant in this case, Kedar Nath Chatterjee, has been convicted of the offence of using as genuine a forged document knowing it to be forged under sec. 471, read with sec. 467 of the Penal Code, and sentenced to two years' rigorous imprisonment.

It appears that one Ram Chandra Mukerji executed in favour of Mahesh Chandra Banerjee a mortgage bond on the 9th of Falgoun 1290. A suit was brought upon this document by Kedar Nath Chatterjee against the heir of Ram Chandra Mukerjee (he being then dead) upon the ground that he was the beneficial holder of the bond, Mahesh Chandra Banerjee being only his *benamidar*. It was, however, found in the course of the trial of that case, that the bond produced was not the true document executed by Ram Chandra, but rather a forgery, and

accordingly the suit was dismissed. The Appellant was thereupon indicted for the offence of using as genuine a forged document, knowing it to be forged.

That Ram Chandra Mukerjee executed on the 9th Falgoun 1290, a mortgage bond for Rs. 199 is conceded on all hands; but the question that has been raised is this, whether the document that was produced by or on behalf of Kedar Nath Chatterjee in the suit instituted by him for the enforcement of the said bond is the true document. The document that is produced purports to be an exact *fac simile* of the original mortgage bond, with all the endorsements of registration on the back thereof, as also the seal of the Registrar. But there is internal evidence afforded by the document itself or rather by the endorsements appearing on the back of it that it could not be the true document which was executed by Ram Chandra Mukerjee, and subsequently registered before the Sub-Registrar of Deeds. And there is besides the evidence of the registration head clerk, in whose handwriting some of the endorsements purport to have been made, as also other evidence for the prosecution, which unmistakably proved that the document in question is a forgery. There can also be no doubt that the prisoner used the document in the suit that he brought against the heir of Ram Chandra Mukerjee.

It appears, however, that it was the case for the prosecution that the original document executed by Ram Chandra Mukerjee was paid up and discharged, and the document then torn up into two pieces, and that the Appellant Kedar Nath Chatterjee having managed through some of his people to get hold of this torn

(1) 1 C. W. N. 256; s. c. I. L. R. 25 Cal. 512 (1897).

(2) I. L. R. 22 Cal. 813 (1894).

(3) I. L. R. 9 Cal. 53 (1882).

(4) I. L. R. 7. All. 459 (1885).

## KEDAR NATH CHATTERJEE v. THE KING-EMPEROR.

document, prepared the document in question by forging the writings and the endorsements thereupon.

The learned Judge, however, was unable to hold upon the evidence, such as it was, adduced on behalf of the prosecution, that the case set up by them that the original document was paid up and discharged, was satisfactorily proved; and upon this, it has been contended before us by the learned counsel for the Appellant that it must be taken that the money covered by the mortgage bond was due to Kedar Nath Chatterjee, and, therefore, the document produced by him, though it might be a forgery, could not be regarded as a "false document" within the meaning of sec. 464, I. P. C., which lays down what a false document is, and that therefore the Appellant could not be held guilty of fraudulently or dishonestly uttering a forged document.

That section says:—

"A person is said to make a false document who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed by or by authority of a person, by whom or by whose authority he knows that it was not made, signed, sealed, or executed or at a time at which he knows that it was not made, signed, sealed, or executed" and so on. This refers us to the definition of a forged document as contained in sec. 463, which says "whoever makes any false document with intent to cause damage or injury to the public

or to any person, as to support any claim or title, or cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed commits forgery." And we find that the words "dishonestly" and "fraudulently" are defined in secs. 24 and 25, I. P. C.; sec. 24 says "whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly." Sec. 25 lays down:—"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

The argument that has been advanced to us proceeds upon the assumption that in any given case where the person procuring a forged document does not intend to attain wrongful gain to him or cause wrongful loss to another, the document could not be regarded as a false document within the meaning of sec. 464. But the argument loses sight of the distinction which is patent in secs. 464 and 463, read with the definitions to which we have just adverted, between "dishonestly" and fraudulently." The matter was fully discussed and considered in the case of *Queen-Empress v. Abbas Ali* (1) and it was held that deprivation, actual or intended is not a necessary ingredient of the intent to defraud referentially imported into sec. 464, and by a similar train of reasoning we are led to the like conclusion as to the true construction of sec. 471. And in this connection, we may also refer to the case

(1) 1 O. W. N. 255 : s. c. I. L. R. 25 Cal. 512 (1897).

## KEDAR NATH CHATTERJEE v. THE KING-EMPRESS.

of *Lalit Mohan Sirkar v. Queen-Empress* (2), where a Divisional Court, following two cases,—one in the Madras and the other in the Bombay High Court, clearly pointed out the distinction between “dishonestly” and “fraudulently” occurring in sec. 464, Indian Penal Code, as also to the case of *Dhunum Kasee* (3), where a person, in the course of an action brought against him to gain possession of a property, used a forged document for the purpose of supporting his title, though there was no necessity for the use of it, it was held that such user was clearly fraudulent within the meaning of sec. 25 of the Penal Code.

It seems to us that though the act of the Appellant in producing a forged bond in the suit that he brought is not proved to be dishonest within the meaning of sec. 24 of the Penal Code, yet it was fraudulent, because it was with the intent to commit a fraud upon the Court, *viz.*, to make that Court believe that he was entitled to recover money upon the basis of the particular document then produced. The word “fraudulent” denotes an intention to deceive, and the intention of Kedar Nath Chatterjee was clearly to deceive the Court into holding that he was entitled to enforce the bond in question.

The learned counsel for the Appellant, however, has relied upon the case of *Queen-Empress v. Sheo Doyal* (4) which, no doubt, may be regarded as supporting his contention, but with all deference to the learned Judge who decided it, we are unable to follow it.

Upon these grounds, we are of opinion that the argument advanced before us cannot be sustained.

The result is that this appeal is dismissed.

*Appeal dismissed.*

H. P. C.

## [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 614 OF 1900.

	BENI SINGH and ors.,
GHOSE, J.	1st party, Petitioners,
PRATT, J.	v.
1900.	UMRAO MAHTO and ors.,
3, December.	2nd party, Opposite
	Party.

*Criminal Procedure Code (Act V of 1898), sec. 145—Dispute as to possession of land—Parties, adding of—Previous proceeding—New proceeding with new parties added, whether can be treated as continuation of previous proceeding—Jurisdiction—Procedure.*

*In a proceeding under sec. 145 of the Criminal Procedure Code it is the duty of the Magistrate to find out in the first instance which parties are concerned in the dispute that has arisen, and to serve his order upon such parties and when the matter comes before him for trial, he should determine which of such parties, namely, the parties as mentioned in the first paragraph of sec. 145 of the Code is in actual possession.*

*A Magistrate is entitled to allow a third party to come in in the course of the proceeding only for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists.*

*Quære—Whether such third party should be made a party to the proceeding.*

(2) I. L. R. 22 Cal. 313 (1894).

(3) I. L. R. 9 Cal. 53 (1882).

(4) I. L. R. 7 All. 459 (1885).

**BENI SINGH v. UMRAO MAHTO.**

*A Magistrate has not the power, after recording the proceeding, as he is required to do under the first paragraph of the section, to add, in the course of the investigation, any new party as concerned in the dispute.*

**PROTAB NARAYAN SING v. RAJENDRO NARAYAN SING (1), JANOKI NATH ROY v. THE QUEEN-EMPRESS (2), LALDHARI SINGH v. SUKHEDEO NARAIN SINGH (3) followed.**

*A Magistrate cannot treat a subsequent proceeding as a continuation of an earlier one and he cannot refer back to the possession held by one or other of the parties upon the date of the earlier proceeding in determining which of them should be declared to be in possession on the date of the subsequent proceeding.*

This was a rule issued on the 6th of August 1900, against the order of the District Magistrate of Patna, dated the 3rd of July 1900.

The facts of the case appear fully from the judgment.

The *Advocate-General*, *Mr. P. L. Roy*, *Mr. Donogh* and *Babus Dasarathi Sanyal* and *Surendra Nath Roy* for the Petitioners.

*Mr. Hill*, *Mr. Jackson*, *Mr. K. N. Sen Gupta*, and *Babu Mohabir Sahay* for the Opposite Party.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

This is a rule calling upon the District Magistrate of Patna to show cause why an order passed by him in a proceeding

(1) 1 C. W. N. 3 : s. c. I. L. R. 24 Cal. 55 (1896).

(2) 3 C. W. N. 329 (1899).

(3) 4 C. W. N. 618 : s. c. I. L. R. 27 Cal. 822 (1900).

under sec. 145 of the Code of Criminal Procedure, on the 3rd July last, should not be set aside. \*

It appears that in February 1899, three proceedings were instituted under sec. 145 by the Sub-Divisional Magistrate of Barh, one relating to 211 bighas of land, another to 106 bighas of land, and the third to 46 bighas of land, all situate in a certain village owned by Prem Singh and Kali Singh as zemindars. An application was made to this Court under its revisional powers to set aside these proceedings and a rule was granted, but the Divisional Court which had to deal with it, discharged the rule, making, however, certain observations for the guidance, as we take it, of the Magistrate. The proceedings then went back to the Sub-Divisional Magistrate, and Mr. Forester, who was formerly the Sub-Divisional Magistrate, and who had in the meantime been appointed to the post of District Magistrate of Patna, called up the proceedings to his own file.

The District Magistrate, having regard to certain considerations mentioned in his final order, was of opinion that a separate proceeding with respect to a portion of the land which was the subject of the first of the three proceedings to which we have already referred, should be instituted; and he accordingly drew up a fresh proceeding on the 4th May 1900, by way of a continuation of the earlier proceeding which had been instituted in February 1899. He was of opinion that Prem Singh and Kali Singh, who were not originally parties to the proceeding instituted in February 1899, as also certain *thikadars* should be added as parties, and he accordingly made an

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order, and then instituted the proceeding of May last to which we have just referred. This proceeding ran thus:—

“Whereas it appears from the police-report, dated the 28th March 1900, that a dispute still exists regarding the possession of land in mouzah Nawarup, Lalla Pari, outpost Larmera, thana Mokamah, and in respect of which a criminal case (*Baljit Dahi v. Raj Kumar Singh and others*, sec. 143, I. P. C.) is now pending in this Court, and whereas there was a similar dispute relating to the same land in February 1899, concerning which a sec. 145, Cr. P. C., proceeding was instituted and proceeded with, and this proceeding is a continuation of that proceeding, and whereas for the better decision of the dispute it is resolved to deal with one of the disputed plots first, and plot No. 54, as shown in the map made by the Sub-Deputy Collector of Barh, dated the 30th May 1899, has been selected for decision of the question of possession; it is hereby ordered under sec. 145, Cr. P. C., that the parties named below do appear on the 14th May and put in written statements of their respective claims, together with their documentary evidence, as regards the actual possession of the said subject of dispute. Names of parties on separate sheet.”

It is unnecessary here to state that Prem Singh and Kali Singh, the landlords, were among others, named as parties upon whom the order was to be served (as they were afterwards served) calling upon them to appear and file written statements on the day appointed. The Magistrate then, upon evidence being taken in the matter of the actual

possession of the land in respect of which the proceeding was instituted, held that such possession was with one of the second party, viz, Omrao Mahto, who claimed to be the tenant of the land, and declared that he was in possession thereof; so that in result, the order that has been passed by the District Magistrate is an order which binds, not only the persons who were parties to the original proceeding, but also Prem Singh and Kali Singh, who were not parties to the proceeding, but who were afterwards added by order of the District Magistrate as parties thereto.

The first ground that has been taken by the learned Advocate-General and which was the real ground upon which the rule was granted by this Court, is that it was not competent to the District Magistrate under sec. 145 of the Code, to add Prem Singh and Kali Singh to the proceeding of May last, when they were not parties to the initial proceedings. Sec. 145 of the Code runs thus:—

“Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any tangible immoveable property, or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court, in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.”



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Then in cl. (4) it is provided—

“The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statement so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order beforementioned in such possession of the said subject.”

And in cl. (5) the section says:—

“Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed, and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but subject to such cancellation, the order of the Magistrate under sub-sec. (2) shall be final.”

It will be observed that it is the duty of the Magistrate to find out in the first instance which parties are concerned in the dispute that has arisen, and to serve his order upon such parties, and, when the matter comes before him for trial, he should determine which of such parties, namely, the parties, as mentioned in the first paragraph of sec. 145, is in actual possession, and though he is entitled to allow a third party to come in in the course of the proceedings, it is only for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists. It is not clear that the Legislature contemplated that such third party should be made a party to the proceedings.

It seems, however, upon a consideration of sec. 145, that the Magistrate has not the power, after recording the proceeding as he is required to do under the first paragraph of sec. 145, to add, in the course of the investigation, any new party, as concerned in the dispute, and this we find to have been definitely held in the case of *Protal Narayan Singh v. Rajendro Narayan Singh* (1) and also in two other cases to which our attention has been called by the learned Advocate-General, one of them being *Janoki Nath Roy v. The Queen-Empress* (2) and the other *Laldhari Singh v. Sukhdeo Narain Singh* (3). If then the Magistrate had no power to add Prem Singh and Kali Singh as parties to this proceeding on the 4th May last, as he did, it seems to be obvious that he acted without jurisdiction in making them such parties and in declaring as against them that Omrao Mahto, one of the second party Defendants, should be maintained in possession of the land in dispute. The learned Magistrate no doubt treats the proceeding that was instituted on the 4th May last as a continuation of the earlier proceeding of February 1899; but we think, in the circumstances, that he could not do so. He might no doubt institute a fresh proceeding upon fresh materials that were then laid before him, but in doing so he could not treat such proceeding as a continuation of the earlier proceeding, and he could not refer back, as he has done in the present case, to the possession held by one or other of the

(1) 1 C. W. N. 3 : s. c. I. L. R. 24 Cal. 55 (1896).

(2) 3 C. W. N. 329 (1899).

(3) 4 C. W. N. 613 : s. c. I. L. R. 27 Cal. 892 (1900).

**BENI SINGH v. UMRAO MAHTO.**

parties upon the date of the said earlier proceeding of February 1899, in determining which of them should be declared to be in possession on the date of the subsequent proceeding of May last. The Magistrate himself saw the difficulty that existed in the way of adding Prem Singh and Kali Singh as parties to the proceeding, but he evidently thought that the High Court in their order, to which we have already referred, made suggestions which favoured the idea of their being made such parties. We are, however, unable to take the same view as the Magistrate has taken. We do not think

that the High Court intended that any person not originally a party to the proceeding should be added as a party to it.

We think that on this ground, and this ground alone, the rule should be made absolute. We accordingly set aside the order of the Magistrate. If the Magistrate thinks that there is any likelihood of a breach of the peace, he may take such steps as he may be advised to prevent such breach of the peace, under the provisions of the Code of Criminal Procedure.

*Rule made absolute.*

H. P. C.

[END OF VOL. V.]

# JUDGES OF THE HIGH COURT.

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## Chief Justice:

HON'BLE SIR FRANCIS WILLIAM MACLEAN, Kt., K.C., K.C.I.E.

## Puisne Judges:

HON'BLE SIR HENRY THOBY PRINSEP, Kt., I.C.S.

„ CHUNDER MADHUB GHOSE.

„ GOOROO DASS BANERJEE, D.L.

„ AMEER ALI, C.I.E.

„ C. H. HILL.

„ R. F. RAMPINI, I.C.S.

„ S. G. SALE.

„ J. F. STEVENS, I.C.S.

„ J. STANLEY, K.C.

„ R. HARINGTON.

„ J. PRATT, I.C.S.

„ C. M. W. BRETT, I.C.S.

„ F. B. TAYLOR, I.C.S. (*Offg.*)

„ BEHARY LAL GUPTA, I.C.S. (*Offg.*)

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### REPORTS (See Index.)

On, the re-opening of the High Court to-day the constitution of the Benches will be as follows:—

**PRIVY COUNCIL DEPARTMENT AND APPEALS FROM THE ORIGINAL SIDE.**—The Hon'ble the Chief Justice, Mr. Justice Prinsep and Mr. Justice Hill.

**PRESIDENCY GROUP.**—Mr. Justice Banerjee and Mr. Justice Brett.

**RAJSHAHYE AND PATNA GROUPS.**—Mr. Justice Rampini and Mr. Justice Sale.

**BURDWAN GROUP.**—Mr. Justice Ghose and Mr. Justice Pratt.

**CRIMINAL BUSINESS.**—Mr. Justice Ameer Ali and Mr. Justice Stevens.

**ORIGINAL SIDE.**—Mr. Justice Stanley and Mr. Justice Harington will sit singly on the Original Side.

OPPORTUNITY HAS BEEN TAKEN OF THE LONG VACATION to effect various alterations in the Court premises. The big court-room to the extreme east, where one of the Judges on the Original Side ordinarily sit and where Criminal Sessions are held, has undergone considerable alteration. The arches on the east and north, between the corridor and court-room have been closed by glass-doors artistically designed to go with the gothic architecture of the court. The Judges' platform has been somewhat curtailed, but the steps leading to it have been considerably improved. The place reserved for the jurors has also been raised in height and a more substantial barrier has been put between the prisoner and the public. On the whole the changes have given a cosier look to the court-rooms, especially in

view of the approaching cold weather; but it is not until all the varying seasons of the year have been tried that a proper opinion can be pronounced as to the general merits of the alterations. But there can be little doubt that for accoustic purposes the changes will be welcomed by both the Bench and the Bar. The Court of the Chief Justice at the other extreme end of the court-house has also undergone similar alterations with only this difference that the green screens have been replaced by more comfortable looking red curtains. The comforts of the Bar have not been over-looked and the Jury-room has been placed at their disposal for improving the accommodation of the Bar Library and another room has been fitted up for the gentlemen of the jury.

WE DEEPLY REGRET, TO HAVE TO RECORD IN OUR first issue the death of Professor Max Müller. Directly, he may not have contributed much to the legal literature, but the publication of the Sacred Books of the East under his able editorship has prominently brought before the civilized world the legal learning of the Hindus, which was confined before his time to only a privileged class in India and a few erudite scholars in Europe. He was not only a great Sanscrit scholar, but what was more, he was, perhaps, the only foreigner who had thoroughly entered into the spirit of the literature which he had made his life-long study. It will be impossible to name another foreign scholar of Sanscrit whose name would inspire in India so much genuine respect and reverence and whose memory would be more lovingly cherished.

THE JUDGMENT OF THE PRIVY COUNCIL IN THE appeal of *Hodges and anr. v. The Delhi and London Bank, Ltd.*, which we publish in our reports this week, is very important and should be carefully noted by the profession and the general public. It decides for the first time, so far as we are aware, that under the Contract Act in this country a surety may by agreement disentitle himself from seeking the protection of the well-known rule of English law, which has been embodied in sec. 135 of the Indian Contract Act and under which a surety is discharged if the principal debtor is given time by the creditor without the knowledge or consent of the surety. We propose to discuss in one of our earliest issues the principle and the qualifications that attach to the law in England and how far they have been adopted by the Courts in this country.

WE DRAW SPECIAL ATTENTION TO THE PRIVY Council decision in *Matikarjuna v. Narhari*, reported by us in this issue. This extends the principle first enunciated by the Board in the case of *Jagadamba Chowdhurani v. Dakhina Mohun* (L. R. 13 I. A. 84) to all cases where limitation is sought to be avoided on similar pleadings. In the Calcutta High Court and also in Bombay, until lately, the view prevailed that when the setting aside of an adoption (4 C. W. N. 405) or of a sale was indirectly involved in a suit for possession or for redemption (11 Bom. 279) the period of limitation prescribed for the latter is to prevail. But in a recent Full Bench case (24 Bom. 160) Jenkins, C. J., and Tyabji, J., went against this view, and it is a fortunate coincidence that their Lordships of the Privy Council have on appeal from an earlier Full Bench of the same Court, reported at p. 10 of our present issue, have pronounced in favour of the later view, which removes all possibility of future conflict. After this the Calcutta cases supporting the contrary view must be considered as overruled and the learned judges whose opinion prevailed in the recent Bombay Full Bench case (24 Bom. 160) must be congratulated on having anticipated the Judicial Committee.

WE INVITE ATTENTION ALSO TO THE CASE OF *Rai Jatindra Nath Choudhuri v. Amrita Lal Bagchi*, reported in this number. Two very important points on the Hindu law of adoption arose in this case. *First*, whether a Hindu widow on adopting a second son on the death of a son begotten or adopted, divested herself of the state which she inherited as a mother. *Secondly*, from what period does the second adopted son take the estate. There was, before this case no direct authority bearing on the questions, these questions not having been raised directly in any of the reported decisions. Nor is there any express text bearing on the question. The commentators on Hindu law are not agreed on this point in their opinions. Mr. Mayne would seem to be opposed to the view taken in the present case, *viz.*, that the widow does divest herself of the estate : while Babu Golap Chandra Sarker, although expressing a contrary opinion still considers it but equitable that the widow should thus divest herself in favour of the second adopted son and, as has been pointed out in the able judgment of Banerjee, J., maintains that unless this be the effect of the adoption, the adopted son would be deprived even of maintenance out of the estate of the adopter. West and Büchler favour the view taken in the judgment under notice. It has moreover the support of the opinion expressed on two occasions by their Lordships of the Privy Council in the well known cases of *Bhoobun Moyee v. Ram Kishore Acharj Chowdhury* (10 Moo. I. A. 279) and in *Vellanki v. Venkata Rama*, (4 I. A. 1). Mr. Justice Banerjee's judgment is a closely reasoned one and contains an examination of

all the earlier cases bearing on the point and will surely have the effect of removing the difficulties hitherto felt by commentators in pronouncing any definite opinion on the question.

WE MUCH REGRET TO ANNOUNCE THE DEATH OF BABU Hem Chandra Bose, Interpreter on the Original Side. Although young at his work he had earned the esteem of the profession by his rare quality of never allowing the merits of a case or the credibility of witnesses to interfere with his fair and faithful rendering of their statements from the box. Another very remarkable fact that had won for him the golden opinion of the profession and the gratitude of suitors was that he never charged any expedition fee for translation work entrusted to him. His death is a distinct loss to the Court.

## HINDU JURISPRUDENCE

AND ITS

### ● ETHICAL EVOLUTION.

"Hindu Law," says John D. Mayne, "has the oldest pedigree of any known system of Jurisprudence." While, for instance, the XII Tables of Rome appeared in B. C. 450, and the Attic codes of Draco and Solon, about B. C. 625 and 550 respectively, there is evidence that the earlier codes or sources of Hindu law and even the Code of Manu are of much earlier origin. So slowly however does the East change that to this day the law may be said to flourish in all its primitive vigour, and shew but little signs of decrepitude. This is due to several causes:—

Firstly and mainly, to the religious sanction with which it is clothed : for all ancient systems of law are "attributed to some divine being from whose statutes and ordinances it were impiety to depart."

Secondly, to the conservatism of the Asiatic races : for "in the tropics," as observed by Bluntschli in his "Theory of the State," "nature often appears so overpowering, that in despair of conquering her, man gives up all effort, and his heart is filled with fear and superstition" inclining him to the *status quo* or at least restraining him from flying from the known to the unknown.

Thirdly, in part, to the fertility of Indian soil : for, as Bluntschli observes, "the main motive to human effort is the desire for subsistence. If this is removed by the bounty of nature, men work little or not at all ; and generally sink into indolence and sensuality. When they do not work, men fail to develop the hidden resources of their nature, and society does not advance." Consequently Law which keeps pace with the movements of society cannot advance under such conditions.

Lastly, to the circumstance of its diffusion over a vast area : for, as Sir Henry S. Maine observes in his Ancient Law "the larger the space over which

a particular set of institutions is diffused, the greater is its tenacity and vitality."

Even to this day Hindu Jurisprudence governs the civil rights of the Hindu races extending

"From Kashmir's icy mountains

To Cochin's coral strand,

Where Mysore's sunny fountains

Roll down their golden sand,"

and that, strangely enough, in much the same way as it did in the days of their predecessors about thirty centuries ago. Witness in the Mahabharata the exclusion from the Raj of Hastinapur of Dhritarastra by his younger brother Pandu on the score of his (congenital) blindness, which is still, as then a disqualification for inheritance in Hindu law, *Ram Nath v. Durga Sundari* (I. L. R. 4 Cal. 550), *Advypa v. Rudrava* (I. L. R. 4 Bom. 104), *Kogiyadu v. Lakshmi* (I. L. R. 5 Mad. 149), IX Mann 210. Indeed in its general feature—for instance, in reference to the condition of the joint family, the order of inheritance, the practice of adoption and the like—Hindu law as at present administered corresponds fairly well with the state of law evidenced by the institutes of Manu, Vasistha and Gautama. Apropos of this conservative tenacity of Hindu religio-legal institutions, all distinctions between the past and present, actually disappear in India. "Sometimes," remarks Sir Henry Maine in his *Village Communities*, "the past is present; much more often it is removed from it by varying distances, which, however, cannot be estimated or expressed chronologically."

In fact, all the institutions of Hindu society seem devised for the maintenance of peace, order and contentment, and hardly any aims at progress in the modern sense. Its ideal is rest, or orderly movement which is but another name for equilibrium. "Life," says Bluntschli, "is an unchanging repetition, a wheel revolving for ever in the same way and round the same axle." The philosophy of the Upanishadas taught the same thing and it is perhaps because of that, that the Bhuddhist doctrine of Nirvana, or absorption into nothingness was hailed by the Hindus at one period of their national life, as a real relief from eternal monotony. When they made religion the governing principle of their life, it is but natural that the practical side of human nature got neglected. This, to a certain extent, explains why law in this country was always subservient to religion and morality, and never was given any independent scope for development.

For instance, the Hindu lawgivers considered that the right to inherit temporal benefits was co-extensive with the obligation of the heir to confer corresponding spiritual benefit on the deceased. Such doctrines are so foreign to the system of Western jurisprudence, that when we view them in the light of the latter, they serve only to puzzle us. Thus Sir Henry Maine wonders

why "the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. If the rites are not properly performed or not performed by the proper person, no relationship is considered as established between the deceased and anybody surviving him, the law of succession does not apply, and nobody can inherit the property. Every great event in the life of a Hindu seems to be regarded as leading up to, and bearing upon, these solemnities. If he marries, it is to have children who may celebrate them after his death; if he has no children, he lies under the strongest obligation to adopt a son from another family, "with a view," "to the funeral, the water and the solemn sacrifice." In the case of *Raja Upendra Lall Roy v. Srimati Rani Prosonnomoji* (1 B. L. R. 221), that eminent Judge Dwarka Nath Mitter entering into the spirit of Hindu law and applying it to the law of adoption said—"The institution of adoption as it exists among the Hindus is essentially a religious institution. It originated chiefly if not wholly in motives of religion; and an act of adoption is, to all intents and purposes, a religious act, but one of such a nature that its religious and temporal aspect are wholly inseparable."

The Hindu institutional writers use the term "Dharma" to signify both religion and law. It literally means "that which supports or holds up." So the Dharmashastra are more or less mixed treatises, which contemplate theology, metaphysics, jurisprudence, ritual, penance, ceremonial, expiatory and customary laws, and, as in Manu, even cosmology, as their proper province. Manu in his treatise on Dharmashastras lays down rules of conduct in all these spheres and phases of life. Yagnavalkya, next to Manu in date and authority, does however treat of the same traditional topics under the separate heads of Achara, Prayaschitta and Vyavahara and under the last, positive law. The only apparent exception to such mixed treatment of social, religious, moral and legal duties in the Dharmashastras is furnished by the work of Narada, a comparatively later compilation, which deals exclusively with civil and criminal laws.

The intermixture of ethics, metaphysics, and theology in the Hindu system of jurisprudence is attributable to a variety of causes. It is no doubt largely due to the notion of the universe as ordained and presided over by a divine agency. It is also true that at the dawn of civilisation "the facts of external nature and the doings of men," as Prof. Holland says, "were alike conceived of as ordained by the gods. The constitutions of states and the customs and laws of all the peoples of the earth were as much of divine contrivance as the paths of the planets." But over and above that, one has to consider the problem before the Hindu sages at that distance of time and the then conditions of society. The task of providing a government that would be at once simple and effective in preserving

- order and contentment throughout a vast continent and amongst such a variety of people as is hardly to be met with any other part of the world. This task had to be accomplished by a handful of men, who were anxious not to sacrifice their best energies in the art of government, but to reserve them for the cultivation of the human mind and to establish its kinship with the Divine.

The legislators were a small but a cultured class and they early conceived that the best means of preserving peace, order and contentment in society was to preserve custom and usage, which were consistent with morality and to give to the people such ideas of life and rules of conduct as would make society move automatically and with the least degree of friction.

The country was then inhabited as to this day by a variety of races differing in manners, habits and speech and unlike now, at various stages of barbarity. The customs, usages and interests of all these numerous races, and their more numerous sections and sub-sections had to be equally preserved and also made to conform to the ruler's ideals of life and conduct. How this task was accomplished, the Code of Manu bears abundant evidence. For instance, the different forms of marriage sanctioned by Manu—especially the Asura, Rakshasha and Pisacha, as the names imply, were presumably of non-Aryan origin and yet because they prevailed as living customs, which could not be put down among the semi-Hinduised aboriginal races that they find a place along with the more approved ones in his Code.

- Mayne truly observes that "when the Aryans penetrated into India, they found a number of usages either the same as or not wholly unlike their own. These they accepted with or without modifications, rejecting only those which were incapable of being assimilated such as polyandry, incestuous marriages and the like. The latter lived only a merely local life, while the former became incorporated among the customs of the ruling race." This accounts for the mention of the practise of *Nyoga*, or raising up issue by one man on another man's wife, as also the disapproved classes of sons in the Code of Manu. Accordingly, to put down such disapproved usages, the sages were obliged to invoke the aid of religion and morality more than the arm of the law which could not go the same length. Thus, while putting together customs and usages of various tendencies, they were at the same time at pains to point out which of them were sanctioned by morality and religion, and ought therefore to be followed, and which were not. So particular customs came to be approved or disapproved on moral principles, giving rise to the intermixture of religious, civil and moral ordinances in Hindu law.

To some extent the policy of the ancient Hindu law, was the same as led to the union of Church and State at the earlier stages of European civilization. "To gain the obedience of men," observes that

acute thinker Walter Bagehot, in his *Physics and Politics*, "the primary condition is the identity—not the union, but the sameness—of what we now call Church and State. What is requisite in the Old World is a single government—call it Church or State as you like—regulating the whole of human life. No division of power is then endurable without danger—probably without destruction, the priest must not teach one thing, and the King another. King must be priest and priest King (or society would go to pieces)." This language fits in with the description of the patriarchal institution of Vedic India.

But undoubtedly the most potent factor of all, is the innate religiousness of the people, which is perhaps the grandest aspect of Asiatic nature. The glory and majesty of Indian skies, her noble rivers and lofty mountains and broad and fertile plains bathed in sunshine, all stirred to their innermost depths the heart and imagination of the primitive Hindu, and bowed him down in kneeling worship of the Spirit behind them. Besides, primitive as he was, he was essentially engrossed by the might of the elements, Agni, the fire of the sun and lightning; Indra the bright, cloudless firmament; the Maruta, or winds; the Usas the dawn; and various kindred manifestations of the luminous bodies, and Nature in general—turned his awe into pious subjectivity and veneration. Thus from the first, the constitution of the Hindu mind took a religious and philosophical bias. Consequently the History of Hindu civilisation is the history of its different systems of philosophy and religion, that of the Vedas and the Upanisadas, the Sara-darsanas (six systems of philosophy) of Buddhism and Vedantism and of the infinite variety of faiths and persuasions, sects and creeds that sprung up out of each. Amongst such a people and under such conditions it is but natural that even law had its peculiar mode of evolution and was wrought out, as Bühler says, "under the influence mainly of religious conceptions."

Not that indications were wanting of a similar influence on Roman or Grecian law, but civilization as it moved westward seems to have taken a more and more practical form, and naturally the distinct provinces of law and religion became once for all established. To this fact more than to anything else, is to be attributed the marvellous development of Roman law, which has practically given birth to the modern science of jurisprudence.

Owing, however, to the peculiar conditions of Hindu society and to the peculiar tendencies of the Hindu nation, law could never extricate itself from the thralldom of religion. Conservatism has early been a creed of the Hindus. Any change in its laws or institutions, was strenuously opposed till they could be proved to be consistent with the Vedas. As Dr. Markby puts it "they are bound to accept the authority of the Vedas and Smritis as divine, and they cannot do this without making it the

basis of their law. If they do not obey the precepts of the divine law, they must explain them away by a process of interpretation, or else allege a super-imposed custom." Both law and religion were subjected to the same process of interpretation, and the method of interpretation developed into a distinct branch of knowledge called the *Mimansa Darsana*. This method of interpretation had early cramped a free and healthy development of the Hindu law, and thus it is that it has ever remained entangled in the meshes of ceremonial law.

Another influence hardly less powerful was the supremacy of the sacerdotal class. Everywhere in the world, legislation is an incident of the sovereign power, but Hindu law presents the curious phenomenon of a divorce between legislation and sovereignty. The Brahmins had reserved to themselves this function of supreme power and established a Brahmin theocracy or oligarchy throughout the length and breadth of the country. "They modified the law," say West and Bühler, "by connecting every phase of moral or religious change with some doctrine or text regarded as of divine authority, or by suggesting a moral reason for the change," and the result of it all has been well summed up by Mayne in the following words: "The religious element entwined itself with legal conceptions and then distorted them in three ways. First, by attributing a pious purpose to acts of a purely secular nature. Secondly, by clogging those acts with rules and restrictions, suitable to the assumed pious purpose. And, thirdly, by gradually altering the customs themselves, so as to further the special objects of religion or policy favoured by Brahmanism."

But still under the Hindu regime, law underwent a development in its own way. When the tide of conquest set in, the conditions of things were changed, and things peculiarly Hindu, could no longer pursue an independent course of evolution. Under such circumstances everything threatened to be reduced into a dead form, till the advent of English jurisprudence infused new blood into it. Thanks to the common sense of the English judges and to the sovereign prerogative of the Privy Council that the Hindu law has entered upon a new phase of evolution and has been fast adopting itself to its new environments and, so far as we can judge, with the best of results. In conclusion this must be said as to intrinsic merits of the law itself that the moral principles which form its backbone will make it survive all vicissitudes of society and make it live and thrive in all civilized relationship between man and man.

## Review.

CASE LAW ON TORTS. By R. D. Alexander, B.C.S. Fourth Edition. By Mr. P. L. Buckland, Barrister-at-Law. Messrs. Thacker, Spink & Co., Calcutta.

That a work which aims at classifying the important Indian cases by way of illustrating the principle of the Law of Torts should attain a fourth edition in these days, when annotated Codes claim almost the sole attention of the practising profession, speaks for its inherent merit. The arrangement is good, the treatment methodical and the import of cases well brought out. The edition under review has been brought up to date by the incorporation of most of the recent rulings affecting the subjects dealt with. But there are one or two regrettable slips and omissions which display some degree of carelessness or haste in the preparation of the present edition. For instance, it is unfortunate that no mention is made of the very important case, *East Indian Railway v. Kally Dass Mukerjee* (3 C. W. N. 781: s. c. I. L. R. 26 Cal. 165), relating to the liability of a Railway Company for the safe carriage of its passengers; the retention of the old title to recent General Clauses Act is a similar slip. Such errors would sometimes occur in spite of ones best endeavours to avoid them and do not in the case of the present work detract from its established reputation as a sound treatise on the Case Law of Torts.

BROOM'S LEGAL MAXIMS. Seventh Edition. By H. P. Manisty and H. Chitty. Sweet & Maxwell, Ltd., 3, Chancery Lane, London.

This is the seventh edition of this famous work which was first published in the year 1845 and at once obtained a wide circulation as a valuable textbook for legal students. The main idea of the work is to present under the head of 'Maxims,' the governing principles of the English law with illustrations as to their application, as to how they are limited or extended having regard to the circumstances of particular classes of cases. It does not pretend to be an exhaustive digest of the case law on any one subject, nor does it deal with any particular branches of the law in detail. No better or more useful book on first principles can be placed in the hands either of the practitioner or the law student. The importance of an accurate acquaintance with the fundamental rules is becoming more and more felt by the profession in India where Statute law is daily increasing in bulk. The Courts also feel the necessity of examining them carefully to see how they are to be applied according to the exigencies of any particular case before them. The book is not merely one for casual reference but should be thoroughly studied and intimate knowledge of it has not only become necessary in these days but should form part of the equipment of every practitioner. The book is divided into chapters. The first two dealing with

the rules founded on the public and legislative policy, those relating to legislative policy and the crown. It then variously deals with certain maxims which are rather reductions of reason than rules of law and comprises maxims relating to property, marriage and descent, the interpretation of written instruments in general, contract, and evidence. In the present edition, the editors have succeeded in maintaining and developing the author's idea and by occasionally re-arranging and modifying a portion of the old work, they have succeeded in improving upon it. There has been a large addition of recent decisions. It also appears that the editors received valuable assistance from certain notes made by Lord Justice Lindley, which alone have enhanced the value of the work, too well-known to require a lengthy review.

ATTACHMENT OF DEBTS, &c. By Michael Cadell. Third Edition. Sweet & Maxwell, Ltd., 3, Chancery Lane, London.

This the third edition of this work which has already been found useful by lawyers, and in which a chapter has been added dealing with charging orders. The author has dealt with the subject of Execution on Debts, Equitable Interests, Stock and Shares. The law and practice in England relating to Execution are not so systematic as here, where most of it is codified. The law, however, relating to Receivers by way of equitable execution in this country is little known or understood and the provisions of the Civil Procedure Code relating thereto are often found not to be helpful. Much assistance will be derived on such subjects from the work under review. The case law is brought down to date and it is a handy little book for daily reference.

LAW RELATING TO INJUNCTIONS IN BRITISH INDIA. Tagore Law Lectures, 1897. By J. G. Woodroffe. Thacker, Spink & Co. Calcutta.

Every one will agree that this book has supplied a longfelt want. Prior to its publication there was no book from which a student could have gleaned the law on the subject as administered in India. We think the author has very properly confined his treatment of the subject to the purposes for which the Tagore law professorship was created. It is an admirable book for the purpose and even the practitioner will find it useful as most of the Indian cases are noticed and commented on. Making every allowance for its being a course of lectures, we cannot help observing that the author might well have avoided repetition without making any the less impression on the minds of the students.

To carry out his purpose, as expressed in his preface, Mr. Woodroffe, has, perhaps necessarily, omitted to notice some very important subjects and cases, which are of rare occurrence and would not, perhaps, be of much use, to a mere law student. The practitioner can no doubt, as the author remarks, refer to the standard works of reference on the

subject. Still we think the author would have done better to remember throughout his work the mofussil practitioner to whom such works are not ordinarily accessible. He would not then probably have omitted to notice such leading cases as *Lytton v. Davey* on the question of copyright in letters, or *Caird v. Syme* on the question of copyright in lectures, or such subjects as injunctions under the Criminal Procedure Code, which are of frequent occurrence in the mofussil.

As a book for students, the index perhaps is not of so much importance as it would have been if the work had been expressly written for the use of practitioners, to whom an exhaustive index is of the first importance.

## English Notes.

COURT FOR CROWN CASES RESERVED.—*REGINA v. BATTON.* Before JUSTICES MATHEW, LAWBRANCE, WRIGHT, KENNEDY and DARLING. 28th July 1900.

*Obtaining goods by false pretences—Remoteness.*

*R. v. LARNER* (14 Cox C. C. 497) *dissented from.*

The Defendant had run in certain races at the August 1899 Athletic Sports at Lonsdown. The name sent in for those contests was that of one Sims who was not present at Lonsdown at the time and knew nothing of the entries for them sent into the secretary of the sports. The entries had statements therein regarding Sims, that he had competed unsuccessfully for certain races, which were correct. Those entries were not in the Defendant's handwriting. Sims being a poor runner the handicapper gave a favourable position to Defendant and he being an expert runner was first in the races and so secured the prizes.

The handicapper becoming suspicious questioned Defendant if he really was Sims and received an answer in the affirmative, which was false. It also appeared that the Defendant had previously secured a prize for running at another place. He was convicted of obtaining goods by false pretences. The Recorder of Lonsdown, however, stated a case, being doubtful whether his summing up to the jury was sound. He had left it to the jury to say whether Defendant had acted "for a lark" without criminal intent or had secured the prizes by false representations wilfully made with that object. The jury being of the latter opinion he was convicted.

THE COURT would not follow the case of *Regina v. Larner* (14 Cox C. C. 497) relied upon by Defendant's counsel who urged that the attempt to obtain the prizes was too remote from the pretence. The judgment states that Lord Justice Lindley had correctly questioned the decision in that case. Here the Defendant was handicapped with a false pretence, he had entered for the races with the intention of

winning the prizes and such fraudulent intention was not too remote. The conviction was correct.

*Mr. P. Hughes* for the Defendant.

*Mr. Shearman* and *Mr. Walker* for the Crown.

C. W. A.

*Conviction affirmed.*

**COURT FOR CROWN CASES RESERVED.**—*THE QUEEN v. STREETER.* Before JUSTICES MATHEW, LAW-RANCE, WRIGHT, KENNEDY and DARLING. 28th July 1900.

*Receiving goods stolen by wife—Larceny Act, 1861, sec. 91.*

*R. v. SMITH* (L. R. 1 C. C. R. 266) *followed.*

In this case the wife of one Tickner had stolen certain goods from her husband and sent it to the Defendant Streeter who was aware that she had stolen them. The wife left her husband and lived as man and wife with the Defendant Streeter. The husband missed the goods, gave the police information. The wife Ellen Tickner and the Defendant Streeter were arrested. At the time of the arrest the missing goods were found in the boxes which Ellen Tickner had sent to Streeter and some of the money was discovered in a box belonging to Streeters the key of which was in Ellen Tickner's purse. Both were indicted for larceny, but the Defendant Streeter was in addition indicted for receiving the stolen goods. At the West Sussex Quarter Sessions the jury found the wife guilty of larceny, but they found that Streeter was not guilty of larceny, but was guilty on the count for receiving.

On the case stated now coming on before the Court as above constituted the Judges held that the indictment for receiving the goods and money stolen by the wife did not lie, the matter was concluded by the case of *Regina v. Smith* (L. R. 1 C. C. R. 266). They so held because under sec. 91 of the Larceny Act of 1861 only persons who received goods, the stealing of which amounted to a felony "either at common law or under the provisions of that Act" could be indicted as receivers. The stealing by the wife of her husband's goods was not a larceny at common law or under that statute.

*Mr. Raven* for the Defendant.

*Mr. G. Campbell* for the Crown.

*Decision in favour of the Defendant Streeter.*

C. W. A.

**COURT OF APPEAL.**—*SMITH v. THE INNS OF COURT HOTEL, LIMITED.* Before LORD JUSTICES A. L. SMITH, VAUGHAN WILLIAMS and ROMER. 14th June 1900.

*Hotel Company—Poisonous food—Negligence—Want of proper care—Verdict of jury.*

This was an appeal by the Defendants, the above-named Hotel Company, against a decision of Mr. Justice Grantham who tried the cause with a special jury. The action was brought by the Appellants

Smith and his wife to recover damages for injuries suffered by them. It appeared that 91 persons were dining one evening at the table d' hôte dinner at the above Hotel on 17th of July of last year, of whom 39 including the Plaintiffs were more or less poisoned, they had all eaten either mutton or fish and they were all poisoned by ptomaines. Two of the 39 had died. At the trial the jury gave a verdict for £140 damages. On the Defendants' appeal the Court unanimously dismissed the appeal. Lord Justice A. L. Smith said "if the case made out by Plaintiffs in an action of negligence was equally consistent with the Defendants having been guilty of negligence and with his having acted with due care then there was no case to go to the jury." But in this case where 39 persons out of 91 who partook of a particular meal were poisoned in a similar manner, he had to ask himself whether that state of facts was more consistent with there having been a proper examination of the food on the part of the persons who supplied it, or with there not having been a proper examination."

The learned Judge thought the state of facts was more consistent with there having been an improper examination; and Mr. Justice Grantham had acted rightly in leaving the matter to the jury and not accepting the suggestion of Defendants' counsel that there was no case to go to the jury. He thought that seeing that the quantity of poison supplied in the food was large, it might have been detected had a reasonably careful examination been made. The jury had on the medical evidence reasonably found that there was a want of proper care. Both contentions for Appellant failed and the application for a new trial or verdict for Defendants must be refused.

*Sir Edward Clarke, Q. C., and Mr. George Elliott* for the Appellants.

*Mr. Dickens, Q. C., and Mr. M. Muckenzie* for the Plaintiffs.

C. W. A.

*Appeal dismissed with costs.*

**COURT OF APPEAL.** *THE KENT COAL EXPLORATION COMPANY v. MARTIN AND OTHERS.* Before LORDS JUSTICES A. L. SMITH, VAUGHAN, WILLIAMS and ROMER. 3rd July 1900.

*Causes of action, joinder—Several Defendants, statement of claim against, same and in the alternative.*

*GOWER v. COULDRIDGE* (1898, 1 Q. B. 348) and *FRANKENBURG v. GREAT HORSELESS CARRIAGE COMPANY* (1900, 1 Q. B. 504) *considered.*

In this appeal the Order of Mr. Justice Bucknill refusing to strike out the Company's statement of claim was confirmed on appeal. The Defendants were 8 in number, 4 of them were the promoters, and the other 4 directors of the Company. The statement of claim charged guilt by conspiracy to defraud against all of them and alternatively that

the Defendants, the directors, in carrying out the purchases loans and other transactions had acted negligently in breach of their duty as directors. The Defendants took out summons at chambers to have such statement of claim struck out, on the ground that a tort alleged against all the Defendants could not properly be joined with a separate tort alleged against only some of them. This position found favour with the master but Mr. Justice Bucknill reversed the master's order.

THE COURT OF APPEAL held that the present case was not governed by *Gower v. Couldridge* (1898, 1 Q. B. 348), the allegations in this statement of claim were very different from that in the other, here there was an alleged cause of action for conspiracy against all the Defendants, and then as regards the same cause of action it was alleged that the Defendants who were directors were guilty of breach of duty as directors. In the other case as regards two only out of 3 Defendants three separate causes of action were alleged, while as to the third only two causes of action were alleged.

*Mr. S. Smith* for the Appellants.

*Mr. Cartmell* for the Respondents.

C. W. A. *Appeal dismissed with costs.*

COMMERCIAL COURT.—*BELL v. PLUMBLY*. Before Mr. JUSTICE MATHEW. 17th May 1900.

*Stock broker—Privity of contract.*

The Defendant's stock broker was one Charles Hemmerde. The Defendant through him brought first 500 and then an additional 1,000 shares in the stock exchange in "the Colonial Gold Fields Limited." These 1,500 shares were by arrangement with the Defendant "carried over" in the stock exchange. Later on Hemmerde found it impossible to keep carrying over such a large amount in the stock exchange and with arrangement with the Defendant he carried over a portion as before and the remaining, the larger portion, he carried over outside the stock exchange, having come to an understanding with his (Hemmerde's) client a lady, the Plaintiff, Mrs. Bell. This lady was one who used her money in advancing for such purpose. This fact was known to Defendant. The actual transfer of the shares were made in Hemmerde's name with the consent of the Plaintiff, Mrs. Bell, whose affairs were managed by her son. Successive carries over took place in that way, 400 shares only being carried over in the stock exchange. For the settlement in the stock exchange of December 14th last the stock broker informed Defendant that he could not carry over more than 500 and he must take up and pay for the balance of 1,000 shares. Thereupon Defendant supplied "a name" and the account was sent to him showing account closed for 1,000 shares balance due £1256. At that settlement Hemmerde was declared a defaulter on the stock exchange.

The Defendant refusing to pay Mrs. Bell, this action was instituted. The learned Judge said Defendant admitted liability but not in favour of Plaintiff; it was urged on his behalf that two separate contracts had been entered into one between Defendant and Hemmerde the other between the latter and Plaintiff, but that was not really the result of the transactions. It was never intended that the broker should as regards the Defendant occupy the position of principal. The approval of the Plaintiff's son (who was acting for Plaintiff) was shown to each separate act of the broker. There was a clear case of contract between Plaintiff and the Defendant and Plaintiff was therefore entitled to judgment.

*Mr. Harrison, Q. C.*, and *Mr. Atkin* for the Plaintiff.

*Mr. Isaacs, Q. C.*, and *Mr. Nevill* for the Defendant.

*Judgment for Plaintiff with costs.*

C. W. A.

COUNTY COURT.—*PHILLIPS v. LONDON BRIGHTON AND SOUTH COAST RAILWAY*. Before HIS HONOR JUDGE LAMBY SMITH, Q. C. 17th October 1900.

*Railway Company—Liability for delay or inconvenience to passenger—Liability for not giving notice of delay—Conditions in the Company's time table.*

In this case Mr. Phillips Silver Smith of Bond Street claimed a damage of £5 from the Railway Company for loss of business owing to delay in the arrival of the train at Victoria. The train started from Three Bridges at 11-30 and was due at the Victoria Station at 2-5. It did not arrive at its destination until two hours after due time, owing to a train in front having been derailed; consequently Mr. Phillips who was going to Christie Manson and Wood's auction to buy certain articles, was too late for purchasing them, and he afterwards found that they had been disposed of for a sum under that which she was prepared to give. The amount claimed was not anywhere near the loss he had thus sustained, he complained that it was the duty of the Company to have informed him of the accident which their servants were aware of when the train reached Streatham, that there would be considerable delay at that station, such information would have enabled him to take a conveyance by road to London and to be in time to secure the objects for which he was journeying. He urged that therefore the Company was liable for wilful misconduct.

His Honor came to the conclusion that Plaintiff was bound by the conditions in the Company's time table to which reference was made in the railway ticket given to Plaintiff, and therefore dismissed the action.

*Mr. Austen* for the Company.

*Judgment for Defendant.*

C. W. A.



# THE Calcutta Weekly Notes.

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[No. 2

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### REPORTS (See Index.)

THE PRESENT CONSTITUTION OF THE BENCHES IS MUCH appreciated by the profession. It would be difficult to improve upon them.

LORD RUSSELL'S GREATNESS IS NOT EXHAUSTED BY calling him a great judge or a greater advocate but, perhaps, to a large extent it is attributable to the breadth of his views. In these days it would be difficult to point to another word which is more often profaned than the word civilization. It is a pleasure therefore to find a different version of it from the late Lord Chief Justice in his address on International Law before the American Bar Association in 1896 from that which the course of recent events is trying to make it out to be.

"What, indeed, is true civilization? By its fruit you shall know it. It is not dominion, wealth, material luxury; nay, not even a great literature, and Education wide-spread—good though these things be. Civilization is not a venger; it must penetrate to the very heart and core of societies of men. Its true signs are thought for the poor and suffering, chivalrous regard and respect for women, the frank recognition of human brotherhood, irrespective of race, or color, or nation, or religion, the narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom, abhorrence of what is mean, and cruel, and vile, ceaseless devotion to the claims of justice. Civilization in that, its true, its highest sense, must make for peace."

CALUMNIES AGAINST GREAT MEN ARE VERY EASILY circulated, more readily believed and hardly ever removed, because they treat them with contempt and seldom care to contradict malicious reports. Lord Russell was commonly believed to be more addicted to the turf and cards than was good for him and he was said to have lost so heavily on both that very little of his enormous earnings remained. The property he has left amounts in value to about £150,000 and has given the lie to his calumniators.

THIS FULLY SUPPORTS MR. DICEY'S TESTIMONY IN the pages of the *Fortnightly Review* that the late Lord Chief Justice's chief attraction for sports consisted in relaxation, display of skill and triumph over an opponent rather than in the stake.

"But it always seemed to me, that for him the real attraction of card-playing lay not in the desire to win, but in the relaxation cards afforded him after the constant strain of his daily life."

"He was too highminded a man to derive much pleasure from winning money for money's sake. But he enjoyed the excitement of the game, the satisfaction of putting his skill against that of other players, and winning at the end."

MR. EDWARD DICEY, IN WRITING TO THE *Fortnightly Review* about Lord Russell, records the following private opinion of the late Lord Chief Justice as to the merits of a jury. "I recollect," says Mr. Dicey, "once remarking to him, after he had become Lord Chief Justice, that if I were on my trial as an innocent man I would sooner be tried by a Judge than by a jury. His answer was to the effect that if I knew as much of the judges as he did I should change my opinion, and that his experience was that juries, as a rule, took a more common sense view of the case than judges." We have in these columns also drawn attention to a similar expression of opinion by the present Lord Chancellor.

### CLOGGING THE EQUITY OF REDEMPTION.

HAVE the recent decisions of the Court of Chancery in *Biggs v. Hoddinott* (1898, 2 Ch. 307: s. c. 2 C. W. N. cccxv) and *Santley v. Wilde* (1899, 2 Ch. 474) altered or modified in any way the old equitable doctrine that the mortgagee shall not clog the equity of redemption? This was the question that was discussed in *Rice v. Noakes* (1900, 2 Ch. 445; 69 L. J. Ch. 643) and the Court of Appeal (Lord Alverstone, M. R., Rigby and Collins, L. JJ.) decided that

the doctrine of clogging remained unimpaired as ever. No doubt this is true to some extent, but as pointed out in a previous article (4 C. W. N. cclxv), it is clear that the doctrine against clogging may now be said to have lost much of that rigour which attached to it when *Jennings v. Ward* (2 Vern. 520) and *Howard v. Harris* (1 Vern 190) were decided. The right to redeem is not a personal right, it is an estate or interest in the property mortgaged. That being so, we may next enquire into the meaning of the word 'clog.' As pointed out by Lindley, M. R., a 'clog' is something which is inconsistent with the idea of 'security' or in other words, a clog is in the nature of a repugnant condition. Ordinarily the mortgagor is entitled to a reconveyance on payment to the mortgagee of the principal and interest. If however, there is a covenant forbidding redemption that covenant would operate in the nature of a 'clog.' And the Court of Equity having its eye constantly on the redeemable nature of a mortgage security brushed aside the cobwebs of restrictive covenants. To this principle of law was grafted by successive decisions of the Court of Chancery beginning with *Mainland v. Upjohn* (41 Ch. D. 126) the view that a mortgagee was entitled to stipulate for reasonable collateral advantages. In *Rice v. Noakes*, it appeared that in a mortgage of a leasehold of a public house, the mortgagor covenanted with the mortgagees who were brewers that he and all persons deriving title under him should not during the continuance of the mortgage term, and whether any money should or should not be owing on the mortgage, use or sell in the house any malt liquors except such as should be purchased of the mortgagees. It was contended on behalf of the mortgagees that the above stipulation was not a 'clog' but was in the nature of a collateral bargain and was in fact part of the consideration for the parties entering into the transaction of loan. And in support of this view, reliance was placed upon the case of *Santley v. Wilde* (1899, 2 Ch. 474) where there was a mortgage of the leasehold of a theatre with a covenant to pay one-third of the profit rental thereof to the mortgagee during the whole of the mortgagor's term although the principal and interest had been paid. Lord Alverstone, M. R., pointed out that if *Santley v. Wilde* were before him, he would have felt some difficulty in deciding that the covenant in that case was not a 'clog' but the Court of Appeal had decided otherwise and he was bound by that judgment. In the present case, however, the Court of Appeal have now decided that the covenant was a 'clog' and hence unenforceable. It must be confessed, however, that the mystery of the doctrine of clogging the equity of redemption is not satisfactorily cleared up and every one will share in the hope of Lord Alverstone, M. R. (now the Lord Chief Justice of England) that in future we may have the guidance of the House of Lords upon the point.

icth.

THE CODE OF CIVIL PROCEDURE (with Explanatory Notes and Commentaries). By *Dinshah Fardunji Mulla, M.A., LL. B. Bombay: Caxton Printing Works. Price Rs. 6-8.*

The present work is intended by the compiler to supply a want felt "by students and by that increasing class of lawyers who are just beginning their practice in procedural law" of a handy book of ready reference. We regret we cannot congratulate the compiler on this book. So far as we have seen of this book makes us doubtful as to its utility to the student and as regards its usefulness to professional men we must say it leaves much to be desired. For instance, the immense mass of the caselaw which has gathered round sec. 13 ought to have been set forth in some detail while care ought to have been taken to incorporate into the notes the effect of the most recent decisions of the different High Courts. The commentary on sec. 11, again, is also very meagre: the student, leaving alone the practising lawyer, is not made acquainted with that exhaustive classification of 'suits of a civil nature,' which ought surely to have found a place in this work. Take again the sections relating to the affidavit and inspection of documents. Here also the notes though they may be considered sufficient and ample for the student, are not such as afford any material assistance to the practising lawyer. Sec. 584 requires a great deal more of elucidation and explanatory notes than are presented by the compiler while the commentary on sec. 622 is hardly sufficient. No doubt the compiler has been somewhat hampered by his desire to keep the book within a narrow compass but this might have been better accomplished by replacing repetition by more useful matter. The index appears to be a carefully executed piece of work. The get up of the work is commendable and its price moderate and on the whole the book shows promise of its being converted with a little more industry, tact and judgment into a very useful work.

A GENERAL DIGEST OF CIVIL CASES: (2 Vols. 1886-1889). By *D. G. Khandekar. Poona.*

The volumes before us comprise Parts IV & V of a General Digest of Indian law cases compiled by Mr. Khandekar. We have been at some pains in looking through the volumes and while we cannot declare it free from defect in its details still we must say that we greatly appreciate the very complete and exhaustive classification adopted by the compiler. In the body of the digest references to the cases referred to or distinguished are given, various cross-references are given and the usefulness of the book is added to by the inclusion of various sub-heads. The get up of the work is no doubt very indifferent but we can always make allowance for such defects having regard to the general usefulness of a work of this kind.

## English Notes.

THE CASE OF *Carter v. Nelson & Co.* DECIDED IN the Queen's Bench Division since the commencement of the Michaelmas sittings demonstrates how careful one must be to scan the terms of a tempting offer made in an advertisement. The offer was made by the Defendants, Nelson & Co., who advertised that they would pay to every woman who became a widow since Christmas 1897, and who since that date shall have purchased not less than one-half pound of their tea per week for the five consecutive weeks previously to her becoming a widow, 10 shillings per week as long as she remains a widow.

The above offer however was subject to a condition. "The only condition is that at the commencement of the continuous taking of the tea the husband must be certified to us to be in good health."

The Plaintiff, a widow, was induced by an agent of the Defendants to purchase the tea with a view of securing the pension, a certificate of good health of the husband was however not supplied at the commencement of the continuous taking but some time later, and although the County Court Judge of Yarmouth found as a fact proved, that the husband was in good health at the time of the taking of the tea yet he held that the certificate of his health not having been given at that time but later invalidated Plaintiff's claim which was dismissed and that decision was upheld on appeal by the Divisional Court.

COURT OF APPEAL.—*HOGARTH AND COMPANY v. WALKER.* Before LORDS JUSTICES A. L. SMITH, VAUGHAN WILLIAMS and ROMER. 25th May 1900.

*Marine Insurance policy—Furniture of ship—Grain trade—Dunnage mats not in use.*

The question in this case was whether a policy covered certain dunnage mats and separation cloths which were damaged on board the ship "Felbridge" by a peril of the sea. The action was brought by the owners of the "Felbridge" to recover for such loss under a time policy of Marine Insurance. The Defendant was the underwriter. The policy was in the ordinary Lloyds form for 12 months. The words used in that policy included "and other furniture of and in the good ship." The mats and cloths were not in use during the voyage, they were stowed away in the forepeak. The "Felbridge" was on a voyage from America with a cargo of grain. In the American grain trade such mats and cloths are not used. It was, however, the custom for ships engaged in the Black Sea grain trade to use the dunnage mats by placing them underneath the grain and the cloths to separate the different parcels in which the grain was usually shipped by the different shippers.

Mr. Justice Bingham had decided in Plaintiffs' favour.

The Defendants appealed.

The Appeal Court, in dismissing the appeal, said the articles in question were necessary for the trade upon which the ship was entitled to go; consequently they formed part of the furniture. No appreciable difference had been pointed out between such articles and moveable bulk heads which last, it was conceded, would form part of the furniture of the ship. The policy covered as wide a power of trading as possible and in the Black Sea trade the mats and cloths were requisite.

*Mr. Rufus Isaacs, Q. C., and Mr. Lush for the Plaintiffs were not called on.*

*Mr. Joseph Walton, Q. C., and Mr. Hamilton for the Defendants-Appellants.*

*Appeal dismissed with costs.*

C. W. A.

CHANCERY DIVISION.—*PETTIFER v. PETTIFER.* Before MR. JUSTICE BYRNE. 7th August 1900.

*Will—Husband and wife—Condition in terrorem, effect of.*

Mr. Pettifer by his Will made in 1897 bequeathed to his wife Ruth all his real and personal property whatsoever and wheresoever situate, the wife was to have complete and sole control thereof during her lifetime "on condition that Ruth do not marry again after my decease." She was appointed the executrix but there was no gift over in case of the marriage.

The learned Judge held that the rule of law applicable to personality governed the case because the realty was mixed up with it. The realty and personality were massed together in one devise to the same person. And therefore the condition was void as to both classes as being one in terrorem merely.

*Mr. Levett, Q. C., and Mr. Hawkins for the Testator's relatives.*

*Mr. Norton, Q. C., and Mr. Jolly for the Executrix.*

C. W. A.

CHANCERY DIVISION.—IN THE MATTER OF THE AUTHORIZED VERSION OF THE RED LETTER NEW TESTAMENT. Before MR. JUSTICE KEKEWICH. 24th October 1900.

*Copyright Act, 1842, sec. 14—Expunging entry in registry of Stationers Company—Proprietor residing outside jurisdiction—Costs as mere brutum fulmen.*

This matter came upon motion under the above Act after service of notice by registered letter sent to America on one Klopsch. The motion was on behalf of the Queen's printers, Eyre & Spottiswoode, who have by Royal letters patent the exclusive right to print and publish the New Testament. The object of the application was to have the name of the said

Klopsch as proprietor of the copyright of the above publication expunged from the registry of the Stationers Company.

The Defendant did not put in an appearance.

The application was granted but the learned Judge refused to order costs against the Defendant because such order could not be enforced and consequently would be a mere *brutum fulmen*.

Mr. W. Horne in support of the application.

C. W. A.

QUEEN'S BENCH DIVISION.—WALKER v. BARKER. Before JUSTICES RIDLEY and BIGHAM. 17th May 1900.

*Authority of shop assistant—Cheque paid by customer drawn in name of assistant, if payment to employer.*

The Plaintiff was a jeweller in Regent Street. He had an assistant, named Miles, who served in his shop and received money across the counter for him. The Defendant was a customer of Plaintiff's and had on various occasions made purchases at the shop paying for same in cash to Miles the shop assistant across the counter. In December of 1897 the Defendant bought an article of jewellery for £34. Two months after this purchase the Defendant called at the shop with his cheque-book to pay for the article. Miles requested that the cheque should be drawn in his own favour or order. This was done with the result that Miles cashed the cheque and embezzled the proceeds.

The Westminster County Court Judge held that when the cheque was cashed it amounted to payment and decided in favour of the Defendant for the £34. The Plaintiff appealed.

The Division Court stated that it was admitted on behalf of Plaintiff that Miles had authority to accept payment in cash as also by cheque drawn in the name of the Plaintiff his employer. The inference followed that Miles had also authority to receive a cheque drawn in his own name provided that cheque was honored. Miles did receive the £34 for the cheque from the Defendant's Banker who was Defendant's Agent; that was the same as receiving it from Defendant and was equivalent to payment. The case was really covered by *Bridges v. Garrett* (L. R. 5 C. P. 451). The decision in *Pearson v. Scott* (9 Ch. D. 198) was not in conflict with it.

Mr. H. Dobb appeared in support of the Appeal.

*Appeal dismissed with costs.*

C. W. A.

PROBATE COURT.—SHAW v. SHAW. Before Mr. JUSTICE BARNES. 6th August 1900.

*Leave to dispense with a co-respondent.*

The husband who sought a divorce from his wife was married to her in November 1883. Some twelve

years afterwards they separated under a deed of separation. In 1890 the lady gave birth to a child, and her story then told, that a commercial traveller was the father, was not true. Later on she informed the same person, a lady she had been lodging with, that another man a Mr. Speechley was its father. The last-named denied this, stating that his only acquaintance with her was through acting professionally for her as the managing clerk of a solicitor's firm. He was prepared to deny on oath that he had misconducted himself. It was disclosed in evidence that she had kept a disorderly house and Mr. Speechley had been seen there on business on two occasions.

The husband's case was that he had made every enquiry but wholly failed to obtain any justification for naming Mr. Speechley as a co-respondent and therefore applied that under such circumstances he should have leave to proceed with his divorce proceedings without a co-respondent.

The learned Judge granted the application suggesting the service of formal notice on Mr. Speechley.

Mr. Burnard for the Petitioner.

*Application granted.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF NATAL.]

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR HENRY DE VILLIERS.

SIR FORD NORTH.

1900.

3, July.

GALLIERS and others,  
v.

RYCROFT and others.

*Construction of Will, Roman Dutch Law—Fidei-commissary and ordinary substitution—"Children"—Papinian's views—Omission of supposed natural duty.*

The testator William Galliers, senior, an Englishman, had married in England before he settled down in Natal where the Will was made which was to be construed by their Lordships.

The Will contained the following disposition: "I give and bequeath all and singular my real and personal estate . . . unto my dear wife Matilda Galliers (born Sabin) for the use and benefit of herself and my children during her lifetime, and after her decease I direct that same may be equally divided among my children or such of them as may be then alive." The testator died in 1864 leaving him surviving his wife, a son and three daughters. In 1875 the son William Galliers, junior, died leaving a Will, whereby he bequeathed all his property to his wife

Fanny Galliers. Besides that wife one son William Elton Galliers survived him. The senior Galliers' wife died in 1897, her three daughters and the said grandson Elton survived her. The executors of the senior Galliers awarded the whole of the estate to the three daughters. Thereupon claim was made by the widow of the junior Galliers and Elton to be entitled to share in the distribution of old Galliers' estate.

In the Supreme Court of Natal the majority of the Court (the Chief Justice contra) directed the executor to frame and file an amended account, so as to include Elton as taking his father's share in the capital as also income of the estate of the senior Galliers from the date of the death of the widow of senior Galliers. The widow Fanny of the junior Galliers supported her son, but in the alternative claimed as entitled herself as sole heiress under her husband's Will. The latter claim was rejected in Natal and concurred in by their Lordships.

The daughters now appealed. Their LORDSHIPS' JUDGMENT states that the ground on which the said Court had supported the claim of the grandson was that the law of Natal, differing from the English law but in conformity with the Roman law, applied to cases of the present kind a rule of construction that where a parent has appointed children (or remoter descendants) as heirs and directed that upon their death their share should go over either to a stranger or to another child, then, the going over or substitution is subject to the tacit condition implied by law that the deceased child left no issue.

The judgment proceeds to state that that statement of the rule if confined to the case of fideicommissary substitutions, was a fair deduction from the Roman Dutch authorities on the subject. It quotes the passage from Papinian its origin and says it is obvious that in that brief opinion Papinian was not referring to the case of a direct or ordinary substitution—that is to say the substitution of the son on failure of the grandson to take under the Will—but to a case of fideicommissary substitution, in other words the substitution of the son for the grandson by virtue of a trust imposed on the latter to restore the inheritance on the happening of a certain event after he entered on it. The term fideicommissum used by Papinian would not be applicable to a direct substitution nor would the grandson be requested or able to restore an inheritance which he had never entered upon. The law relating to fideicommissum had been fully developed in his time, and it was very common practice for Roman testators in creating such trusts to make them conditional upon the fiduciary heir dying without children. Papinian held in effect that that condition *si sine liberis decesserit* should be read into every Will whereby the burden of fideicommissum was imposed on a grandchild of the testator. The authority of Papinian was very high, his response was accepted as law and confirmed by two imperial rescripts quoted

in the Code. The terms of these rescripts showed that the condition *si sine liberis* was intended to be read only into Wills by which fideicommissa were created. None of the Dutch commentators on the Digest or the Code extend the rule any further.

The judgment proceeds to consider the comments which were noticed in the Court below, it also considers the case of Mylne (1 Natal Law Reports, p. 88) which it finds was no authority for the proposition that the condition *si sine liberis* could legally be read into a Will which merely substituted one heir or legatee for another in the event of the substituted heir or legatee not entering on the inheritance or legacy. The judgment proceeds:—

“By the Will now in question the testator, after giving a life interest in his estate to his wife for the benefit of herself and his children, directed that after her decease the estate should be equally divided among his children or such of them as might then be alive. The effect of that direction was virtually to institute the children as heirs on the death of their mother and to substitute the survivors for such of the children as might die before their mother. It was a case, therefore, of direct and not fideicommissary substitution. The children were not requested to part with their inheritance after they had once entered on it, and consequently those who survived their mother took their inheritance free from any burden. Those who died before their mother entered upon no inheritance and possessed nothing to restore.”

The judgment next refers to the case of *Sturges v. Pearson* (4 Mad. 411) and says that even if the doctrine of vesting and divesting had ever been adopted into the Roman or Dutch Law such vesting and divesting would be a very different matter from the additio and restitutio by an heir or legatee under a fideicommissary substitution. The present Will was free from ambiguity and contained no indication of the testator's desire to benefit his grandchildren.

Next the judgment takes into consideration the argument for Respondent that where a testator conferred benefits on “children” by his Will he must be presumed to have intended to include “all other descendants” but even the reasoning of Toet showed that the word “kinderen,” the Dutch for “liberi” or “children” must *prima facie* be taken to refer to descendants of the first degree unless the Will showed that descendants of a remoter degree was intended. The point which remained undecided in *Martin v. Lee* (14 Moore P. C. C. 142) need not be decided here for as in that case so in this seeing that the true intention of the testator was to restrict the gift to his children.

In the result their Lordships agreed with the Chief Justice and reversed the decision of the majority of the Judges. They allowed the appeal, disallowed the objections regarding the distribution, and

ordered that the costs of all parties below be paid out of the estate of the senior Galliers as also the costs of this appeal.

*The Hon'ble Leonard, Q. C. (Canadian Bar), for the Appellants.*

*Mr. Israel Davis for the Respondents.*

*Appeal allowed: Costs out of estate.*

C. W. A.

### PRIVY COUNCIL.

[APPEAL FROM NEW SOUTH WALES.]

LORD HOBHOUSE.	} PENNY ( <i>in forma pauperis</i> ) v. THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES and others. • •
LORD MACNAGHTEN.	
LORD LINDLEY.	
SIR R. COUCH.	
SIR H. STRONG.	
1900.	
21, July.	

*Construction of Will—Vested interests—Gifts over.*

This was an appeal from a decision of the Supreme Court of New South Wales affirming that of Mr. Justice Walker. Both Courts had rejected the claim of the Appellants to two-fifths of two sums of money which the local Railway Commissioner had paid into Court as proceeds of certain lands taken by the Railway Commissioner; those amounts were paid into Court after satisfying the claim of the widow of James Williams whose property the lands taken were.

James Williams of Queanbeyan, New South Wales, died in December 1857. His Will which was to be construed in this appeal was dated in the March previous. His wife died in 1898. He left 4 step-sons, William Penny, Francis Penny, Thomas Penny, and Henry Penny, also a son James Williams. Of these William and Henry Penny predeceased his wife. The Appellant James Penny was heir to both the deceased Pennys and claimed as devisee the property which they would have taken had they survived their mother. The claim was opposed by the surviving step-sons, and the son who set forth their own claim to the whole. Since the testator's death two portions of his property were taken by the Railway Commissioner, and the remaining proceeds £382 and £209 were paid into the Supreme Court as aforesaid.

The following statement of the Will contains the material clauses:—The wife and one Morton were appointed executors and trustees of the Will, and it "devised and bequeathed all his real estate to his wife during her life and after her decease upon trust that the said executors and trustees should stand possessed of the same in trust" for the said four step-sons the sons of his wife by a former marriage and his own said son, "or of such of them as should be living at the time of the decease of the said wife and who should attain the age of 21 years, and in case they" (naming the 4 step-sons and the said son) "should all be living at the decease of the said wife and who should attain the age of 21 years" then

he gave to William Penny a certain parcel of land containing 320 acres "to the use of the said William Penny and his assigns for life" and similarly he gave and bequeathed to each of his step-sons and to his own son specific plots on the same terms, and he declared that in the case of the death of any of the before mentioned persons then he "gave and devised the share to which he would have been entitled to the use of the person or persons who should then answer to the description of their general to such persons so dying as aforesaid, his her or their heirs or assigns forever, if more than one as tenants in common and upon, to, or for no other trust intent or purpose whatsoever.

The specific devises to the step-sons and son never took effect, the word "share" was only to be found in the last clause of the Will above set out. In describing the parcels specifically devised each portion was referred to as the "land."

The JUDGMENT proceeds and concludes as follows:— "The series of specific devises did in effect give each devisee a defined share of the testator's real estate and their Lordships saw no justification in so construing the last clause as to make it either inapplicable to the shares so specifically devised or applicable to them alone. The last clause appeared to have been inserted to provide for the event of any devisee dying in his mother's lifetime, or, if he survived her, for the event of his dying under 21. The Court of Appeal and Mr. Justice Walker also appeared to have treated the last clause as confined to the specific devises and as having no application to the first clause, but that view was only arrived at by giving no effect to the important words in the last clause, "the share to which he would have been entitled." Their Lordships could not regard any construction satisfactory which failed to give effect to these words. The key to the proper construction of this Will was, in their Lordships' opinion, to be found by attending to the first clause and reading the last clause as applying as well to it as to the series of specific devises interposed between those two clauses. The form in which the first devise to the step-sons and son was expressed was a very common form and its effect was well established. It was not equivalent to a simple devise to such of the devisees as shall survive the widow and attain 21. The effect of the clause was to give to all the devisees vested interests in fee subject to be divested as regards each devisee, in the event of his death in the lifetime of the testator's widow, in favour of those devisees (if any) who survived her and attain 21. If there were none such the divesting clause failed, the original vested gifts remained, and all the devisees took absolutely. That was settled by *Sturges v. Pearson* (4 Mad. 411) as regarded bequests of personal estate, and in that respect there was no difference between personal estate and real estate (See 1 Jarman Wills, 827, Ed. 4). The last clause in the Will now in question

modified the first by saying in effect that if any devisee, i.e., the share to which he would have been entitled if he had survived her and attained 21—should go not to the survivors but to his heir as a purchase in fee. It was true that the last clause said only in the case of his death and did not say at what time. Death in the testator's lifetime might be meant; but it could hardly have been exclusively meant. Death before attaining a vested interest was covered by the words and could not be rejected as not intended by the testator. The event of death being inevitable, a gift to one person in the event of the death of another was only treated as a gift in remainder where the first taker took for life only. A gift over of property given to a person absolutely in the event of his death was always construed as a gift over in the event of his death before the period of distribution or vesting, unless some other period was indicated by the context (See the cases collected in Hawkins on Wills, 254, et seq.). That being, in their Lordships' opinion, the true construction of the Will it followed that the gifts over on the deaths of the two step-sons who died in the wife's lifetime took effect, and that the Appellant as their heir was entitled as devisee to two-fifths of the money in Court; and that the whole did not belong to the two step-sons and the son who survived the wife as decided by the Supreme Court. Their Lordships would humbly advise Her Majesty to allow the appeal and to reverse the orders appealed from and to remit the petition to the Supreme Court with a declaration that, according to the true construction of the testator's Will and the events which have happened, the Appellant James Penny was entitled to two-fifths of the sums of £382 2s. and £209 17s. 2d. in the petition mentioned and to two-fifths of any interest or dividends which might have accrued in respect of those sums since the payment thereof into the Supreme Court, and to direct that the costs of the original petition be borne as ordered by the order of September 8th, 1898, and the costs of the appeal to the Supreme Court be borne by the Respondents other than the Railway Commissioner. The costs of the Appellant of the appeal to this board would also be borne by the same Respondents and would be taxed on pauper scale. But the Railway Commissioner must bear his own costs."

*Mr. Alfred Adams* for the Appellant.

*Mr. Hawkins* and *Mr. Cowell* for the Respondents.  
*Appeal allowed with costs.*

C. W. A.

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 357 of 1898.

STANLEY, J. } KEDAR NATH GHOSE  
1900. }  
20, November. } BHUPENDRA NATH BOSE and anr.  
*Evidence Act, sec. 135—Order of examination of witnesses.*

The facts of this case are immaterial to this report.

*Messrs. Sinha* and *Knight* for the Plaintiff.

*Messrs. Jackson* and *A. Chaudhuri* for the 2nd Defendant.

*Mr. M. L. Dutt* for the 1st Defendant.

At the close of the examination-in-chief of the Plaintiff's attorney, who was the first witness called *Mr. Jackson* referring to sec. 135 of the Evidence Act and asked that the cross-examination of the witness be deferred, until after the examination-in-chief of the Plaintiff by his counsel, submitting that the word "examined" includes cross-examination, referring to sec. 138.

THE COURT.—How does the case come within the section?

*Mr. Jackson.*—The section says that the order of examination in the absence of any law relating to Civil Procedure shall be regulated by the discretion of the Court. The Plaintiff should have been first called and given his account of the transaction.

STANLEY, J.—The Court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined. I think that in the present case the ordinary practice should regulate the order of examination, and that the witness should be cross-examined at the conclusion of the examination-in-chief.

The witness was then cross-examined.

*Babu Ramnath Chunder Mitter*, Attorney for the Plaintiff.

*Babu Preo Nath Sen*, Attorney for the 2nd Defendant.

*Babu K. N. Ganguli* for the 1st Defendant.

J. G. W.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 610 of 1900.

SALE, J. } THE CHARTERED BANK OF INDIA,  
1900. } AUSTRALIA AND CHINA  
6, August. }  
HURISH CHUNDER NEGOT and others.

*Receiver—Practice—Liberty to sue where property in possession of Receiver.*

This was a suit upon promissory notes and an

equitable mortgage made and effected by the Defendants as Executors of one Kristo Kissors Neogy, deceased, shortly after the death of the latter and prior to grant of Probate. The equitable mortgage was effected in respect of properties which the testator purported to make *debutter* by his Will. Subsequent to grant of Probate a son of the deceased instituted a suit (138 of 1900) against the Defendants in this suit and others praying for the construction of the Will, for a declaration that the alleged dedication was void, for administration and for the appointment of a Receiver, which suit was pending at the date of the institution of the present suit. An order had been made by consent in suit 138 of 1900 appointing a Receiver of, amongst other property, the premises subject to the equitable mortgage in favour of the Plaintiffs in the present suit. The sums advanced by the Plaintiff Bank not having been paid, an application was made for leave to file a plaint against the executors and for special leave if necessary to sue, having regard to the fact that the property the subject-matter of the intended suit, was in the hands of the Receiver—though the latter was not a party Defendant to the suit. The application was made *ex parte* at the time of presenting the plaint, and not in the suit in which the Receiver had been appointed or, on notice to the parties.

*Mr. J. G. Woodroffe* for the Applicants.

The Receiver has not been made a party. Though the mortgaged premises are in his possession he was no party to, and was not appointed until after, the transactions in suit: *Smith v. Lord Effingham* (7 Beav. 374 referring to *Lewis v. Lord Zouche* (2 Sim. 388). *Kerr Receivers*, 4th Ed. 166: and will unlike a third party be bound by the Court's order. It may, however, be urged that though the suit is not brought directly against the Receiver, leave is necessary as the suit is against parties over whose property a Receiver has been appointed, such Receiver being in present possession of the mortgaged premises. *Kerr Receivers*, 172. It is submitted that leave is unnecessary in the present case, since the Receiver's possession will not be affected until a decree for sale is made and the purchaser takes possession which may never occur for the executors may discharge the debt out of other assets in their hands. If however there be a decree for sale, an application may be subsequently made for leave to take possession. *Jogendra Nath Gossami v. Debendra Nath Gossami* (3 C. W. N. 90).

*SALE, J.*—I think that that is so but as any order made by me declaring that leave to sue was not necessary would not bind the parties who are not present it will be safer for the Plaintiffs that they should have leave.

Leave to sue was then applied for and granted and the plaint presented and accepted.

*Messrs. Morgan & Co.*, Attorneys for the Plaintiffs.

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 311 of 1898.

STANLEY, J. } SM. NESTARINI DASSEE  
1900 v.  
15 & 16, May. } RAI NUNDO LALL BOSE and others.

*Evidence Act, sec. 159—Refreshing memory—Evidence Act, sec 157—Corroboration of witness.*

This was a suit for the construction of the Will of Mohendra Nath Bose and for administration of his estate. The facts of the case except so far as they appear in this report are immaterial.

*Messrs. W. C. Bonnerjee, J. G. Woodroffe and S. K. Bonnerjee* for the Plaintiff.

*Messrs. Pugh, Jackson, Allen, A. Chaudhuri and Chakravarti* for the various Defendants.

Arbitration proceedings had been held some years prior to suit and at their close a draft minute of the proceedings was prepared by the arbitrators and then fair copied by their clerk. A witness who was present at the arbitration who had compared the draft and fair copy minutes made by the clerk and had found the latter to be correct was allowed under sec. 159 of the Evidence Act to refresh his memory as to what occurred at the arbitration by reference to the fair copy minutes made by the arbitrator's clerk.

A witness was asked with a view to corroborating another person intended to be called as a witness whether or not the latter person had made any statement to him with respect to one of the matters in suit. It was held that as sec. 157 of the Evidence Act refers to the corroboration of the testimony of a "witness," ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given. The Court has no doubt a discretion to allow evidence to be given under this section out of the regular order upon an undertaking by counsel to call the witness sought to be corroborated, though such a course will be found in most cases to be inconvenient. If necessary a witness will be allowed to be recalled to give evidence under this section after the person sought to be corroborated has given his evidence.

*Babu Romesh Chunder Bose*, Attorney for the Plaintiff.

*Messrs. Gonesh Chunder Chunder & Co., and Babu Hirendra Nath Dutt*, Attorneys for the Defendants.



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[No. 3.]

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### REPORTS (See Index.)

THE HON'BLE THE CHIEF JUSTICE WILL PRESIDE AT the Court of Criminal Sessions which will commence its sittings from to-day. The hearing of the Original Side appeals will stand over till the Criminal Sessions come to a close. Mr. Justice Prinsep and Mr. Justice Hill, during this period, will hear appeals of the Rajshahye Group.

IT WILL BE NOTICED FROM THE BOARD OF THE JUDICIAL Committee which we publish to-day that the number of appeals is one of the lowest on record. The appeals from the Colonies have gone down considerably. There was only one appeal from Bengal and this and two others have been taken out of the list.

WE NOTICE WITH PLEASURE THAT THERE IS ONLY ONE appeal in which the Committee had reserved judg-ment for about six months and that in the majority of cases their Lordships' considered judgments were delivered as speedily as is consistent with their importance. In this respect the Judicial Committee is much ahead of the House of Lords.

IT IS INTERESTING TO NOTE THAT THE JUDICIAL Com- mittee notwithstanding its singular services to the

British Empire is hardly any burden on the State as it is said that the fees defray all salaries, &c., three years out of every four.

• THE APPOINTMENT OF THE FOUR CHIEF JUSTICES IN Australia to be the Lieutenant-Governors of their respective Provinces under the new Commonwealth is no small tribute to the prestige of the legal profession. Sir Samuel Way, Chief Justice of South Australia, is also one of the Colonial Members of the Judicial Committee and sat on the Board in 1897 (2 C. W. N. 1). The judicial training of the Chief Justices is sure to make them fill their new offices with dignity and ability.

WE UNDERSTAND THAT THE MICHAELMAS SITTINGS of the Judicial Committee of the Privy Council com- menced on the 7th November, when a Board compris- ing seven Judges presided over by the Lord Chancellor heard the arguments in the case of the Secretary of State for Foreign Affairs against Charlesworth Pilling & Co., and Messrs. Thomas D. Charlesworth & Co. This was an appeal and cross-appeal from a judgment of Her Britannic Majesty's Court for Zanzibar dated 28th November 1898, varying decrees of the Consular Court for Mombasa in the East Africa protectorate. The dispute arose owing to lands or "Shambas" belonging to Respondents having been compulsorily acquired by the Secretary of State for the building of the State railway from Mombasa to Uganda. Questions arose whether the case is governed by the maxim of English law, *quid quid plantatur solo solo cedit* as contended for by the Respondents; or governed by the *lex loci rei sitæ* which was the *sharia* or Mahomedan law as alleged on behalf of the Secretary of State.

The Court of Appeal had varied the decrees of the Consular Court by holding that the first named Respondents were entitled in addition to the value of the land taken, to the value of the railway buildings erected on one of the large "Shambas," viz., Rs. 60, 140, and it awarded in each case an increased sum for the lands. The Secretary of State objected to pay for the railway buildings and to the increased compensation. The Respondents claimed the sta- tutory 15 per cent. under the Land Acquisition Act 1894, over and above what was conceded to them, and they also objected to the value assessed on the land and buildings.

We understand that the Lord Chancellor at the close of the argument for the Respondents addressing the Solicitor-General (who was present and who argued the case with the Attorney General for the Secretary of State) said that their Lordships did not think it necessary to call for a reply; judgment will be delivered on a future occasion. We hope in our next issue to give a short history of the case and of the authorities on the Mahomedan law referred to during the arguments.

## JUDICIAL AND EXECUTIVE

### FUNCTIONS AND THEIR SEPARATION.

In the last number of *Law Magazine and Review*, Mr. Martin Wood, formerly Editor of the *Times of India*, contributes an article on the Judicial System of India. It follows in the train of the discussion that arose out of Sir John Scott's lecture before the Indian section of the Society of Arts and notices the opinion of some retired Anglo-Indian officials on the question of the separation of the Judicial and Executive functions. This question is now engaging the attention of the Government of India upon a reference from the Secretary of State. It is, therefore, interesting and it may also be useful to review some of the opinions noticed by the writer.

A member of the legal profession in India, who was present there as a casual visitor, took part in the debate and naturally gave expression to the prevailing sentiment in India that the administration of justice is the most popular feature of the British administration in this country. His observations are thus noticed by the writer:—

The only native Indian lawyer who took part in the debate was Mr. Taleyarkhan, to whose concise and pertinent remarks on the occasion a certain melancholy interest attaches, in that three weeks later he perished in the Great Western Railway collision at Slough. Mr. Taleyarkhan, as a legal practitioner of long experience in the use of the Indian codes, expressed his feeling of surprise that the administration of law proceeds so smoothly here without those aids and safeguards, to the great ability and learning of the Judges and the Bar, and to the orderly habits of the people." He considered that especially as regards criminal law, "codes in India are an absolute necessity, because more than half the Magistrates are not trained lawyers." He endorsed Sir John Scott's opinion that the people of India "regard the High Court with almost superstitious veneration,"—partly, as he indicated, because under the code, those tribunals have power "to revise every order and sentence passed by any Magistrate." Sir John Scott had quoted the testimony of the late Mono Mohun Ghose (an eminent practitioner on the Bengal side) in his well-considered statement in 1895 that "justice was never better administered, and life and property were never more secured in the history of India than they are at the present moment. Even the masses and the people in Bengal have learnt to appreciate the blessings of a pure administration of justice." Mr. Taleyarkhan fully en-

dorsed this, and, speaking himself from his knowledge of western India, said, "there never was a time . . . when justice was so well administered in India. They are dissatisfied with other matters, with (some) executive proceedings; but so far as the Judiciary are concerned they are absolutely satisfied . . . that this is one of the greatest claims of England to the gratitude of India."

Of the other opinions referred to, those of Sir C. Cecil Stevens, who officiated for a short time as the Lieutenant-Governor of Bengal and of the Hon. Herbert Birdwood, ex-judge of the Bombay High Court, are deserving of notice. Sir Cecil has always been a man of moderate views. Still it is but natural that he should retain some bias for the system under which he had worked for thirty-six years.

His views have thus been shortly put by the writer:—

"He was not willing to admit that the separation of the two functions on that wide, remote, and secluded region can be accepted even as 'a counsel of perfection.' His more definite objection to the change is, that the supervising powers of 'the High Court provide an effective remedy' for occasional indiscretions, or even scandals that arise under the present system of Collector-Magistrates." And Mr. Martin Wood goes on to observe "our readers are aware, these powerful local magnates sometimes use their personal influence in course of trials, and occasionally let Sessions Judges know what they think as to the line that decisions should take."

As regards the views of Hon. Mr. Birdwood and those of Sir William Lee-Warner the writer adds:—

Here it may be well to recall that the objections to the proposed change as stated by the Hon. Mr. Birdwood, though expressed with more of the lawyer's precision, are very similar to those maintained by the Bengal Civilian. But it must be noted that on the Bombay side the judicial and revenue (executive) branches of the service have long been separate to a large extent. Hence the Bombay men are apt to regard too lightly the need for this long-desired reform in Indian administration. Thus Sir William Lee-Warner (formerly a Bombay Civilian, now occupying a high position at the India Office), after acknowledging that "the broad principle of a thorough separation of judicial from executive action is sound," and stating that "the victory of the separatists has long been won," asserts that "only one very small residuum of a great principle is at stake." He proceeded to magnify the supposed cost of the change, and make the most of "the loss of prestige" objection. Sir William who by the way had no judicial experience, ignores the mischief frequently arising in other provinces of India from the incongruous union of these two functions in one officer, or the friction and obstruction caused in the administration of justice by interference with the provincial Judiciary.

It is hardly surprising that any one whose mind is free from official bias and who at all desires to take a common sense view of the matter should come to such conclusions.

The "loss of prestige" argument is well met by the testimony of all who know the people of this country that British prestige has had its origin and

growth amongst them through the courts of law and can only be maintained by the impartial administration of justice.

As regards the argument on the ground of expense, we have little to add as to its hollowness. We attempted to show in a previous article (4 C. W. N. clxxii) how by a simple notification in the Gazette and some necessary amendments of the Codes the change may be brought about. If there be a more rational division of work between the executive (police and revenue) officers and the magistrates entrusted with judicial duties and if the local Government would only agree to transfer the administrative control over the latter to the High Court, to at least the same extent as exists with regard to the civil judiciary, the whole problem may be solved in a manner which will greatly economise labour and necessarily wages.

### English Notes.

CENTRAL CRIMINAL COURT.—REGINA v. WARD. Before the RECORDER. 31st October 1900.

*Prosecution for obtaining money by false pretences—“The purse trick.”*

George Ward was charged for obtaining the sums of one shilling and two shillings by false pretences from one John Bannon. The prosecutor Bannon met the prisoner in a London thoroughfare. The prisoner was offering to a crowd round him to sell for 1 shilling a purse containing 3 shillings in it. The coins used to be dropped into the purse in the presence of the spectators. Prosecutor bought two purses on being asked by prisoner to do so. One of them for one shilling and the other for two shillings. The first was said to contain three shillings, the second four shillings instead of which they contained four half pennies.

The Recorder was of opinion that there was no case of false pretence; he could not think that the prosecutor could possibly believe, as he said he did, that the man was selling to him 3 shillings for one shilling. The jury was of the same opinion. The Recorder intimated that the prosecution of the prisoner should have been as a rogue and a vagabond.

The jury found him not guilty of the charge in the indictment and he was discharged.

Mr. Mackay and Mr. Perrott for the Prosecution.

Mr. Frith defended Ward.

*Prisoner discharged.*

C. W. A.

CENTRAL CRIMINAL COURT.—PROSECUTION OF ADA JANE STODDART BY THE ANTI GAMBLING LEAGUE. Before MR. JUSTICE CHANNELL. 30th October 1900.

*Coupon betting, legality of—Betting Act, 1853, consideration of.*

CAMINADA v. HULTON (60 L. J. M. C. 116), STODDART v. SAGAR (1895, 2 Q. B. D. 474), HURT v. HAY (37 Scottish Law Reporter) *stating a case.*

The matter was brought before this Court at the desire of the Defendant so as to have the legality of the coupon system she carried determined by the Court for the consideration of crown cases reserved. She was the proprietor of *Sporting Luck*, a sporting journal started in 1890 and carried on in 10 Red Lion Court. In that paper was published 49 coupons with names of three horse races to be run that week and the conditions stated were that any person who bought the paper for one penny was at liberty to fill up the first coupon with the name of the selected winner free of charge and he could do so with the rest of the coupons, but for more than one the competitor would have to pay one penny each for the number filled up. Another system attacked by the prosecution was called the “skill coupon combination system.” The business had developed into a very large one. In 1899, £47,800 were said to have been paid away in prizes, the monies received by postal orders, stamps, &c., forwarded by competitors were sorted by 30 or more employees employed for that portion of the work alone, and two rooms set apart for it. The Defendant’s husband assisted her in the production of the said newspaper and to carry on her coupon advertising enterprise.

The indictment was for that she did unlawfully keep and use the said premises for the purpose of receiving money or valuable securities for contingencies relating to horse racing.

The second part of the Act (sec. 1) provided that no place, &c., shall be kept or used “for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, &c.”

The learned Judge expressed a difficulty in understanding the case of *Stoddart v. Sagar* to which necessitated his stating a case for the consideration of the Court for Crown cases reserved.

Mr. Ivory and Mr. Mackay for the Prosecution.

The Defendant who pleaded not guilty was defended by Mr. Joseph Walton, Q. C., Mr. Gill, Q. C., Mr. Grain and Mr. Kershaw.

C. W. A.

*Case stated.*

COURT OF APPEAL.—DORMER (otherwise Ward) WILLIAMS v. WARD. Before the LORD CHANCELLOR, THE MASTER OF THE ROLLS and LORD JUSTICE VAUGHAN. 5th November 1900.

*Variation of marriage settlement—Nullity of marriage—Impotence.*

For the facts of this case, see 4 C. W. N., cxcix. The Court of Appeal agreed with Mr. Justice Barnes

from whose decision this appeal was preferred in holding that the Court had power under the Matrimonial Causes Act, 1859, sec. 5 (22 and 23 Vict., c. 61) as amended by the Matrimonial Act 1878, sec. 3 (41 and 42 Vict., c. 19) to vary the marriage settlement. And upon a consideration of the provisions thereof the Court of Appeal differing from Mr. Justice Barnes held that there was the settled sum of £200 which could be applied for the benefit of the Petitioner. The judgment directs that the matter be sent back to Mr. Justice Barnes with an intimation that "we think that an order should be made for the application for the benefit of the Appellant of so much of the £200 and the rents and profits as to Mr. Justice Barnes may seem right."

*Mr. Danckwerts, Q. C., and Mr. F. Russell* for the Appellant.

*Mr. Renshaw Q. C., and Mr. R. Parker* for the Respondent.

C. W. A.

*Appeal allowed.*

COURT OF APPEAL—*PRITCHARD v. DOUGHTON LOYCK AND COMPANY.* Before LORDS JUSTICES A. L. SMITH, WILLIAMS AND ROMER. 11th May 1900.

*Commission agents—Money had and received—Gambling transaction—Placing bets out.*

The Defendants were turf commission agents having an office in Pall Mall where they carried on a betting commission business. Among the circulars they sent round advertising themselves as such, one was sent to Plaintiff. Plaintiff wired to Defendants to put on £20 on a certain horse named Sointilant for the Cesarewitch at 6 to 1. That horse won that race and Plaintiff not receiving payment brought this action to recover £120 which he alleged had been received by Defendants as his agents. The defence was that the Defendants' firm had neither made the bet nor received the money. The jury found a verdict for Plaintiff for the full amount and judgment was entered in accordance with such finding by Mr. Justice Darling. Defendants now appealed for judgment or a new trial.

THE APPEAL COURT held that such an action was not maintainable, as it was one for not fulfilling the order given by Plaintiff to Defendants for making a bet in accordance with his directions that is for not entering into a gambling transaction, which the Defendants could resist as an unlawful transaction.

It was for Plaintiff to prove two things, that Defendants had made the bet and that they had received payment from the person with whom the bet had been made; there being no evidence to sustain either of those propositions, the action for money had and received failed entirely. It was always possible for persons with whom such betting transactions were made, instead of placing the bets out in accordance with the desire of the person authorizing such commission agents to do so, for the latter to

make the bet with himself and if he did so there was no security for the betting person, the commission agent was in a secure position.

It was ordered that judgment should be entered for Defendants.

*Mr. Holman Gregory* for the Plaintiff.

*Mr. S. Bower* for the Defendants.

C. W. A.

*Appeal allowed with costs.*

COURT OF APPEAL—*THE QUEEN v. SHEEL AND OTHERS.* Before LORDS JUSTICES SMITH, WILLIAMS AND ROMER. 25th April 1900.

*Appeal by civil proceeding to reopen matter criminal—London Building Act, secs. 74 & 150—Public house—Summary Jurisdiction Act, 1879, sec. 33.*

*CARRITT v. GODSON* (1899, 2 Q. B. 193) followed.

The present proceedings were started under sec. 150 of the above Act by the London County Council with reference to a public house, that building was intended to be carried on as fully licensed, the publican occupying part thereof as his private residence. Sec. 74 enacts that when a building is intended to be used part for trade and part for dwelling-house fire resisting materials should be used for the walls and flooring separating the two portions. The proceedings against the Defendants were taken before a Magistrate. The Magistrate following the decision of the Divisional Court in *Carritt v. Godson* decided against the London County Council and refused to state a case. That case had decided that a public house was not within sec. 74. That case having been decided under a criminal section of the above Act, the decision of the Divisional Court was final. Therefore the London County Council conceding that that case was on all fours with the present one commenced these proceedings under another section, their object being to challenge the said decision in *Carritt v. Godson*.

The Magistrate's order in this case was supported by another Divisional Court, they followed *Carritt v. Godson* and considered it was rightly decided.

THE COURT OF APPEAL considered the appeal to them frivolous. The Magistrate very properly followed the ruling in *Carritt v. Godson* from which case the present one could not be distinguished. The Magistrate was moreover perfectly right in refusing to state a case when requested by the London County Council to do so under sec. 33 of the Summary Jurisdiction Act of 1879, on the ground that his decision following as he did a ruling by which he was bound was not erroneous. The decision of the Magistrate was not wrong in law as the law stood and the Divisional Court was right in so deciding. The legislature had said that the decision in *Carritt v. Godson* was not appealable, nevertheless the County Council was desirous of having it set aside and go on appeal to the House of Lords and that was their object in this proceeding. If there was any Civil proceeding whereby they could obtain that

object the Court was not aware of it. The learned Judges refused to establish a practice which appeared to be novel.

*Mr. Horace Ivory* in support of the Appeal.

*Mr. Danckwerts* opposing.

C. W. A.

*Appeal dismissed with costs.*

**COURT OF APPEAL**—**THE QUEEN v. THE CHIEF REGISTRAR OF FRIENDLY SOCIETIES.** Before LORDS JUSTICES SMITH, WILLIAMS and ROMER. 24th April 1900.

*Friendly Societies Act, 1896—Powers of Chief Registrar—Enforcement of award.*

This matter arose out of proceedings taken before the Chief Registrar of friendly societies under sec. 80 of the Friendly Societies Act, 1896, for the dissolution of a society of which one Evans was the managing director. Evans had applied before the Divisional Court for a writ of prohibition to restrain the Chief Registrar from adjudicating upon claims which Evans had against the society and the society had cross-claims against him. That application was rejected. Evans then obtained a *rule nisi* from the Court of Appeal. Now on the arguments of that rule the Appeal Court held, that under that section the Registrar was acting within his powers in making an award for dissolution and he was also empowered to investigate the affairs of the society and upon such investigation if he arrived at the conclusion that the funds of the society were insufficient to discharge the existing claims, sub-sec. 3 empowered him to pass an award that the society be dissolved and by sub-sec. 5 such award was final and conclusive against all members of the society and also against persons having claims on the funds of the society, and the award could be enforced as a decision on a dispute under the Act. No appeal was allowed. The Registrar was consequently acting within his jurisdiction. The Rule was discharged.

*Mr. Sutton* against the Rule.

*Mr. Stutfield* in support.

C. W. A.

*Applicant failed.*

### Notes of Cases.

(The important ones to be fully reported hereafter.)

#### PRIVY COUNCIL.

LORD HOBHOUSE.

LORD MACNAGHTEN. **THE MONTREAL GAS COMPANY,**

LORD LINDLEY. Defendant, Appellant,

SIR R. COUCH.

v. \*

SIR H. STRONG.

VASEY,

1900.

Plaintiff, Respondent.

30, July.

*Contract—Agreement to "favourably consider" certain proposals, effect of.*

An agreement was entered into by the above Gas Company with the Plaintiff-Respondent Vasey to supply to them certain ammoniacal liquor manufactured

at their gas works. That agreement was dated the 15th December 1886. The Respondent agreed to pay for same under certain terms and conditions.

Five days after the execution of the above agreement the following letter was written by the Chairman of the Gas Company to Respondent the interpretation whereof was the main matter for consideration by their Lordships:—"Referring to the contract made with you on the 15th instant for the sale of ammoniacal liquor, I may say that if we are satisfied with you as a customer we would favourably consider an application from you at the expiration of the term for a renewal of the same for another period."

At the expiration of the agreement of the 15th December, the Appellants refused the Respondent's application for a renewal. Therefore the Respondent commenced the present suit seeking to recover damages for an alleged breach of the said agreement, also for the refusal to receive the contract, alleging that the Gas Company were bound to renew it under the terms of the said letter. On both claims the Court of first instance, Mr. Justice Mathew, decided in favour of the Respondent, and for the refusal to allow a renewal of the contract he gave \$10,000 damages with interest from the date of judgment. Appeal and cross-appeal from such decision were heard together before the Court of Queen's Bench, and judgment, (the Chief Justice dissenting) was thereupon given, maintaining the first judgment as regards the damages for breach of contract held to be contained in the letter, but allowing the appeal on the question of interest by allowing interest not only on the above-mentioned sum in question but upon other items of damages which need not be here mentioned.

In this appeal the Gas Company contended that the said letter did not comprise any contract or agreement susceptible of legal enforcement.

THE JUDGMENT OF THEIR LORDSHIPS states:—"The letter must speak for itself. If there was a contract to renew, its terms must be found in the writing. Their Lordships are unable to find in the promise made in the letter 'that the Appellants would favourably consider' an application to renew anything legally binding on the Appellants. So far from that being so the terms used implied that the Appellants reserved to themselves the right to deliberate on the question of renewing the contract if the Respondent should apply to them to do so. The utmost that could be said was that the Respondent if he proved to be satisfactory as a customer might, as the letter assured him, expect favourable consideration. It did not require demonstration to show that such an undertaking fell short of a contract."

Her Majesty would be advised to allow the appeal by discharging so much of the judgment as awarded for damages \$10,000. No costs to be awarded to either party in the Court of Queen's Bench.

No order for costs of the present appeal.

The Hon'ble *Edward Blake, Q. C.*, and *Mr. Branson, Q. C.*, for the Appellants.

*Mr. Lawson Walton, Q. C.*, and *Mr. Smith, Q. C.* (Canadian Bar), for the Respondent.

C. W. A.

*Appeal allowed.*

# CALCUTTA HIGH COURT.

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 441 OF 1898.

STANLEY, J.  
1900.

RAM CHURN LAW

v.

19, November.

JOTINDRA NATH SEN.

*Registrar's sale—Purchase by agent—Principal, refusal by, to complete purchase—Sub-purchasers' application by agent to complete purchase—Period for payment of balance expiring during holidays, interest.*

This was an application in chambers for substitution of the name of a purchaser and for liberty to complete the sale.

The properties were sold by the Registrar under a mortgage decree. At the sale the Petitioner, Bhavadab Chatterjee, attended with instructions from his uncle Ram Akhoy Chatterjee, to purchase the properties on his behalf for a sum of Rs. 9,000. The Petitioner, however, exceeded the limit and bid up to Rs. 9,725 when he was declared the highest bidder, and he thereupon signed the bidding paper as for Ram Akhoy Chatterjee, and paid in the required deposit. The latter, however, refused to complete the purchase on the ground that his limit had been exceeded, and the Petitioner now applied that his name might be substituted for that of Ram Akhoy Chatterjee as the purchaser of the said properties and that he be allowed to complete the purchase by paying the balance of the purchase money into Court. The application was consented to by Ram Akhoy Chatterjee. Forty days within which the balance of the purchase money was to be paid under the conditions of sale had, however, expired within the holidays.

*Babu Pearl Lall Haldar* for the Petitioner referred to Rules 448 and 451 of Chambers' Rules and Orders, and submitted that in equity he was entitled to be substituted for Ram Akhoy Chatterjee.

*Babu Amar Nath Ghose* for the Plaintiff, contended that the Petitioner should pay interest from the date when the time for paying in the purchase money expired.

*Babu Pearl Lall Haldar.*—The time expired within the holidays when we could not pay in the money. The time should be held to have expired on the opening of the Court.

The Court.—Rule 448 did not apply to this case, but upon equity the substitution of name should be allowed.

The conditions of sale were binding on the pur-

chaser and he must pay interest from the date when the 40 days expired.

S. R. D.

*Application allowed.*

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 837 OF 1897.

STANLEY, J.  
1900.

UMBICA CHURN SARKAR

v.

19, November

A. C. MEIK.

*Decree, execution of—Receiver, appointment of, for the purpose of realising money in the hands of third parties—Civil Procedure Code (Act XIV of 1882), secs. 268 and 503 (a).*

This was an application in chambers for the appointment of a Receiver for the purpose of realising certain monies in execution of a decree. The Plaintiff had obtained a decree against the Defendant and in execution of that decree obtained an order under sec. 268, Civ. P. C., prohibiting and restraining the Defendant until the further order of the Court from receiving from the Chief Auditor, East India Railway Co., a moiety of his salary with exchange compensation allowance for each and every month, commencing from the date of the order, and the Chief Auditor from making payment of those sums to any person whomsoever.

On the 24th August 1900 the Plaintiff obtained an order that the Chief Auditor should be at liberty to pay into Court the moneys attached under the previous order, but the Chief Auditor in the exercise of his discretion under the last para. of sec. 268, declined to pay the money into Court.

*Babu Pearl Lall Haldar* for the Plaintiff now applied for the appointment of a Receiver under sec. 503 (a), Civ. P. C. He contended that that was the only course left open to him to realise the money and it was the usual course followed in such cases.

The Court.—The appointment of a Receiver would be a heavy burden on the Defendant. Can you give me any precedent?

*Babu Pearl Lall Haldar.*—There are no reported cases that I know of, but that is usually done.

*Mr. Leslie (as amicus curiae).*—In the case of *Girdharilal Dhunmia v. Jogeshur Roy and others* (unreported) a Receiver was appointed by Sale, J., under similar circumstances.

The Court.—Very well, I grant the application.  
S. R. D.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 345 OF 1898.

GHOSE, J.  
PRATT, J.

DOMAN PANDY, Plaintiff,  
Appellant,

v.

1900.

21, Novembr.

PANCHU KOLE and others,  
Defendants, Respondents.

*Sonthal Pergunnah Regulation (III of 1878)—Partition, by mal riyats, of waste and jungle lands*

and of fruit trees—*Mal raiyats, right to partition, inter se—Suit for partition of such land—Effect of partition.*

This was an appeal preferred on the 22nd of February 1898, against the decision of R. Carstairs, Esq., Deputy Commissioner of Dumka, District Sonthal Pergunnahs, passed on appeal from a decision of H. H. Heard, Esq., Sub-Judge of Deoghur, dated the 1st of September 1897.

This appeal arose out of a suit for partition of mouzabs Baramerkhi and ohak Domartari, taluk Pathrol, in the Sub-Division of Deoghur. The village was settled under the Sonthal Pergunnahs Regulation (III of 1872) with two persons, the Plaintiff being entitled under the settlement to a 14 annas share and the Defendant to the remaining 2 annas share of the village. The parties were described as "*mal raiyats*" of the village and the Plaintiff sought to have his interest separated from that of the Defendant as between themselves and to have the whole area of the village divided from the share of his co-sharer.

The suit had been dismissed originally by the lower Courts upon the ground that no partition could be effected of the jungle and waste lands, as also of the fruit trees; but the High Court, in second appeal (No. 553 of 1895, decided, on the 28th August 1896, by Ghose and Gordon, JJ) was of opinion that the view adopted by the lower Courts was erroneous and upon that ground the case was remanded to the Court of first instance for trial upon the merits.

The suit was again dismissed by the lower Courts upon two grounds:—*First*, that so far as the jungle and waste lands were concerned, they being lands reserved for the benefit of the village *raiya*, they could not become the property of the *mal raiyats* until they had been cleared or occupied by them; and, *secondly*, that there being two classes of trees upon the property, one class belonging to the superior landlord, the *ghatwal*, and the other class belonging to the *mal raiyats*, no partition of the trees generally could be made.

*Held*—That as between the *mal raiyats* themselves, there can be no difficulty as to partition of such lands (waste and jungle lands) though such partition cannot be binding upon the superior landlord, the *ghatwal*, and will only subsist during the currency of the settlement.

That so far as the trees to which the superior landlord is exclusively entitled, they cannot be the subject of partition, but as to the trees which belong to the *mal raiyats*, they can be partitioned.

*Babu Karun Sindh Mookerjee* for the Appellants.

*Babu Shib Chandra Palit* for the Respondents.

*Appeal allowed: Case remanded.*

H. P. G.

[CIVIL APPELLATE JURISDICTION.]  
APPEAL FROM APPELLATE DECREE

No. 1016 of 1898.

RAMPINI, J.  
SALE, J.  
1900.

GIRISH CHANDRA DEY and others,  
Defendants, Appellants,  
v.

23, November. JURAMONI DE, Plaintiff, Respondent.  
*Transfer of Property Act (IV of 1882), secs. 60, 86, 91, cl. (a)—Redemption, right of, of the purchaser of a portion of the equity of redemption—"An interest or charge upon property," meaning of—Raiyati interest, if sufficient to entitle one to redeem—Review granted to bring in necessary parties in a mortgage suit, if proper, after dismissal of suit.*

This was an appeal preferred on the 18th of May 1898, against the decree of G. Gordon, Esq., District Judge of Zillah Chittagong, dated the 25th of February 1898, affirming that of Babu Charu Chandra Mukherjee, Munsif of Hat Hazari, dated the 20th July and 27th August 1897.

The facts of the case were as follows:—

The property in suit was owned by Isafali, Defendant No. 7, and his two nephews, Latif Ali and Petra Mia, Defendants Nos. 5 and 6, the former having 8 annas and the latter 4 annas each. On the 27th of Kartik 1247, they mortgaged the land to Girish Chandra Dey and his two brothers, Defendants Nos. 1 to 3, Appellants in the present appeal. On the 2nd of Asar 1249 Defendants Nos. 6 and 7 sold their rights in the property of Soh. II to one Abdul Ali, Defendant No. 4 and on the 19th of Chaitra 1253, Abdul Ali granted a *raiya* lease to the Plaintiff Respondent, Juramoni Dey. On the 30th of Chaitra 1254 Defendants Nos. 5 and 6 sold their rights in the property in Soh. I to the Respondent and the Respondent became entitled to 8 annas of the property in Soh. I and 12 annas of that in Soh. II.

In 1893 the Defendant No. 1, Girish Chandra Dey, instituted a suit for foreclosure against Defendants Nos. 5, 6 and 7 and obtained a decree. The Respondent attempted to save his property by deposit of the money due on the mortgage but as his title was denied, his application was rejected. He then instituted a suit which was dismissed by the Munsif in May 1894, but he obtained permission from the Appellate Court in January 1895 to withdraw the suit with leave to bring a fresh suit upon the same cause of action. He then instituted the present suit on the 16th of September 1895, chiefly for declaration of his rights to the properties as also for redemption of the properties mortgaged.

The Munsif found all the issues in favour of the Plaintiff except a new issue framed by the Court and upon the finding of that issue, i.e., that the suit was bad for non-joinder of necessary parties the Munsif dismissed the suit on the 17th of March 1897. Subsequently the Plaintiff applied for a review which was granted on the 19th April 1897, and the widow of Defendant No. 2 being made a party, the suit was tried in her presence and was decreed. On

appeal by the Defendants, Girish Chandra Dey and others, the District Judge dismissed the appeal and affirmed the decree of the first Court and declared Plaintiff's right to redeem the whole of the mortgaged properties.

Against that decree the Defendants preferred this appeal and on their behalf it was contended, *first*, that the Plaintiff having merely a *raiyati* interest in the 12 annas of the property mentioned in Sch. II was not entitled to redeem that portion of the mortgaged property; *secondly*, that his right of redemption must be restricted to the 8 annas share of the property specified in Sch. I; and, *thirdly*, that the Court of first instance improperly granted a review in this case and that the suit having been dismissed for non-joinder of parties, should not have been allowed to be reviewed.

*Held*—(1) That the words "any person" having any interest in or charge upon the property," in sub-sec. (a) of sec. 91 of the Transfer of Property Act (IV of 1882) means any person having an interest in or charge upon the property which is affected by the mortgage.

(2) That the Plaintiff as a *raiyat* having no such interest in the property mentioned in Sch. II is not entitled to redeem it.

That the purchaser of a portion of the equity of redemption is not entitled to redeem the whole but must be restricted to the redemption of that share.

*Nawab Azmat Ali Khan v. Jowahir Sing* (13 M. I. A. 404, at p. 415) cited and followed.

That having regard to the provisions of Sec. 85 of the Transfer of Property Act as to necessary parties, the review was properly admitted.

*Babu Harendra Narain Mitter (Babu Jatra Mohon Sen)* for the Appellant.

*Babu Dharendra Lal Khastgir* for the Respondent.  
H. P. C. Case remanded.

### List of Business for the Judicial Committee of the Privy Council.

NOVEMBER AND DECEMBER, 1900.

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(N. W. P. Allahabad.) The Maharaja of the State of Bharatpur v. Rani Kanno Del. (4 C. W. N. ccxxvii).	4-12-90 16-6-00	Application by decree-holder (Appellant) for execution of a decree made in 1886 and based on a mortgage deed. Question whether judgment-debtor (Respondent) is liable for interest after the date of decree.	Barrow, Rogers and Nevill, A. Ranken Ford, Ford and Chester, R.

### INDIAN APPEALS. FOR HEARING.

CAUSE.	Record received — Set down for hearing.	SUBJECT.	SOLICITORS.
(N. W. P. Allahabad.) Rai Radha Krishen v. The Collector of Jaunpore.	27-10-90 21-8-00	Whether a Decree was "passed <i>ex parte</i> " within the meaning of s. 108 of the Code of Civil Procedure; whether the Order appealed from is "final" within the meaning of s. 595 of the Code.	Barrow, Rogers and Nevill, A. Solicitor, India Office, R.
(Oudh.) Raja Rameshar Baksh Singh and another v. Arjun Singh.	22-2-90 13-9-00	Whether a grant of certain villages conveyed a heritable or a life estate to the grantee.	Watkins and Lempriere, A. T. L. Wilson & Co., R.
(Bengal.) Udwant Singh and ors. v. Tokhan Singh and ors.	31-7-90 13-9-00	Whether Appellants are entitled to execute a Decree against certain properties; power of the High Court to vary its Decree in the execution proceedings.	Watkins and Lempriere, A. T. L. Wilson & Co., R.
(Oudh.) Ganga Baksh Singh v. Dalip Singh and ors.	4-7-90 13-9-00	Claim by Appellant to resume one-fourth of the income of villages granted to the Respondents' ancestor in satisfaction of maintenance; jurisdiction of Assistant Judicial Commissioner to hear the Appeal alone; s. 8, Act XIV of 1891.	Watkins and Lempriere, A. T. L. Wilson & Co., R.
(Madras.) Immutipattam Thirugana S. O. Kondama Nalk and anr. v. Periya Dorasami and anr. (Consolidated Appeals.)	11-4-90 8-10-00	Dispute between Appellants and first Respondent as to who is entitled to redeem a mortgage.	Lawford, Waterhouse and Lawford, A. Keen, Rogers & Co., R.
(N. W. P. Allahabad.) Mujib-un-nissa and ors. v. Abul Rahim and anr. (representatives of Ulfat-un-nisa, deceased).	17-6-97 18-10-00	Whether a certain document constituted a valid deed of <i>wakf</i> .	T. C. Summerhays, A. Barrow, Rogers and Nevill, R.
(Madras.) Vasudeva Padhi Khadanga v. Maguni Devan Bakshi Mahapatra.	21-9-98 30-10-00	Suit by Respondent for partition of certain villages and for mesne profits.	Lawford, Waterhouse and Lawford, A. R. T. Tasker, R.
(N. W. P. Allahabad.) Banarsi Parahad v. Kashi Krishn Narain and anr. (representatives of Mewa Kunwar, deceased).	15-1-98 7-11-00	Claim for mesne profits. Construction of ss. 43 & 44 of the Code of Civil Procedure.	Barrow, Rogers and Nevill, A. <i>Ex parte</i> .

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#### REPORTS (See Index.)

THE LAST ISSUE OF THE *Calcutta Gazette* PUBLISHES the following resolution of the Government of Bengal regarding the improvement of the prospects of the members of the Civil Service who may select the judicial line instead of the executive. We set out now only the outlines of the proposed changes and reserve our comments for a future occasion.

In 1897 certain District and Sessions Judges in Bengal submitted memorials praying for the improvement of the Judicial Branch of the Indian Civil Service. In transmitting the memorials to the Government of India this Government suggested the advisability of providing a few appointments for the members of the Judicial service with higher pay than that of the present first grade of District and Sessions Judges, in order to place them more on an equality with officers of the Executive Branch.

The proposals were laid in due course before the Secretary of State, and he has now sanctioned the following re-arrangement of the grades and rates of pay of District and Sessions Judges in Bengal:—

	Rs.
3 first grade District and Sessions Judges on	3,000
14 second grade ditto ditto ..	2,500
16 third grade ditto ditto ..	2,000

The total number includes the Superintendent and Remembrancer of Legal Affairs, and the Judicial Commissioner of Chota Nagpur. One of the conditions under which the scheme has been sanctioned is that these two appointments are not attached to any particular grade, but may be held by an officer of any grade. Another condition is that promotion to the highest grade on Rs. 3,000 will go by merit, rather than by seniority.

In compliance with these orders, the Lieutenant-Governor is pleased to give effect to this re-arrangement from the 1st October 1900.

THEIR LORDSHIPS OF THE JUDICIAL COMMITTEE HAVE settled the conflict between the Calcutta High Court and the Allahabad High Court, in respect of allowing interest on mortgage decrees, in favour of the Calcutta view. We invite attention to the note of the Board's judgment in *Maharajah Bharatpur v. Rane Kanno Dei* at p. 28 (xxviii) of this issue and also to 4 C. W. N. p. cccxxxiii and p. cccxxvii.

OUR ENTERTAINING CONTEMPORARY THE *Green Bag* from across the seas recites some lessons from the life of a departed lawyer which reminds us of the poet who sang the Psalm of Life. We cull some of these in our columns in the expectation that the example of the late Lord Chief Justice of England will prove profitable both to the Bench and the Bar.

He was gentleness and kindness itself to the young and nervous barrister, and amazingly patient and helpful with a painstaking lawyer and an honest witness. But woe betide the pertinacious counsel, trying to bolster up a bad defence, or, worse yet, fighting a trumpety or speculative action, or an evasive or mendacious witness.

THE FOLLOWING NARRATIVE ABOUT TWO OF ENGLAND'S greatest lawyers, now departed, may be said to have left

"Footprints, that perhaps another,  
Sailing o'er life's solemn main,  
A forlorn and shipwrecked brother,  
Seeing, shall take heart again."

His progress was sufficiently slow to discourage him, and the story runs that about this time he dined with two other young limbs of the law who were also in despair of ever getting work enough to afford them a living. Some one suggested abandoning the Bar, joining forces and emigrating to the Colonies, and the proposition was seriously considered. Happily, it was not adopted, as one of the three afterwards became the Lord Chancellor of England and was known and affectionately regarded in America as Lord Herschel; the second was Lord Russell of Killbuck, Lord Chief Justice of England, and the third is now the present Speaker of the House of Commons.

AND THE FOLLOWING INCIDENTS IN LORD RUSSELL'S forensic career well illustrate the truth of the poet's advice

"In the world's broad field of battle  
In the bivouac of Life  
Be not like dumb, driven cattle!  
Be a hero in the strife!"

In 1878 he got his first big chance in one of the libel actions brought against Labouchere's *Truth*. The case came on for trial before Sir Alexander Cockburn, in the old Queen's Bench Court at Westminster; and for a "silk" new, or comparatively new, to London, and in a sense upon his own trial in the metropolis, the commencement did not seem propitious to Russell, whose vigorous handling of the plaintiff caused Chief Justice Cockburn to interject some comment as to the proper limits of cross-examination, and to express the opinion that they were being over-stepped. Russell, always fearless at the Bar, even with such an opponent as Cockburn on the Bench, would not give way, saying that the line he was adopting was necessary to the justification of his defence, and he hoped that when his case came to be fully heard by the Chief Justice that he would withdraw what he had said, and in the meantime suspend his judgment. At the conclusion of the trial when both Russell and his defence had been heard, Cockburn was generous enough to publicly withdraw every word of injurious comment which had fallen from his lips, and in paying a high tribute of praise to the defendant's advocate went on to blame himself for an interference, which, on reflection, he admitted had not been warranted.

In Mr. Russell's young days in "silk" when the late Mr. Justice Denman was going the Northern Circuit, just before the rising of the Court on a warm summer afternoon some very high words were flung from the Bar to the Bench, in a tone and with a vehemence which caused the learned Judge to say that he would not trust himself to reprove them in his then condition of sorrow and resentment, but would take the night to consider what he ought to do, and when they met again the next morning he would announce his determination. "In considerable commotion the Court broke up, and on the following day it was crowded, in anticipation of a "scene"—an anticipation somewhat encouraged by Mr. Justice Denman's entry into Court with, if possible, more than ordinary solemnity, and, on taking his seat, commencing the business of the day by saying, "Mr. Russell, since the Court adjourned last evening, I have had the advantage of considering with my brother Judge the painful incident. . . ." Upon which Russell quickly broke in with, "My Lord, I beg you will not say a word more upon the subject for I can honestly assure you that I have entirely and for ever dismissed it from my memory"—a turning of the tables which evoked such a roar of laughter in the Court that even the learned Judge himself could not but join in it.

THE COURT OF APPEAL IN ENGLAND IS NOW REPRESENTED by all four sections of the United Kingdom, though its jurisdiction is confined to two. England is represented by the Master of the Rolls and Lord Justice Rigby, Wales by Lord Justice Vaughan Williams, Ireland by Lord Justice Collins, and Scotland by Lord Justice Stirling, who is, by the way, the only Scotchman now on the English Bench. All the members of the Court, except Lord Justice Vaughan Williams, who belongs to Oxford, are Cambridge men. Both Lord Justice Romer and Lord Justice Stirling were Senior Wranglers. Lord Justice Rigby, who, as senior Lord Justice, will now preside in Appeal Court II., was Smith's Prizeman. Lord Justice Collins obtained high honours in Classics, and became a Fellow of Downing College; and the Master of the Rolls rowed in the University race.

THE COUNCIL OF THE INCORPORATED LAW SOCIETY have taken steps to redeem the honour of the profession. Every solicitor who is an undischarged bankrupt or who has executed a deed of arrangement or assignment for the benefit of his creditors has been informed that his certificate will not be renewed "as a matter of course." It may safely be assumed that a solicitor who can show that his insolvency is due to undeserved misfortune will not be driven from the ranks of the profession. The obvious reasons for adopting this course are that the solicitors stand in a fiduciary capacity to the public; they are officers of the court with great responsibilities; and it is not desirable that those responsibilities should continue to be borne by members of the profession whose financial position may tempt them to betray their trust.

THIS NOTICE ON INSOLVENT SOLICITORS CAN HARDLY be regarded as an innovation. Since the Solicitors Act, 1888, was passed, it has always been the practice of the Society to refuse a fresh certificate to an undischarged bankrupt, but until last year the Society was under the impression that it was bound to renew the certificate of bankrupt solicitors who had not allowed their certificates to expire. A decision given by the Divisional Court last year showed this impression to be wrong, and thereupon it became the practice of the Society not to renew the certificates of solicitors who were undischarged bankrupts. What is novel is the extension of this practice to solicitors who have executed deeds of arrangement or assignment for the benefit of their creditors.

AT THE MEETING OF THE SOCIETY HELD THIS YEAR at Weymouth the President put forward a proposal as to the undue retention by solicitors of clients' money. "I see no reason," said Mr. Ellett, "why a client should not be able to give notice to a solicitor requiring him to deliver a cash account and a statement of all securities and documents held by him for the client, and if this is not complied with within, say, seven days, the client should be empowered to apply to the Statutory Committee, and that committee should have power to suspend the solicitor from practice until the notice is complied with." Several speakers supported this proposal, but quite as many opposed it. A resolution was moved in favour of its adoption, but was ultimately withdrawn, on the understanding that the Council would consider the proposal without any formal expression of opinion by the meeting. The steps to be taken by the Council are being watched with interest.

LITTLE SPARKS OF HUMOUR OCCASIONALLY RELIEVED the proceedings of the Incorporated Law Society. One of the speakers at the Weymouth meeting claimed that all solicitors were brothers. "Brothers-in-law," quickly came the correction. After this exhibition of humour a long discussion took place on the constitution of the Council, in the course of which it was con-

tended that many of the members of that body were too old. Immediately following this discussion a prominent member of the Council proceeded to read a paper on "Ancient Lights."

It would seem that the procedure once peculiar to the *Kazis* in this country is occasionally followed in the proceedings before the County Courts in England.

In the Westminster County Court, before his honour Judge Lumley Smith, Q. C., the case of *Johnson v. Page* was decided. The Plaintiff, a housemaid, claimed damages for the detention of her boxes by the Defendant, her late employer. She admitted leaving his service without notice. The Defendant admitted detaining the boxes and counterclaimed for damages against the plaintiff for leaving without notice. He said if he won the day he was willing to pay all the costs and forego claiming what damages he was awarded. He kept her boxes, so that the matter would come into court and he could get a decision on a very important question—could a servant leave without notice, take her boxes away, and leave her master or mistress quite unprepared? She went on a Sunday and never returned. He did not get anyone in her place for about a week. His Honour said there was no right to detain the boxes, and plaintiff had no right to leave without notice. He found for the plaintiff for 10s. on the claim and for the defendant for 10s. on the counterclaim, each without costs.

### English Notes.

**BANKRUPTCY COURT.**—*In re Ford*. Before Mr. Justice Wright. 19th May 1900.

*Bankruptcy—Payment into Court pending action—Secured creditor.*

Jay & Co. were creditors of Ford. They sued him for a sum of over £1,000 and applied for judgment under order XIV of the High Court rules. An order was made in favour of Plaintiffs to be at liberty to sign judgment if the money sued for was not paid into Court within three days. Ford paid the money in Court and thereafter early in December put in a defence and counter claim, but the matter was not further proceeded with. In January on Ford's own petition a receiving order was made and adjudication followed.

The matter now came before the Court on a claim made by the trustee in bankruptcy for the money deposited on the ground that it still remained the money of the bankrupt, that it was the bankrupt's at the time of the receiving order, when the trustees title accrued.

The Plaintiffs' position at that time, it was urged, was that of an ordinary creditor and still was so, they would only be entitled to whatever they might be able to prove in the bankruptcy.

The learned Judge had to decide whether Jays were ordinary creditors or secured creditors. He referred to the order of the High Court which Plaintiffs had obtained and said that order must be treated as an order that the right to the money when paid into Court "shall abide the event." And it was settled that when money is paid into Court to abide the event it must be treated as a security, that the Plaintiff shall not lose the benefit of the

decision of the Court. It has been held that when Plaintiff has, without default on his part, failed to get judgment before the bankruptcy the "event" is the decision of his right in bankruptcy (*ex parte Banner*, 9 Ch. 379, *In re Gordon* 1897, 2 Q. B. 516). It was ordered that the money was to remain in Court until decision in the trial or adjudication upon a proof by the Plaintiff in the bankruptcy.

*Mr. Reed, Q. C., and Mr. Macaskie for the Company.*

*Mr. Muir Mackenzie and Mr. Sinclair for the Trustee.*

*Decision in favour of the Plaintiff Company.*

C. W. A.

**CHANCERY DIVISION.**—*SANDERS CLARK v. GUGHELMO D'ALLESANDRI*. Before Mr. Justice Buckley. 30th May 1900.

*Property, reasonable use—Nuisance to neighbour by noise or smell.*

Plaintiff Clark was lessee of a flat, 10 Grosvenor Mansions. The Defendant was lessee of premises comprising the basement and *entresol* beneath the flat and used it as a restaurant. Plaintiff sought an injunction to restrain Defendant's use of the restaurant in such a way as to cause a nuisance to Plaintiff. The nuisance complained of was smell from cooking and noise.

In delivering judgment in Plaintiff's favour, the learned Judge referred to Lord Selborne's words in *Gaunt v. Finney* (1872, L. R. 8 Ch. 8, sec. 12) where it is said that a nuisance by noise was emphatically a question of degree, and that to offend against the law, the acts must be done in a manner which beyond fair controversy ought to be regarded as excessive and unreasonable. Here the noise had neither been excessive nor unreasonable. As regards heat the Defendant had altered the premises, a large cooking range had been put in by him, the result being an excessive increase in the heat which Plaintiff complained of. After action brought, the Grosvenor Mansions Company had remedied this but Defendant had exposed his neighbour to an annoyance which she should not have had to endure and following *Ball v. Ray* (1873, L. R. 8 Ch. 467-9) he was liable for that. Mr. Justice Buckley guided himself by the judgment of Lord Selborne in that case to the effect that the Court must have regard to whether the Defendant was using his property reasonably or not. If he was using it reasonably, there was nothing which at law could be considered a nuisance; but if he was using it for the purposes for which the building was not constructed, then the Plaintiff was entitled to relief. In the present case the alterations made by Defendant were unreasonable so he was liable, and also for the smell and for the reason that by altering the window he had exposed Plaintiff to the smell from the restaurant; that was a substantial interference with the Plaintiff's comfort. There would be no order except that Defendant was to pay

Plaintiff's costs of the action as he had undertaken to carry out the alterations suggested by Plaintiff.

*Mr. Asbury, Q. C., Mr. Farrer for the Plaintiff.*

*Mr. Ingpen, Q. C., and Mr. Attwater for the Defendant.*

C. W. A. *Judgment for Plaintiff with costs.*

**PROBATE AND DIVORCE COURT.**—BAILEY v. BAILEY. Before the PRESIDENT and MR. JUSTICE BARNES. 7th November 1900.

*Compromise of action—Counsel, authority of.*

The complaint in this appeal of the husband from a conviction by the Salago Justices in May last was that his Solicitor Mr. Copeland had compromised the case without his authority. It appeared as the husband's case that Mr. Wilcock, an experienced counsel, was retained for him but at the hearing Mr. Copeland appeared and declined to conduct the case on the lines suggested by him. The wife had alleged persistent cruelty on the part of the husband. On her behalf Mr. Copeland's affidavit was put in disclosing that the husband had on his advice expressly consented to the order made against him.

In favour of his argument for setting aside the compromise by counsel, *Kempshall v. Holland*, 14 The Reports 336, was relied on for the husband. In the result the appeal was dismissed with costs, the Court acting on the affidavit of Mr. Copeland which confirmed the wife's account and it was pointed out that in *Kempshall v. Holland* matters outside the scope of the action were included in the settlement come to in that case.

*Mr. Gore Browne for the husband.*

*Mr. Clark Hall for the wife.*

C. W. A. *Appeal dismissed.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

**PRIVY COUNCIL.**—Appeal from the Allahabad High Court. The MAHARAJA OF BHARUTPUR STATE v. RANEE KANNO DEL. 10th November 1900.

*Mortgage decree for sale—Interest up to realization—Transfer of Property Act (IV of 1882), secs. 88 and 97.*

The facts and arguments of this case are stated in Vol. IV, C. W. N. at p. ccxxvii, where the decree in execution is set out as also the important portion of the High Court's judgment.

LORD HOBHOUSE to-day delivered their Lordships' judgment in the above appeal, heard last sittings, advising Her Majesty that the order appealed from and that of the Subordinate Judge should be discharged; and that the case should be remitted to the Subordinate Judge for execution of the original decree with the declaration that, according to the proper construction of the decree, the Plaintiff was entitled to interest at 8 annas per cent. up to date of payment.

The decision is an important pronouncement upon the meaning of sec. 88 of the Transfer of Property Act. As regards that section the judgment in its concluding portion states as follows:—"It must be admitted that the language of sec. 88 was calculated to cause difficulty and a sort of difficulty which was a common cause of conflict in judicial interpretation of new statutes. It looked as if the draftsman of the Transfer Act had overlooked the difference between a foreclosure and a sale, and had forgotten that in the former case interest stopped because the mortgagee got the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases was subject to long delays. However that may be, there was the difficulty, and if sec. 88 could be looked at as an isolated enactment quite detached from other legal considerations it would be hard to construe it otherwise than was done in the case of *Amolak Ram* (I. L. R. 19 All. 174). But considering the universality of the long established practice, its continuation for years after the Transfer Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting it, the conformity with it of sec. 97, which was in *pari materia* with sec. 88, the presumption that sec. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by the Procedure Code, their Lordships had no hesitation in expressing their concurrence with the Courts of Calcutta (I. L. R. 24 Cal. 766) and Madras (I. L. R. 21 Mad. 364) and with the ultimate decision of the Allahabad Court (I. L. R. 21 All. 361)."

*Mr. Cohen, Q. C., and Mr. Ross for the Appellant.*

*Mr. Mayne for the Respondent.*

C. W. A. *Appeal allowed with costs.*

## PRIVY COUNCIL.

[APPEAL FROM THE MADRAS HIGH COURT.]

LORD HOBHOUSE.	IMMADIPATTAM THIRUGNANA
LORD DAVEY.	[SAMANDA OVALA KONDAMA NAIK
LORD ROBERTSON.	and another, Defendants,
SIR R. COUCH.	Appellants,
1900.	v.
15th November.	[PERIYA DORASAMI by his grand-
	mother Kuppamal, Plaintiff
	and Lukshman Chetti, De-
	fendant, Respondents.

*Usufructuary mortgagee, claim of proprietary right by—Non-registration of deed of transfer.*

Two suits were brought in *forma pauperis* by the Respondent Periya, son of the late zemindar of Ayakadu, to redeem family property. The principal Defendant, the Appellant, is a near relative of the Plaintiff. The Defendant Chetty is the mortgagee, he did not dispute Plaintiffs' title.

While the property was in the hands of Plaintiffs' father he mismanaged it to such an extent that it became liable to a heavy debt. Decrees were obtained

by creditors, with the result that a document was executed, by the adult members of the family, and the mortgagees' representative, the abovenamed Lukshman Chetty, on the 4th November 1882, called an usufructuary mortgage.

It was under this arrangement that the Appellant claimed and alleged that he was thereby constituted proprietor of the property. The evidence with regard to Appellant's claim that the property was transferred to him is to be found in this mortgage deed, and in an *arzi* written by Plaintiffs' father to the Collector three days after.

The actual possession of the property has been with the mortgagee Defendant.

The principal issue raised was "whether by the arrangement come to between Plaintiffs' father and the Defendant the property passed to the latter."

The Sub-Judge of Madura held that Appellant was entitled to succeed on that issue. He declined to consider the question, because he thought it was taken too late, that the alleged transfer was invalid inasmuch as it could only be made under the Transfer of Property Act by a registered document.

The High Court, *inter alia*, said with reference to the mortgage:—

"It may be said that there was declaration of an intention on the part of Plaintiffs' father to divest himself of his "ownership in the zemindari, but nothing was done to "give legal effect to this intention, and without a registered conveyance it was not competent for him to pass the property whether the transaction was in the nature of a sale or in the nature of a gift . . . . .

It is hardly suggested that the Plaintiffs' father absolutely divested himself of the ownership in such a manner as to vest an indefeasible title on the Respondent."

The High Court decided both suits in Plaintiffs' favour. Mr. Mayne now relied on the terms of the said mortgage deed, the *arzi*, documents of later date, showing that Appellant was, as he urged, the openly recognized Zemindar, and as evidence that the transfer was recognized. He urged that the absolute transfer of title to the Zemindari was part of a family arrangement all the terms of which were embodied in the said registered mortgage deed.

LORD DAVEY.—You have got no conveyance. .

Mr. Mayne.—No, we have not, but we have it all set out in this family arrangement.

LORD DAVEY.—No consideration passed from you, you were a mere volunteer.

Mr. Mayne.—The mortgagee relied on our undertaking personal responsibility to Government and then further commented on the terms of the mortgage deed more particularly referring to cls. 25 and 27 thereof.

Their Lordships did not call on Mr. Phillips, who appeared for the Respondent for reply.

*Judgment reserved.*

C. W. A.

## PRIVY COUNCIL.

[APPEAL FROM THE ALLAHABAD HIGH COURT.]

LORD HOBHOUSE.

RAI RADHA KISHEN

LORD DAVEY.

v.

LORD ROBERTSON.

RAJA SHANKAR DUBE, and

SIR RICHARD COUCH.

after his death the Collector of Jaunpur as Manager Court

1900.

14, November.

of Wards.

Ex parte decree—Sec. 108, C. P. C.

The questions raised in this appeal were whether the decree complained of was an *ex parte* decree or not and whether an appeal to Her Majesty in Council lay in this case.

The High Court of Allahabad had reversed the decision of the Subordinate Judge of Benares and the appeal came on under the usual certificate granted by the High Court that the case was a fit one for appeal under sec. 596, C. P. C.

The suit was brought for the recovery of a sum of Rs. 65,426 principal and interest due on two hypothecation bonds, dated 17th and 30th June 1890, executed by Raja Harihar Dut Dube of whom the Defendant in this suit Shankar Dut Dube was the legal representative.

The first Court decreed the claim on the 19th March 1896. Subsequently on the 9th April 1896 Shankar Dut Dube applied to the same Court to set aside the decree as having been passed *ex parte* under the provisions of sec. 108, C. P. C. On the 8th October 1896 the Sub-Judge disallowed the objection, but on the Defendant's appeal the High Court (Chief Justice Edge and Mr. Justice Blair) set aside the order of the Sub-Judge and remanded the case to that Court under sec. 562, C. P. C.

The amended plaint had been filed on the 8th January 1895, written statements of the various Defendants including Shankar Dut Dube was placed on the record on the 17th May 1895, and with regard to what had followed the Sub-Judge stated as under:—

"The 19th March 1896, on which the decree in question was passed, was fixed to the knowledge of the pleaders for both parties, for the purpose of the production of evidence on the issues framed. These issues had been framed with reference to the plaint and the written statement filed on Defendant's behalf on the 17th May 1895 and 19th March 1896; but the case was postponed before 19th March from time to time, either by reason of the application of Defendant's pleader praying for the postponement on account of his being busy elsewhere, or by reason of the Record of the Suit not having come back from Jaunpur, where it had been sent on requisition. The postponement took place on the 31st January 1896, on which an order was passed that the case should come on for decision on the 19th March 1896, and that the parties with their witnesses should appear on that date, due notice thereof was admittedly given to pleaders. That day having arrived the pleader for the applicant stated that he could

not conduct the case and he had received no instructions from his client. Thereupon the Court proceeded to try the case, and tried and decided the issues on the evidence adduced on Plaintiff's behalf and decreed the suit against the applicant. Now, taking these circumstances into consideration, and also the fact that Applicant's pleader as well as that of the Plaintiff had in the beginning applied for time to enable him to produce *precedents*, I hold that the Defendant's pleader, who refused to conduct the case on the 19th March 1896, was not without instructions; and that his appearance in Court, therefore, was an appearance of his client (the applicant). . . . I may also remark that notice to a pleader of the date fixed is as good as a notice to his client *in person*. Hence the decree was not *ex parte*, and no application lies under sec. 108, Civil Procedure Code."

The judgment of the High Court reversing the decision of the Sub-Judge and remanding the case is as follows:—

"It appears to us that the decision of this Court in *Bhagwan Dai v. Hira* (I. L. R. 19 All. 355) and of the High Court at Calcutta in *Jonardan Dobey v. Ramdhone Singh* (I. L. R. 23 Cal. 738) are authorities in favour of the contention of the Appellant that an application lay in this case under sec. 108 of Act No. XIV of 1882. On the other hand, we have been pressed by the learned counsel for the Plaintiff decree-holder with the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan v. Sahibzada Ahmed Raza Khan* (L. R. 5 I. A. 223: s. c. I. L. R. 2 All. 67). The procedure which the Subordinate Judge must in our opinion have adopted was that under sec. 157 of Act XIV of 1882. That section makes applicable, so far as may be, to cases coming within the section, the procedure of Chapter VII of the Code. Sec. 157 apparently relates to a later period in the litigation than the sections which are to be found in Chapter VII, but there is no difficulty in ascertaining the rule to be followed in cases under sec. 157 by reference to Chapter VII. It has been contended for the Plaintiff decree-holder that the effect of the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan v. Sahibzada Ahmed Raza Khan* (L. R. 5 I. A. 233) is, that there can be no decree which can be called a decree *ex parte* against a Defendant who has, at any time and on any occasion before the decree is made, put in an appearance in the suit, although at the hearing he may have been absent and unrepresented, or may have been present merely a pleader who had no instructions. In our opinion the decision of their Lordships of the Privy Council merely referred to the opening paragraph of sec. 119 of Act No. VIII. of 1859. That section itself shows quite clearly that there can be *ex parte* decrees against Defendants, whether or not they have put in appearances in the suit. The prohibition of an appeal in the earlier part of sec. 119 is limited, to apply the decision of their Lordships of the Privy

Council, to a case in which the Defendant had not put in any appearance at all. In our opinion the decision of their Lordships of the Privy Council has no bearing on the case before us here."

*Mr. Upjohn, Q. C., and Mr. Ross* for the Appellant.

LORD HOBHOUSE.—Is there nothing in the record to show whether Defendant's pleader informed him?

*Mr. Upjohn*.—No.

LORD DAVEY.—It all depends on that fact.

SIR R. COUGH.—It may be he was present without proper authority.

For the Appellants it was contended that the decree of the 19th March 1896 was not an *ex parte* decree within the meaning of sec. 108, C. P. C. Moreover if it was, the High Court was wrong in remanding the case. The Defendant had not complied with the terms of that section, he had to satisfy the Sub-Judge that he was prevented from sufficient cause from appearing, &c.

LORD HOBHOUSE.—That appears to be so, the application should have been remanded for the Sub-Judge to find on evidence whether Defendant had satisfied the terms of that section.

After hearing *Mr. Phillips* for the Respondent their Lordships called on Mr. Ross to show the appealable nature of the order, and whether the decree of the High Court under appeal was a final one.

*Mr. Ross* referred to among others secs. 594, 588, 566 of the Civil Procedure Code and to *Syed Muzhar Husein v. Bodha Bibi*, L. R. 22 I. A. 1.

C. W. A.

*Judgment reserved.*

## CALCUTTA HIGH COURT.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 214 of 1898.\*

RAMPINI, J.	}	RUP CHAND MAHTON, Defendant,
SALE, J.		Appellant,
1900.		<i>v.</i>
21, November.	}	GUDAR SINGH and others, Plaintiffs,
		Respondents.

*Rent, suit for—Bengal Tenancy Act (VIII of 1885), sec. 61, Art. 2 (a), Sch. III—Co-sharer landlords, right of, to recover rent—Separate collection—Deposit of rent—Service of notice—Limitation.*

This was an appeal preferred on the 7th of February 1898, against the decree of Babu Birj Mohan Pershad, Subordinate Judge of Mozafferpur, dated the 25th of September 1897, passed on appeal from the decision of Babu Jaya Prasad Panday, Munsif of Samastipur, dated the 30th of June 1897.

These were several appeals which arose out of several suits brought by the Plaintiffs for the recovery of rents due from the Defendants who held *khas*

\* With this appeal was heard analogous appeals Nos. 269 to 309, 369, 654 and 655 of 1898.

in mouzahs Chaka and Masina, in which the Plaintiffs were co-sharer landlords. Some of the suits were for the recovery of rents due for the years 1302 to 4 annas *kist* 1304, B. S., and all the remaining suits for 1301 to 4 annas *kist* 1304, B. S. It was alleged that the mouzahs were divided into several *pattis* under an Ekrarnama executed by all the *maliks* and that the Plaintiffs had been in possession of their *pattis* from the date of the document. There was a dispute in some of the suits as to the annual rentals, the Defendants having stated them to be less than those stated by the Plaintiffs. In two suits, the Defendants stated their *jamas* was more than those claimed by the Plaintiffs. In some suits the Defendants pleaded payments in full till 1302, B. S., and in some other suits, the Defendants said that the Plaintiffs were not entitled to recover rents from them as they sold their *khas* several years ago to Mr. Manners, proprietor of Almasnagar Factory. In the remaining suits the Defendants pleaded that the Plaintiffs did not own so much share in the two mouzahs as alleged in the plaints; that their *jamas* were less than those alleged by the Plaintiffs; that there had been no division of the mouzahs by private partition; that the mouzahs were in joint possession of all the *maliks* and the suits could not therefore proceed without all the sharers being parties; that the collection of the Plaintiffs' share was not separate, and the suits for the recovery of rents of their share alone could not be maintained; that the rents till 1303, B. S., they had deposited in Court, and that the present suits having been instituted after the expiry of six months from the date of service of notice, the claim for the period ending with 1303, B. S., was barred, and that the Plaintiffs were not entitled to recover rents for 4 annas *kist* of 1304, B. S., as they had not accrued due at the time of the institution of these suits. Only in two suits the Defendants stated their *jamas* to be more than those alleged by the Plaintiffs.

The Munsif decreed the suits and on appeal the decrees of the Munsif were affirmed by the Subordinate Judge of Mozuffarpore.

Against these decrees the Defendants preferred these appeals and on their behalf it was argued (1) that the suits were not maintainable; (2) that the rent of 1303 B. S. was barred; (3) that the rent 4 annas *kist* of 1304 was premature and fourthly that the finding as to the rate of rent was not supported by any evidence.

*Held*—That the Plaintiff being entitled to have 9 annas share of the rent, which he is in the habit of collecting separately from his other co-sharers the suits are maintainable.

That the co-sharer landlords being jointly and severally entitled to the rent claimed the service of notice of the deposit of rent on any one of the landlords under sec. 61 of the Bengal Tenancy Act would not reduce the period of limitation to six months as provided in Art. 2 (a) of Sch. III of the Act.

That the agricultural year commencing in Behar from the 1st of Assar and the 4 annas *kist* rent becoming due after the expiry of 3 months, *i. e.*, in Assin, long before the institution of these suits, they are not premature.

*Babu Unakali Mukherjee* for the Appellants.

*Mr. Gregory* and *Babu Harendra Narayan Mitter* for the Respondents.

*Appeals dismissed.*

H. P. C.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1892 of 1898.

SHEIKH SARAFUDDIN MONDUL  
and another, Defendants Nos. 1 &  
2 Appellants,  
v.

GHOSE, J.

PRATT, J.

1900.

23, November.

CHANDRA MONI GUPTA and another,  
Plaintiffs, and ASUTOSH MONDUL  
and others, *Proforma* Defendants,  
Respondents.

*Bengal Tenancy Act, (VIII of 1885), Art. 3, Part I, Sch. III—Co-sharer landlord, dispossession of occupancy raiyat by—Occupancy raiyat, right of, to possession—Suit for declaration of right of co-sharer landlord to bring to sale property of such raiyat—Limitation—Recognition of right of raiyat after dispossession, effect of.*

This was an appeal preferred on the 8th of September 1898, against the decree of Babu A. C. Ghose, Subordinate Judge of Birbhum, dated the 25th of July 1898, reversing the decision of Babu Bhaba Charan Mukerjee, Additional Munsif of Ram-purhat, dated the 15th of March 1897.

The facts of the case out of which this appeal arose were as follows—

Chandra Moni Gupta (Plaintiff No. 1) having obtained a decree for money against Shiva Ram Mondul (Defendant No. 3) attached in execution of the said decree the land in suit together with other lands forming the *jote* of the said Siva Ram Mondul. Thereupon the Defendants Nos. 1 and 2, the Appellants in this appeal, preferred a claim to the land in suit which was allowed. Chandra Moni Gupta then brought the present suit, for a declaration of her judgment-debtor's (Siva Ram Mondul's) right to the land in suit and that it was liable to be sold in execution of the decree obtained by her against the said Siva Ram Mandul.

The Plaintiff's case, so far as is material to this report was briefly this.—That the disputed 6 bighas 11 cottahs of land formed part of the *jote* of Siva Ram Mandul consisting of 12½ bighas of land in *kismut* Chanchal of which the Plaintiff was *seputnidar* to the extent of a one moiety share and Defendants No. 1 was the *durputnidar* of the remaining one moiety share, and that both the landlords were in possession by separate realization of rent from the

tenants of the aforesaid *mehol kismut* Chanchal, that Siva Ram Mandul who was an occupancy *raiyat* of the said *jote* sub-let a portion of his *jote*, viz., the disputed 6 bighas 11 cottahs of land, to one Ram Doyal Muchi in 1289, B. S., and Ram Doyal Muchi remained in possession of the same since then to 1293 as *koyfadar* under Siva Ram Mondul, that Ram Doyal gave up the land in 1293, whereupon Siva Ram sub-let the same to one Haridas Babaji who died in 1299 without leaving any heir, that after Haridas' death, Siva Ram took *khas* possession of the land, and that since then he was in *khas* possession of it, by cultivating the land himself, that the Plaintiff obtained a decree for money for Rs. 8.9 annas against Siva Ram Mondul on the 17th January 1895 and that in execution of the said decree the whole *jote* of Siva Ram was attached; out of which Defendants Nos. 1 and 2 preferred a claim in respect of 6 bighas, 11 cottahs only, the subject-matter of the present suit; that the said claim was allowed on the 13th July 1895.

The defence of the principal Defendants Nos. 1 and 2 was, *inter alia*, that the Plaintiff Chunder Moni Gupta had no right to sue inasmuch as she had no right to the money due upon the decree mentioned by her in the plaint; that the Defendant No. 3 Siva Ram had no right to the land in suit; that the suit was barred by limitation as Siva Ram was never in possession within twelve years prior to the suit; that Siva Ram, on behalf of himself and his minor brother relinquished the land in suit in favour of Defendant No. 1 and the predecessors in interest of the Plaintiff, who were the 16 annas landlords at that time; that thereafter Defendant No. 1 kept the land in *khas* possession and paid rent therefor to himself and his co-sharer landlord and settled the same with Ram Doyal Muchi but no mutation of names in the landlord's *sherista* was made and Siva Ram's name continued in the *sherista* in respect of the whole *jama*; that Defendant Nos. 1 and 2 continued to be in possession up to date; that subsequently the land in suit was registered in the name of Haridas Babaji, who was merely a *benamidar* of Defendant No. 1; that its objection was made by Defendant No. 3 at that time and as Defendant No. 3 or his brother was not in possession within 12 years or two years of the suit, whatever right they had in the land in suit had been relinquished. Defendant No. 3 supported the Plaintiffs' allegations.

The Munsif dismissed the Plaintiff's suit and held on the question of limitation, that Siva Ram was an occupancy *raiyat*, and any suit for recovery of possession of the land in suit by him would be governed by art. 3, Part I, Sch. III of the Bengal Tenancy Act which provides two years limitation from the date of dispossession and that the said article would apply to any such suit by Siva Ram Mondul was sufficiently clear from the case reported in I. L. R. 24 Cal. p. 40, and that the provisions of sec. 28 of the Limitation Act read together with sec. 185 of the Bengal Tenancy Act, clearly shewed that even if

Siva Ram had any such right as alleged by the Plaintiff it was extinguished.

On appeal, the Subordinate Judge, reversed the decision of the Munsif and allowed the appeal and decreed the Plaintiff's suit holding that the suit was not for recovery of possession of *jote* land by a tenant against his landlord, and that two years' limitation would not apply, but was for declaration of *jote* right of the tenant in the disputed land under sec. 283 of the Civil Procedure Code, that it might be sold in execution if Plaintiffs' decree for money, and that the Defendant No. 1 not being 16 annas proprietor, dispossession by him could not be held to be dispossession by the landlord as contemplated by the Bengal Tenancy Act, and relying upon the case of *Dinabondhu Shaha v. Lolit Mohun Mitter* Vol. II, C. W. N. p. 259 (short notes) held that 12 years' limitation applied to the case and the suit having been instituted within 12 years from 1294 the date of dispossession, was not barred.

Against that decree the Defendants Nos. 1 and 2 preferred this appeal and on their behalf, it was contended that under art. 3 of sch. III of the Bengal Tenancy Act the suit was barred, and the question argued was whether the *raiyat* Siva Ram having been dispossessed by the Defendants more than two years antecedent to the suit, it was open to the Plaintiff, who was one of the co-sharer landlords, to bring to sale the land of Siva Ram in execution of a decree obtained by him against Siva Ram.

*Held*—That if the *raiyat* lost his right by efflux of time and if he was not in a position to assert his right to the land by reason of art. 3, Part I of sch. III of the Bengal Tenancy Act, it would not be open to the Plaintiff to bring to sale the property in question as the property of Siva Ram.

That the right of the *raiyat* to the land not coming to an end before two years antecedent to the suit, and the title of the *raiyat* as *raiyat*, having been throughout recognized by all parties concerned, notwithstanding the unlawful possession by one of the co-sharer landlords, and the recognition having been up to within two years of the institution of the suit the suit was not barred.

*Babu Karuna Sindhu Mukerjee* for the Appellants.

*Babus Golap Chandra Sarkar and Surendra Chandra Sen* and *Mr. J. R. Percival* for the Respondent.

*Appeal dismissed.*

H. P. C.



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## CHARTER ACT,

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[No. 5.]

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has to guard against failure of justice and to exercise the prerogatives of the Crown. There can be no doubt that a lawyer is better fitted to discharge such duties than a layman. Besides, he has in his gift the offices of Specially magistrates and recorders and it is always better that the power should be exercised by men who have a knowledge of the Bar. Mr. Ritchie who succeeds Sir Mathew White Ridley was under the last Government, the President of the Board of Trade.

## THE LAW OF INSOLVENCY IN BRITISH INDIA AND ITS ANOMALIES.

In the last quarterly number of the *Journal of the Society of Comparative Legislation* there is an article on Comparative Legislation in Bankruptcy by professor Richard Brown. The object of the article is to examine the Bankruptcy laws of Great Britain and its Colonies in comparison with the law in other European countries. The learned professor maintains that the object of the law of insolvency is to secure a rateable distribution of the insolvent's assets amongst the creditors and proceeds to shew that the Scottish system has attained the greatest perfection in this respect. Although the law as it obtains in British India does not come in for his consideration, yet judging the law here by his standard, we have no hesitation in declaring that it is the most defective of any system that prevails at the present day.

In the Presidency-towns in India, the English Statute (11 & 12 Vic., C. 21) is still in operation and in the rest of British India, Chap. XX of the Civil Procedure Code governs the law. For the present we shall deal with some of the prominent defects in both.

We shall begin with the Civil Procedure Code. In sec. 344 power is given to any holder of a decree for money to apply that his judgment-debtor may be declared an insolvent. This provision was apparently inserted in the Code without much consideration and it has often worked harshly towards the judgment-debtor. No money limit is fixed and a creditor who has obtained a decree for a trifling sum may apply to have his judgment-debtor adjudicated an insolvent. Besides this, it has given rise to other anomalous results to explain which we must go into the history of this curious clause in sec. 344.

In the former Code of 1877 there was no provision for the judgment-creditor to apply for adjudicating the judgment-debtor an insolvent. This

THERE WILL BE NO ISSUE OF THE "WEEKLY NOTES" during Christmas week

AT THE LAST FINAL EXAMINATION OF THE BAR HELD in the middle of October last, there were 73 candidates out of which 54 passed.

THE *Journal of the Society of Comparative Legislation*, not so very long ago, expressed its surprise at the number of the verdicts by jury which are interfered with on reference or appeal in this province. The opinion of the leading professional organs in England, as also that of the head of the judiciary there, such as the present Lord Chancellor and the late Lord Chief Justice, seems to be at one that a jury is more often likely to be right than a judge. Of course, the jury may return sometimes a perverse verdict and then it is but right that the judge should interfere, especially if it be one for conviction. But in case the majority are for acquittal it is, perhaps, the safer course to accept the verdict or to send it for re-trial before another judge.

SIR MATHEW WHITE RIDLEY, THE HOME SECRETARY under the late Ministry, has been raised to the peerage. His successor is like him a layman. For a considerable length of time it was the practice to appoint a lawyer to that place. There are two special reasons in favour of the former practice. In England, where there are no Courts of criminal appeal, the Home Secretary has in a manner to take its place and

defect was noticed and the Legislature proceeded to amend the Code and did it in such a slipshod manner that it has given rise to great uncertainty both as to the law and its administration. To explain both, we must notice first the amendments. To begin with, provision was made in sec. 344 to the effect that a decree-holder may apply to have the judgment-debtor declared an insolvent. But the Legislature omitted to state on what grounds. Following up the amendment to the next section, we find that it was provided that the decree-holder need only set forth in his application the date of the decree, the name of the Court, the amount remaining due and the residence of the judgment-debtor. The earlier part of this section (345) was, however, so amended as to restrict the declaration thereunder as to the details of the debtor's property, his debts and creditors and his *bond fide*, only to cases where he is the applicant. The only other material amendment that need be noticed was in sec. 347 which provided that when the applicant was the judgment-creditor no notice need be served on any one except on the judgment-debtor or his pleader. Coming to the procedure to be followed by the Court, the Code does not seem to indicate the course to be taken when the decree-holder is the applicant. Sec. 350, which provides that the judgment-debtor is to be examined has, in the cases we report in this issue, *Gouri Kanti Burman v. Damodar Das Burman* (p. 90) and *Ram Komal Saha and ors. v. Bank of Bengal* (p. 91), been held as having no application when the decree-holder is the applicant. Consequently the provision of sec. 351, which says that the Court has to be satisfied that the judgment-debtor has not concealed any property or committed any fraud or act of bad faith before declaring the judgment-debtor an insolvent, has also no application when the decree-holder is the applicant. Such a law it may well be imagined leaves a large loop-hole for the judgment-debtor to commit fraud on other creditors in collusion with one of them. While the Code thus gives ample opportunity to the dishonest insolvent to give undue preference to one of his creditors it can hardly be said to give an effective redress to an honest insolvent. The Code does not apparently provide for a final discharge so as to release him from all his liabilities. An insolvent may disclose all his creditors or debts in his statement but if the creditors or some of them do not care to come in and prove their debts, he can only obtain a discharge in respect of those who do. Thus under the present law an insolvent-debtor may be harassed all his life, if his creditors choose to lie in wait and turn up in turns.

Turning now to the Insolvent Debtors Act we find that a creditor to whom five hundred rupees are owed by a trader may apply to have his debtor adjudicated an insolvent. The Code, as we have seen, fixes no such limit but still provides that notice of the proceedings should be given to the judgment-debtor though not necessarily to the public (see s. 347, C. P. C. and also 5 C. W. N. 91).

But under the Insolvent Debtors Act (11 & 12 Vic., C. 21) an adjudication order can be made *ex parte* and we know how often traders have been adjudicated without any reason and the loss they have suffered in consequence. But the worst anomalies may be said to arise out of this conflict of law coupled with the question of jurisdiction under the Insolvent Debtors Act. It frequently happens in practice that a man who has for years traded in the mofussil, say in the North Western Provinces, finds himself in insolvent circumstances. He may owe lakhs of rupees to persons there and only a few hundreds to creditors in Calcutta. The insolvent-debtor comes here, takes a room in some house with some friends of his and after a stay of a few days, petitions the High Court to be declared an insolvent. In a case tried a few years ago (I. L. R. 24 Cal. 634), it was held that there was nothing to shew that the residence contemplated by sec. 5 of the Insolvent Debtors Act must necessarily be a permanent residence; the object of the section being to extend the benefit of the Act to those who could be said to be *bond fide* residents, for the time being, within the jurisdiction of the Court at the time they filed their petitions. This case has not always been followed by other learned judges and in practice it has often been found that a person has obtained the benefit of the Insolvent Debtors Act from a Court within whose jurisdiction he has no *bond fide* residence.

Some years ago a Bill was introduced into the Imperial Council with a view to amend the law. This Bill was copied largely from the English Bankruptcy Act of 1883 and the opinion of judges and various public bodies was obtained, we do not know what was said by those who were consulted, but the Bill was unaccountably dropped and nothing further has been heard of it since. Any one who is acquainted with the law and practice of Bankruptcy in India will agree that the Bankruptcy law in India is badly in need of reform.

### English Notes.

COURT FOR CROWN CASES RESERVED.—  
THE QUEEN v. ADA JANE STODDART. Before the LORD CHIEF JUSTICE and JUSTICES WILLS, WRIGHT, KENNEDY and PHILLIMORE. 17th November 1900.

*The Betting Act, 1853, sec. 1—Coupon betting, keeping office for.*

The facts of this case when before Mr. Justice Channell are reported in Vol. V, C. W. N. at p. xix.

The case is known as the "Sporting Luck" case, the Defendant being the owner of that weekly paper. In each publication large prizes were offered to persons who correctly filled in a number of coupons printed in the paper with the names of the first three horses in a given race.

Mr. Justice Channell had held that the case fell within the intention of the above act, but stated a case showing that the indictment charged Defendant, that she being the occupier of 10 Red Lion Court

used that office for the purpose of money being received by or on her behalf as the consideration for undertaking to pay thereafter money on events relating to horse racing.

The main argument for the Defendant was that what she did was neither betting nor wagering and so was not covered by the Betting Act.

THE COURT as above constituted held that the transaction in this case came within the express words of the statute and effect must be given to it even if it were assumed that what the Defendant did as argued on her behalf did not amount to betting or wagering. The operation of the section was not limited to those transactions alone.

*Mr. Joseph Walton, Q. C., argued on behalf of the Defendant.*

C. W. A.

*Conviction affirmed.*

**COURT OF APPEAL**—*In re* MARCUS BEBRO. Before the MASTER OF THE ROLLS, LORDS JUSTICES RIGBY and COLLINS. 25th May 1900.

*Bankruptcy application, consent by withdrawal—Creditor securing increased amount—Whether extortion.*

The original debt of the debtor was for £115. The creditor obtained judgment thereon in October 1899 and immediately after filed a bankruptcy petition in respect thereof. By consent of parties when the matter was on for hearing before the Registrar on November 14th it was dismissed upon the debtor giving the creditor a fresh acceptance for a larger sum, *viz.*, £130, and agreeing to pay costs of the petition as well as of the judgment and that was done at the intimation taken by the debtor. On this new bill the creditor obtained a judgment and on the 2nd February 1900 he presented a second petition for over £140 the amount of the judgment and also the sum that was due for the costs of the previous judgment.

The question was whether the creditor in securing an increased amount as the inducement for permitting the former petition to be dismissed had used the process of the Court for extortion. Mr. Registrar Griffard made a receiving order, arriving at the conclusion that as a fact extortion had not been substantiated.

THE COURT OF APPEAL came to the conclusion that the proceedings in the previous bankruptcy application were of a *bond fide* nature; that being so, it was not to be regarded as an extortion simply because a larger amount was obtained than could then have been recovered in the bankruptcy. In *In re G* (44 Sol. J. 345), the Registrar had found extortion proved, here on the contrary, it was held, not proved. The Master of the Rolls cited with approval the view taken in *In re Atkinson* (9 Morr. 193), where it is said "the moment the Court saw the petition was made a means of extorting money, a Petitioner should not be able to get a receiving order, and it did not follow that because the solicitation on the first instance came from the debtor there could not be extortion since the creditor in demurring to the request might still

act in such a way as to put considerable pressure on the debtor."

*Mr. Herbert Reid, Q. C., and Mr. Muir Mackenzie for the Debtor.*

*Mr. Isaacs, Q. C., and Mr. Simmons for the Respondent.*

C. W. A.

*Appeal dismissed with costs.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM HER BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.]

LORD CHANCELLOR.	SECRETARY OF STATE FOR FOREIGN
LORD HOBHOUSE.	AFFAIRS, Defendant,
LORD MACNAGHTEN.	<i>v.</i>
LORD SHAND.	CHARLSWORTH PILLING & Co.,
LORD DAVEY.	and also against THOMAS D.
LORD ROBERTSON.	CHARLSWORTH & Co.,
LORD LINDLEY.	Plaintiffs.

1900.

7, 8, and 9, Nov. ] Appeal and cross-appeal.

*Lex loci—English Law—Jurisdiction.*

On the 28th November 1898, Her Britannic Majesty's Court at Zanzibar varied two decrees pronounced in 1897 by the Consular Court for Mombasa, in the East African Protectorate in two suits brought by the two above-named Charlsworth firms. From such decision special leave to appeal was granted by Her Majesty in Council to all parties, Secretary of State and the Respondents.

The said decrees appealed from of the two local Courts purported to assess the compensation payable by the Secretary of State to the respective Plaintiffs in the two suits for certain lands belonging to the Plaintiffs in the Island of Mombasa and compulsorily acquired by the Secretary of State for the construction of a railway from Mombasa to Uganda. Those lands lay in 4 plots called "Shambas." The first three belonging to Plaintiffs-Respondents first named, the fourth to Thomas D. Charlsworth and Company. The last-named carried on business in London. While Charlsworth Pilling and Company carried on their business in Zanzibar with a branch at Mombasa.

On the 27th May 1896 the Land Acquisition Act of 1894 came into force in Mombasa. On 2nd November 1896 Mr. Crawford, Her Majesty's acting Commissioner and Consul-General, issued a declaration under sec. 6 of that Act declaring that the lands now in question were needed for public railway purposes and also issued a notice on the Respondents under sec. 9 requiring them to state their interests in the lands and claims for compensation.

Before any of these steps were taken in 1895 the railway buildings for which compensation is claimed had been erected on certain of the said "Shambas," by railway engineers employed by Her Majesty's Government and they without authority took possession of the Shambas.

On 16th November 1896 and 5th January 1897 claims for compensation were sent in by both firms, objecting to the Collector's measurement of the said "Shambas."

The Island of Mombasa forms part of the mainland dominions of the Sultan of Zanzibar and was leased by him to Her Majesty with full sovereign power to administer on His behalf.

Her Majesty has also extra-territorial jurisdiction under treaty (signed 30th April 1886) with the Sultan which at the time of these proceedings was regulated by the Zanzibar Order in Council of 1884 (November 29th).

Sec. 8 of that Order in Council is as follows:—

Sec. 8 (a) ..... Subject to the other provisions of this order, and to any treaties for the time being in force relating to Zanzibar, Her Majesty's Criminal and Civil Jurisdiction in Zanzibar shall, so far as circumstances admit, be exercised on the principles of, and in conformity with, the enactments for the time being applicable as hereinafter mentioned of the Governor-General of India in Council, and of the Governor of Bombay in Council, and according to the course of procedure and practice observed by and before the Court in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Judicature at Bombay according to their respective jurisdiction and authority, and so far as such enactments, procedure and practice are inapplicable, shall, so far as circumstances admit, be exercised under and in accordance with the common and statute law of England in force at the commencement of this order.

(b) ..... Declares certain Indian enactments not affecting this question to be applicable to Zanzibar.

(c) ..... Any other existing or future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council shall also be applicable to Zanzibar, but shall not come into operation until such times as may in the case of any of such enactments respectively be fixed by the Secretary of State.

On the 27th May 1896 pursuant to above, the Land Acquisition Act, No. 1 of 1894, came into operation in Zanzibar.

The judgment of Mr. Oator, the Judge of the Mombasa Court, on the question of which law governed the case, the Mahomedan law as urged for the Secretary of State or the maxim of English law *quid quid plantaver solo solo cedit* as urged for the Respondents, was as follows:—

Besides my duties as a Consular Judge, I sit here as one of the Sultan's Judges, and in that capacity have to administer, with the help of native Judges, the Sheria or Mahomedan law which is the local law here, and the observance of which has been solemnly guaranteed to the inhabitants of the country, but Mr. Daly contended that I could not make use in this case of any knowledge so acquired, and although it is an extreme instance of the rule, that in every case Foreign law must be proved as a fact to an English Judge, I think he is right. The Defendant

called two of the Sultan's Cadi's or Judges from Zanzibar and their evidence is conclusive that in a case, such as the present, the landowner cannot claim possession of buildings placed upon his land by a trespasser but can only call upon the trespasser to remove the buildings and restore the land to its original state. They gave their evidence well and referred to text-books. Mr. Daly cross-examined them severely but failed to shake their testimony, and although I may not make use of my knowledge of the Mahomedan law directly, I think there can be no harm in my saying that I in no way disagree with them; whether or not the question would be affected by the fact that the Government of the country is that of the Sultan, although administered by Her Majesty's Government, if, in my opinion, English law had to be applied, I need not consider. Mr. Daly thought not, but I have grave doubts on the point, because although the Defendant is in form an Englishman, he is after all but the Agent of a Mahomedan Prince to whom unquestionably Mahomedan law would apply.

The evidence of the Cadi's or Kathi's referred to, contain, *inter alia*, the following:—

I have been a Kathi 14 years.

I studied Mahomedan law under many teachers, Mahomed Bnb Seh, the Mufti of Mecca, the chief of all the Mecca tutors was my greatest teacher, Said Ahamed Dahalar, one of the Mecca teachers, Said Baka Shettar.

My father was a Kathi.

Q.—If a man builds a house on the land of another man against his will, to whom does the building belong?

A.—The house belongs to the man who built it.

Q.—What remedy has the owner of the land against the builder?

A.—The man who has built the house can remove it or leave it there as he likes.

Q.—If the owner of the land came to me as Kathi with a complaint that a man had built on his land?

A.—I should ask him to remove it, *i.e.*, the man who had built the house—the owner of it.

Q.—Could the owner of the land claim the house and prevent the builder from removing it?

A.—This would be impossible; the ground alone belongs to him, not the house.

If any damage has been done to the land by building and removing the house he must make it good. If no damage has been done the owner of the land, gets no compensation.

If the house has stood for some time before being removed, the owner of the house is bound to pay rent for it.

I can show written law in support of this in the Tufa, the great book of the Laws, written long ago—400 years—always printed.

Chapter called Ghrasib, No. 394, Vol. II. Ghrasib means "to take a man's property."

All the judges ought to judge according to this book. This is for everywhere, Constantinople, Mecca. The doctrines are taken from the Koran and the

Prophets and some others besides. If Christians go to the Islam judge they will be judged according to this law. If he goes to any other judge, he will be judged according to the law of that judge.

The other Kathi also deposed similarly; he moreover referred to a book called Monhaj and said it was printed in 1295 at Misri a place called Bolak, part of Cairo, in the time of Ismail Pasha; in cross-examination he said:—

If the owner of the land tells the other man not to build, and the man still builds, the building will still remain the property of the man who built it.

He will be told to remove it.

All those who build houses on others' land know that the land is not their own when he is building on it.

It is called Rhasib when a man takes another man's property in this way.

If the landowner seized the house I should tell him to give it back again; he cannot get it except by agreement between the parties.

This book is very old—650 years; this book is older than Tufa. I don't quite recollect how old Tufa is. I have seen the date. It is an old Law book.

There is no new law. The students of law all follow the old law.

There are new books by other authors. They are all the same as this, I could bring them. I have not got them here.

Sherbe wa Fatila Olmoim is one of them. It was written not long ago. The author died lately.

I do not know of an author called Amir Ali. I have heard that there is a big book in the High Court in Bombay, but I have not seen it.

This statement of the law was accepted by both Courts.

From the decision pronounced by the learned Judge the Charlsworths appealed to the Bombay High Court. The appeals were rejected by that Court for want of jurisdiction.

They then appealed to the Zanzibar Court.

In two respects the latter Court varied the decrees of the Consular Court.

(a) By holding that Charlsworth Pilling & Co. in law were entitled in addition to the value of their land taken to the value of the Railway buildings which the Court estimated at the cost price of 60,140. The Consular Court having held that Plaintiffs were not as a matter of law entitled to be paid for the same.

(b) As regards the general value of the land taken, by awarding in each case, apart from any question of railway buildings, a far larger sum than that awarded by the Consular Court.

The Judge of the Consular Court decided that Mahomedan law applied. The appeal Court held that the English law applied on the ground that the principle of extra-territoriality established by the Zanzibar Treaty of 1886 introduced that law into Zanzibar.

Reference during the arguments was made to the XVI clause of the said treaty which was as follows:—Subjects of Her Britannic Majesty shall as regards

their person and property enjoy within the dominions of His Highness the Sultan of Zanzibar the rights of extra-territoriality. The authorities of His Highness the Sultan have no right to interfere in disputes between subjects of Her Britannic Majesty amongst themselves or between them and members of other Christian nations. Such questions whether of a civil or criminal nature shall be decided by the competent Consular authorities. The trial and also the punishment of all offences and crimes of which British subjects may be accused within the dominions of His Highness the Sultan, also the hearing and settlement of all civil questions, claims, or disputes in which they are the Defendants, is expressly reserved to the British Consular authorities and Courts, and removed from the jurisdiction of His Highness the Sultan.

"Should disputes arise between a subject of His Highness the Sultan or other non Christian power not represented by Consuls at Zanzibar, and a subject of Her Britannic Majesty in which the British subject is the Plaintiff or the complainant, the matter shall be brought before and decided by the highest authority of the Sultan, or some person specially delegated by him for this purpose. The proceedings and final decision in such a case shall not, however, be considered legal unless notice has been given, and an opportunity afforded for the British Consul or his substitute to attend at the hearing and final decision."

And, secs. 8 and 21 of the said Orders on Council, sec. 21 was as follows:—

"Subject to the other provisions of this Order, the Code of Civil Procedure, "The Bombay Civil Courts Act 1869," "The Indian Succession Act," and the other enactments relating to the administration of civil justice and to bankruptcy for the time applicable to Zanzibar, shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay; the Consul-General shall be deemed to be the District Judge of the district, and his Court the District Court or Principal Civil Court of Original Jurisdiction in the District, and the Court authorised to hear appeals from the decisions of the District Court; and the powers, both of the Governor-General in Council and the Local Government, under those enactments, shall be exercisable by the Secretary of State, or with his previous or subsequent assent by the Governor-General of India in Council."

For the Secretary of State it was contended that as a matter of law the Respondents were not entitled to be paid for the Railway buildings and that the compensation was properly assessed by the Consular Court; also that as regards that question the evidence did not warrant the Court for Zanzibar varying the judgment of the Consular Court. That the rights of the parties must be governed by the *lex loci rei sitæ* that the 16th, 18th and 20th articles of the treaty did not impair that rule. That even if English law applied, Plaintiffs would not be entitled under the circumstances to compensation for the value of those buildings.

For the Respondent it was contended that the Mahomedan law did not apply, and even if it did, it would not help the Secretary of State's case. They disputed the decree of the Zanzibar Court as to the area and value of the lands and of the buildings and they set up the affirmative claim of 15 per cent. for compulsory acquisition under the Land Acquisition Act, 1894, in addition to the amount awarded. During the course of the argument the Indian authorities referred to by the Respondents were the Hedaya as a leading book and not the Tafa; Grady at p. 539 or Hamilton's Vol. 3 on Usurpation. *Thakore Chunder Poramanik v. Ramdhone Bhuttacharji* (6 Suth. W. R., p. 228; 3 Calcutta Law Reports, p. 194), Indian Land Acquisition Act (I of 1894), sec. 23.

Appellant's counsel were not called on to reply.

*The Attorney-General, The Solicitor-General, Mr. Mayne and Mr. Sutton* for the Secretary of State.

*Mr. Haldane, Q. C., and Mr. Branson* for the Respondents.

*Judgment reserved.*

C. W. A.

## CALCUTTA HIGH COURT.

### [CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 805 OF 1900.

AMEER ALI, J.

STEVENS, J.

1900.

8, December.

In the matter of the petition of  
SHEOBARAN OJHA.

*Criminal Procedure Code (Act V of 1898), sec. 4 (h), 250—Compensation for frivolous and vexatious accusation—Information given by a Police constable—Order for compensation passed against police-officer lodging information.*

This was a rule granted by Pratt and Brett, JJ., on the 16th of October 1900, against an order of the Joint-Magistrate, in charge of the Giridih Sub-division of District Hazaribagh, dated the 1st of September 1900.

The facts of the case were shortly as follows:—

The Petitioner, Sheobaran Ojha, a Police constable of the Kharakdih outpost, in the Sub-division of Giridih, gave information to the outpost that one Nunmonia Doshad of Kharakdih had in his possession four counterfeit coins (Rupees) which were found by the Petitioner on the 14th August 1900. The Sub-Inspector took up the enquiry, arrested Nunmonia and sent him up for trial under sec. 243, I. P. Code. The Joint-Magistrate of Giridih tried the accused Nunmonia and ultimately discharged him under sec. 253, Cr. P. Code, and recorded an order "enter mistake of fact, sec. 243, I. P. Code." The Magistrate found "that the constable either from feelings of enmity towards the accused or more probably because he wanted to shew what a smart detective he was deliberately resolved to run a case

against the accused, though he must have known that the accused had acted in a perfectly *bona fide* way." He observed in his judgment as follows:—"There is just a modicum of truth in the case to prevent it being classified as false; but it is obviously both frivolous and vexatious. It is only right that the accused should be recompensed for the trouble and expense to which he has been put in defending this case; and I therefore call upon the complainant constable who has no business to prostitute his position as a constable by bringing a case of this nature to shew cause why he should not pay Rs. 50 as compensation to the accused under sec. 250, Cr. P. Code."

The Petitioner constable in shewing cause said that he acted *bona fide* in the discharge of his duties. But the Joint-Magistrate on the 1st of September 1900 made his previous order absolute and directed the constable Sheobaran to pay Rs. 50 to Nunmonia as compensation under sec. 250, Cr. P. Code.

Against this order the Petitioner moved the High Court and obtained the present rule to shew cause why the order for compensation should not be set aside on the ground that the Petitioner was a police-officer acting in the discharge of his duties and not a private prosecutor and that sec. 250, Cr. P. C., did not apply.

*Held*—That sec. 250 of the Code of Criminal Procedure does not apply to a case instituted on information given by a police-officer.

*Ramjeevan v. Durgacharan* (I. L. R. 21 Cal. 979) followed.

*Rule made absolute.*

H. P. C.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 237 OF 1900.

HARINGTON, J.

1900.

4, December.

AMRITA LALL CHOWDHRY

v.

CHARLES JAMBON and another.

*Practice—Order, peremptory, to file written statement, non-compliance with—Transfer of Small Cause Court suit to be heard with High Court suit—Dismissal of High Court suit for non-prosecution—Retransfer Small Cause Court suit, power to.*

This was an application on behalf of the Defendants for an order that the suit may be dismissed with costs for want of prosecution and that the suit instituted by them in the Small Cause Court, which had been transferred to this Court to be heard along with this suit, may be retransferred to the Small Cause Court. The facts are shortly these. In January 1900 Jambon & Co. instituted a suit in the Small Cause Court against the present Plaintiff and one Moti Lal Mukerjee for the recovery of a sum of Rs. 750 due by them in respect of certain mica transactions. In March 1900 the Plaintiff instituted this suit in this Court, alleging that the



balance in respect of the said mica transactions stood in his favour and amounted to a sum exceeding the jurisdiction of the Small Cause Court. By an order of this Court, dated the 9th April 1900, the Small Cause Court suit was transferred to this Court to be heard together with the present suit. On the 28th June the Plaintiff was ordered to file his affidavit of documents within three weeks from date of the order. This he failed to do and on the 20th August the Defendants obtained a peremptory order against the Plaintiff directing him to file his affidavit of documents on or before the 3rd September and ordering that in default his suit should be dismissed with costs. The Plaintiff failed to comply with this order, and on the 12th September the Defendants made this application before Pratt, J., the Vacation Judge, who adjourned the matter till after the holidays. The application now came on for hearing.

*Mr. Zorab* for the Defendants:—The order of the 20th August not having been complied with, this suit *ipso facto* stood dismissed on the 3rd of September last. My application is really for a declaration that the suit is dismissed; the Court cannot go behind that order.

If this suit stands dismissed the Small Cause Court suit should be retransferred to that Court. The order for transfer says that it is to be heard with this suit. That cannot be done if this suit is dismissed.

HARINGTON, J.—What power have I to retransfer the suit.

*Mr. Zorab*.—Sec. 25, Civ. P. C., and cl. 13 of the Charter, which relate to the transfer of suits, do not say anything about retransfer, but the Court has power to vacate its own order if the purpose for which it was made subsequently fails. The purpose of the order having failed, the order of transfer should be vacated, and the Small Cause Court suit would automatically go back to that Court. It would be of no benefit either to the Plaintiff or the Defendants that costs should be incurred on the High Court scale in a suit for Rs. 750 and odd.

*Mr. Robinson*.—I have got my affidavit of documents ready and ask to be allowed to file it at once. According to the practice of this Court the suit was not dismissed by the order of the 20th August, but a further order has to be made. That is why the Defendant had to make this application. This is a matter entirely in the discretion of the Court, but the order should only be made in the last resort and where a party is contumacious. I have an affidavit explaining why the orders of this Court were not complied with. He then cited *Twycroft v. Grant* [W. X. (1875), p. 201, 229].

*Mr. J. N. Banerjee* for Moti Lal Mukerjee.

*Held*.—That the Court has no power to go behind the order of the 20th August and the suit must be dismissed.

That this Court has no power to retransfer the Small Cause Court suit to be tried by that Court.

*Babu Ashutosh De*, Attorney for the Plaintiff.

*Messrs. Dignam & Co.*, Attorneys for the Defendants.

*Babu Kumar Krisna Dutt* for Moti Lal Mukerjee.

S. R. D.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 164 of 1899.

BANERJEE, J.

BRETT, J.

1900.

28, November.

RAJAH PEARY MOHUN MUKHERJEE,  
Defendant, Appellant,

v.

NORENDRA KRISHNA MUKHO-  
PADHYA and others, Plaintiffs,  
Respondents.

*Suit for recovery of money advanced—Debutter estate, representation of—Relief—Personal and against debutter estate—Limitation—Loan or donation—Order declaring liability of estate and directing accounts to be taken, whether appealable—Appellate Court, power of, to allow amendment of plaint—Civil Procedure Code (Act XIV of 1882), secs 2, 53, 582—Limitation Act (XV of 1877), Sch. II, Arts. 36, 120.*

This was an appeal preferred on the 17th of April 1899, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge, third Court, Hughly, dated the 17th of February 1899.

This appeal arose out of a suit brought by the Plaintiffs-Respondents to recover a certain sum of money against a *debutter* estate or in the alternative against the Defendant, Raja Peary Mohun Mukherjee, or any of the other Defendants whom the Court might consider liable for the same.

Under a Will of the late Babu Jaga Mohun Mukherji, dated the 28th Bhadro 1247, B. S., certain properties were made *debutter* or trust properties and Babu Joy Kissen Mukherji was the first *shebait* or trustee respecting such properties. After the death of Babu Joy Kissen Mukherji, Babu Naba Kissen Mukherji became the *shebait* and on the death of Babu Naba Kissen, which took place on the 27th Bhadro 1297, B. S., the duties of the office of trustee devolved upon Babu Bejoy Krishna Mukherjee. During the incumbency of the last-mentioned *shebait* or trustee Raja Peary Mohun Mukherjee, c.s.t., interfered with his possession and management of the properties and litigations, civil and criminal, followed. The Raja tried to ignore the *debutter* character of the properties, and Babu Bejoy Krishna had to institute a suit for the establishment of his *shebait* right and the *debutter* character of the properties, Babu Bejoy Krishna succeeded in this case but pending the final decision of it died on the 29th January 1894. It was alleged in the plaint that owing to the acts of the Raja, Babu Bejoy Krishna could not realize the whole rent from the tenants of the mehals, but could with difficulty realize only a small portion of it; that he had to lay out large sums of money

from his own pocket for the performance of the acts enjoined by the Will creating the trust estate, for the preservation and maintenance of such property and for wresting it from the grasp of a wrong-doer who claimed it as his secular property and on such allegations the sons of Babu Bejoy Krishna brought this suit for the recovery of the money advanced by them and their father from their own pockets for the purposes alluded to above, from the *debutter* properties.

The Defendant, Raja Peary Mohun Mukherjee, alone contested the suit and his defence in the case was that the Plaintiffs had no cause of action; that the suit was bad on the ground of misjoinder of parties and causes of action; that it was barred under secs. 12, 13, and 43 of the Civil Procedure Code and by the law of limitation that the allegations in the plaint as to the wrongful acts of the Defendants were untrue; that the Defendant was not in any way either in law or in equity liable for the claim, and that the *debutter* estate was not liable for the claim.

The Plaintiffs made all the male descendants of Babu Jaga Mohun's family Defendants in the suit, as they could not ascertain who would be the next *shebait*, and they wanted the suit to be decided in their presence. The suit was brought within six years from the date of Bejoy Krishna's death. The Court below disallowed the objection of the Defendant in bar, and held that the Defendant, Raja Peary Mohun Mukherjee, was personally liable for the claims so far as he had realized money belonging to the *debutter* estate, and it further held that for the remainder of the claim the *debutter* estate was liable; and having come to that conclusion it made a preliminary decree and appointed a commissioner and directed certain accounts to be taken.

Against that order of the lower Court the present appeal was preferred by the Defendant, Raja Peary Mohun Mukherjee, and on his behalf it was contended, *first*, that the suit must fail so far as it sought relief against the *debutter* estate by reason of no one having been made a party Defendant as representing that estate; *secondly*, that the suit so far as it claimed reliefs against the Defendant, Raja Peary Mohun Mukherjee, was not maintainable, as the Plaintiffs, who were only creditors of the *debutter* estate, were not entitled to advance any claim against any debtors of the estate; *thirdly*, that the claim was barred by limitation; and, *fourthly*, that the Plaintiffs, as the heirs and legal representatives of Bejoy Krishna Mukherjee, were not entitled to recover the money alleged to have been advanced by Bejoy Krishna to the *debutter* estate, as there was evidence to shew that the advances were not made as loans to the *debutter* estate and were not intended to be recovered from it.

At the hearing of the appeal a preliminary objection was raised on behalf of the Plaintiffs Respondents, that no appeal lay as the order appealed against was not a decree.

*Held*.—That the order appealed against was a decree within the meaning of the definition of that term in sec. 2 of the Code of Civil Procedure and that an appeal lay against such an order.

That the Plaintiffs who claimed to be creditors of the *debutter* estate and sued for recovery of the money that was due to them were not entitled to claim any relief against the Defendant, Raja Peary Mohun Mukherjee, personally simply on the ground of his having realized money belonging to that estate.

That the claim against that Defendant personally was barred by limitation under Article 36 of Schedule II of the Limitation Act.

That as regards the claim against the *debutter* estate time began to run not from the date when the advances were made but from the date on which Bejoy Krishna Mukherjee died and the period of limitation was six years under Article 120 of Schedule II of the Limitation Act, and the claim against the *debutter* estate was not barred by limitation.

That the absence in the Will of Bejoy Krishna of any mention of or reference to any monies being due from the *debutter* estate and the destruction of the accounts of Bejoy Krishna in which those advances were entered cannot destroy the character of those advances and make them donations to the estate, and they do not evince any intention of wiping out the debt that was due to the *debutter* estate.

That in the absence of any definite statement by the Plaintiffs as to who the *shebait* of the *debutter* properties was against whom they asked for a decree making the *debutter* estate liable or in the absence of any prayer in the plaint asking the Court to determine for the purpose of the suit who was the *shebait* and the person entitled to represent the *debutter* estate and such determination by the Court none of the persons who were made Defendants in the case can be said to represent the estate.

That the order of the Court below declaring the liability of the *debutter* estate and directing accounts to be taken is bad and must be set aside.

That the Appellate Court has power, under sec. 582 read with sec. 53 of the Code of Civil Procedure, to allow an amendment of the plaint if such amendment does not alter the character of the suit, and to send back the suit for retrial on amended plaints. *Gagan Chand Kundoo v. The Land Mortgage Bank of India* (I. L. R. 9 Cal. 695), *Dhani Ram Shaha v. Bhagirath Shaha* (I. L. R. 22 Cal. 692) and *Sheshamma v. Chennappa* (I. L. R. 20 Mad. 467) referred to.

*Mr. Hill* (with him *Babus Dwarka Nath Chuckerbarty, Mr. Hendra Nath Roy, Surendra Nath Roy, Tarit Mohun Das, Syama Prasanna Mozumdar and Manmatha Nath Mukherjee*) for the Appellant.

*Babus Saroda Charan Mitter and Anulya Churn Banerjee* for the Respondents.

*Appeal allowed :  
Fresh trial ordered.*

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, DECEMBER 31, 1900.

[No. 6

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### REPORTS (See Index.)

IT IS ANNOUNCED THAT THE NEXT EXAMINATION OF candidates for admission as Attorneys will commence on Monday the 4th day of February next.

THREE WELL-KNOWN LONDON SOLICITORS ARE SAID to be under arrest on charges of fraud. The most lamentable case, perhaps, is Mr. Lake's. He has served as President of the Incorporated Law Society, and as Chairman of the Discipline Committee, and has been for many years one of the most active and respected members of the Council.

THE JUDGES FROM THEIR BETTER EXPERIENCE ON THE Bench are loath to make long Wills. Lord Russell's Will, by which he disposed of property worth £150,000, is said to be remarkable for its brevity, while Lord Mansfield, who had more wealth to dispose of than any Chief Justice that has ever been, disposed of it all very economically on a half-sheet of note-paper. But, perhaps, none has yet surpassed Sir James Fitz James Stephen, whose last testamentary wishes were expressed in the simple words "I give all my property to my wife whom I appoint sole executor."

LORD RUSSELL BEQUEATHED ALL HIS PROPERTY, "freehold and personal," to his wife. It is somewhat curious that after such a clear and concise expression of his wishes he should have thought fit to annex a schedule of his properties to his Will and then omitted to sign it. But such informality could not invalidate the Will in which his intentions were so clearly expressed.

LORD MANSFIELD THOUGH WRITING HIS WILL ON half a sheet of note-paper yet contrived to pen a longer document than most people would write in such a limited space. His economy of space stands in sad contrast to his extravagance of language. Having provided for specific legacies to his more intimate friends, he gave the rest of his possessions to his nephew in such superfluous terms: "Those who are dearest and nearest to me best know how to manage and improve, and ultimately, in their turn, to divide and sub-divide the good things of this world which I commit to their care, according to events and contingencies which it is impossible for me to foresee or trace through all the mazy labyrinths of time and chance." It was common in those days to indulge both in extravagance of language and of feelings in testamentary documents.

THE FOLLOWING INSTANCE GIVEN BY THE *Law Journal* is, nothing out of the common. "In making a very simple gift to his 'most virtuous, faithful, and dearly loved wife,' the Earl of Dorset took occasion to remark that he did not intend it to be regarded as 'any recompense of her rare and reverent virtues, of charity, modesty, fidelity, humility, secrecy and wisdom,' which he 'honoured, loved, and esteemed above all the transitory wealth and treasure of this world, and which therefore by no price of earthly riches could be valued, recompensed, or requited, but he desired it to be accepted as 'a true token and testimony of his unspeakable love, affection, estimation and reverence.'"

LORD ST. LEONARDS IS THE ONLY WELL-KNOWN Judge whose Will has been the subject of litigation. His testamentary wishes occasioned a probate suit, not because he was not careful in framing his Will, but because he omitted to take proper precautions for its safe custody.

## English Notes.

QUEEN'S BENCH DIVISION.—IN THE MATTER OF FOUR SOLICITORS. LYDALLS, FATHER and SONS v. MARK JAMESON LETCHER. Before the LORD CHIEF JUSTICE and MR. JUSTICE KENNEDY. 21st November 1900.

*Solicitors—Undisclosed practice of receiving a share of profit in legal proceedings.*

The applicant was a Barrister, named Stephens, who in his affidavit charged various misconduct on the part of J. H. Lydall, father and his two sons, partners in his firm, and also against Mark Jameson Letcher, all London solicitors. The committee of the Incorporated Law Society found that the senior Lydall for many years past, and the two sons since 1894, had introduced the Respondent Letcher and other solicitors, to act for parties in administration actions whose interests conflicted with those of the parties for whom the Lydalls were acting. And in all such cases the Respondents received from the solicitors introduced by them, agency on, or a share of their profit costs without disclosing that fact; and the committee found that the Respondents were guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

In their considered judgment the Court held that such conduct was fraught with risk to the welfare of clients and wrong in principle and injurious to the proper administration of justice. The committee had found that the Respondents in carrying on this practice of undisclosed profit-making with solicitors who represented conflicting interests have been guilty of professional misconduct. The Court agreed with that and emphatically endorsed the grave censure which that finding involved.

As this was the first time the Court had to consider this particular kind of professional misconduct, the Court in its order leaned towards clemency, but if after this public condemnation and warning such misconduct should again come before the Court, the principal ground for mitigation will have disappeared.

The order was that the senior Lydall should be suspended for three months, and he and the others, all of them, should pay the costs of the Incorporated Law Society but not of Mr. Stephens because the graver charges he had formulated in his affidavit he was unable to maintain.

*Sir Edward Clarke, Q. C., Mr. Pickford, Q. C., and Mr. Jones* for the Respondents.

*Mr. Trevor* for the Society.

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR R. COUCH.

1900.

10, November.

HASAN JAFAR and another,

vs.

MAHAMMAD ANKARI.

*Privy Council, order of, application to vary—Point not raised during hearing—Mistake.*

In this appeal their Lordships in their judgment,

dated 18th May 1899 (4 C. W. N. 65 at p. 70 or L. R. 26 I. A. 229 at p. 235), declared as follows:—

“And it should be declared that in the events which happened Karam Ali became and was as to one-fourth of the estates comprised in the sanad granted to him trustee for Sadek Husain and that the Appellants, as representatives of Sadek Husain, are now entitled to recover one-fourth of those estates.”

Upon these Appellants attempting to execute this decree as regards the 13 villages comprised in the talukdari estate of which Karam Ali was the talukdar, the Respondent objected as to two out of the 13 villages on the ground that they were not included in the sanad but acquired subsequently at regular settlement by Karam Ali. The Courts in India rejected Appellants' application *quoad* these two villages on the ground that the decree of the Privy Council only awarded one-fourth of the villages included in the decree.

The matter now came on upon a petition praying Her Majesty in Council to vary that order so that the Petitioners may not be deprived of their interest in the two villages which were an integral part of Karam Ali's talukdari estate.

*Mr. Cohen, Q. C.*—My Lords, in this case I appear with my learned friend Mr. Arathoon for the Petitioners. It is an application praying that an order in Council made upon the 29th May may be varied.

LORD MACNAGHTEN.—Were you for the Appellants in the case on the former occasion?

*Mr. Cohen.*—Yes.

LORD MACNAGHTEN.—Nothing was said about the two villages at the time.

*Mr. Cohen.*—There were no distinctions drawn between the two villages.

LORD MACNAGHTEN.—The particular circumstances in which they were situated were not called to our attention.

*Mr. Cohen.*—Not at all.

LORD HOBHOUSE.—I suppose you were perfectly ignorant of the point now raised, as we were?

*Mr. Cohen.*—Yes.

LORD HOBHOUSE.—We were all ignorant.

*Mr. Cohen.*—Yes, the Respondent's case drew no distinction at all, nor did the argument of the Respondent.

LORD HOBHOUSE.—The whole case was treated as standing or falling by the establishment of a trust.

*Mr. Cohen.*—That is exactly so. If we had objected that the sanad did not comprise those two villages I should have mentioned it.

LORD MACNAGHTEN.—It does appear from the papers, but it certainly was not called directly to our attention. I do not think any thing was said about it.

*Mr. Cohen.*—No, nor was it at all material.

LORD MACNAGHTEN.—I do not know. I think it was material.

SIR R. COUCH.—It seems to have been assumed that the sanad included all that was settled.

LORD HOBHOUSE.—The non-mention of it creates the present difficulty.

SIR R. COUCH.—I do not see any thing in the proceedings to show what villages were actually included in the settlement? How does it appear? It seems to have been rather assumed that the sanad showed what was settled.

Mr. Cohen.—I think I can show your Lordships that that is not so.

SIR R. COUCH.—Look at the plaint, p. 2, 6th paragraph.

Mr. Cohen.—The plaint enumerates the 13 villages.

SIR R. COUCH.—No, the plaint has got a list of villages.

Mr. Cohen.—The plaint does not mention the sanad at all.

SIR R. COUCH.—It gives a list of the villages claimed.

LORD MACNAGHTEN.—The whole of the argument turns on the effect of the sanad.

Mr. Cohen.—No.

LORD MACNAGHTEN.—The argument before us did.

Mr. Cohen.—I think your Lordships will find not; nor did the judgment which turned really on the settlement which was made.

SIR R. COUCH.—It is true the argument turned on the settlement, but it was assumed that the sanad showed what was settled. The sanad was the document to be looked at, to see what was actually settled.

Mr. Cohen.—If your Lordships will allow me to state the facts I can state them in a few words.

LORD MACNAGHTEN.—The claim as presented to us on the one side, was that the sanad conferred an absolute title upon the person to whom the Government granted the land; on the other hand that there was a trust for the representative.

Mr. Cohen.—Would your Lordships kindly look at the statement of defence page 11, paragraph 18.

LORD HOBHOUSE.—That is your lodged case.

Mr. Cohen.—Yes, at the bottom of page 10. "That Hakim Karam Ali, after the meeting during the summary settlement, applied for the settlement of the whole taluka in his name offering however to give Plaintiff and Ali Mehdi their shares when they came back, and paid what was due to him."

SIR R. COUCH.—This is the Defendant's written statement.

Mr. Cohen.—Yes. "That the settlement of the whole taluka was ultimately on 8th November 1859 made unconditionally and absolutely with Hakim Karam Ali in distinct repudiation of the claims of Plaintiff and Ali Mehdi. That the Government granted a talukdari sanad to Hakim Karam Ali in respect of the estate under dispute except the villages Pyaripur, Sarayan and Daulatpur."

LORD MACNAGHTEN.—That is so.

SIR R. COUCH.—It was not gone into.

Mr. Cohen.—No, but then it goes on to say "that Hakim Karam Ali sued for and obtained settlement decrees for villages Pyaripur, Sarayan and Daulatpur."

That falls within the 3rd section of the Act of 1869.

LORD MACNAGHTEN.—Our attention was not called to this certainly.

Mr. Cohen.—No, because we say there was a settlement made.

LORD MACNAGHTEN.—I do not think the settlement decrees were in evidence at all.

Mr. Cohen.—The sanad was in evidence on the record I think.

Mr. Arathoon.—No, the sanad was not in the record.

Mr. Cohen.—The settlement decrees were in the record; that is at p. 20 "settlement of village Zaidpur."

LORD HOBHOUSE.—It is the summary settlement at page 20. It is in the regular settlement that I understand the claim was made for the two additional villages.

Mr. Cohen.—That is so. The regular settlement is not in evidence, the fact is, it was assumed throughout that the fate of the 13 villages depended entirely upon the question whether or not they were held in trust as regards one-fourth for the Plaintiff.

LORD MACNAGHTEN.—Of course there were many other points argued below, but nothing but that was argued here.

Mr. Cohen.—If your Lordships look at the judgment or in the Respondent's case there is no distinction drawn at all.

LORD MACNAGHTEN.—That is so.

Mr. Cohen.—Kindly look at the judgment on p. 149. It is the judgment of the District Judge; I think this judgment makes it quite clear; reads from "the property which is the subject" to the words "sec. 3 of Act 1 of 1869, became part of this taluka." I should like to direct attention to that section, reads the section. It is stated here "more landed property" that means these two villages, "was decreed to Hakim, Karam Ali at the first regular settlement of the Province of Oudh and that property under sec. 3, Act 1 of 1869, became part of his taluka."

So that under the Act of 1869 these two villages became part of the taluka, and the only question that was argued was whether the whole taluka was not held in trust as regards one-fourth share. In the judgment of the Court below they said that the land was afterwards acquired; your Lordships' judgment in effect stated that on the whole their Lordships were of opinion that the Appellants had made out their case as to one-fourth of the estate. That really means the whole taluka. It was, however, an accident that those words were put in "property comprised in the sanad." The sanad was not in at all; it was not part of the record. It was really admitted throughout that the question was not whether some of these villages were held in trust, but whether the whole of the villages were. Your Lordships were of opinion that the case was made out as to one-fourth of the estate. That is the taluka which under the Act of 1869 comprised these two villages. The Judicial Commissioner in the very

same case says exactly the same thing "Karam Ali died on the 22nd August 1879. At the time of his death he was the recorded proprietor of the taluka which then consisted of the estates abovementioned, and villages which had been decreed to Karam Ali at the first regular settlement."

**LORD MACNAGHTEN.**—We do not know why they were decreed to him or on what ground he claimed them originally when the suit was instituted. You claimed the whole taluka, your case was that the man died intestate, and you were entitled to the whole taluka.

**Mr. Cohen.**—We claim the whole; they set up the sanad really and say that these villages were granted to them and their name only was inserted on the sanad.

**LORD MACNAGHTEN.**—Your point was that although their name was inserted he was a trustee.

**Mr. Cohen.**—Yes.

**LORD MACNAGHTEN.**—And after the sanad was granted you acquired some other villages. You may have acquired them by reason of your position as holding the sanad. I do not know. Have you an opponent here to-day?

**Mr. Cohen.**—No, I ought to tell your Lordships something which is not mentioned in the petition.

**LORD HOBHOUSE.**—Are you asking now for leave to appeal from this?

**Mr. Cohen.**—No.

**LORD HOBHOUSE.**—Because what can we do.

**Mr. Cohen.**—I am asking that the order may be varied in form. There is authority for saying that your Lordships can do that, that you can recommend Her Majesty to make another order. I ought to state that when this mistake, if I may so call it, was discovered, my clients applied to the Indian Courts for execution to obtain possession of the 13 villages and the Indian Courts said (and if I may say so with great deference I think quite rightly) that they could only look at the actual words of the order and therefore they dismissed the application. We then at once gave notice to the other side that we should apply to your Lordships. We gave them notice in June. They are not, as far as I know, here to oppose our application. It was evidently a mere slip and nothing else.

**LORD MACNAGHTEN.**—I think it is very likely if it had been mentioned at the time, they would have admitted that they were governed by the same rule. But we have not got them here to-day.

**Mr. Cohen.**—In June we gave notice so that they have had ample time.

**Mr. Arathoon.**—The petition was served on them on the 1st of June.

**Mr. Wheeler.**—We issued a summons.

**Mr. Cohen.**—They have had an opportunity, we served on them the petition. The fact is they know that it was a mere slip. The point was never raised. Your Lordships would not have allowed them to raise it.

**Mr. Arathoon.**—The Judicial Commissioner throughout speaks of the claim to the whole estate, which includes these villages.

**Mr. Cohen.**—It is a mere mistake in the form of the judgment, arising from the fact that no body at the time drew any distinction—on the argument I mean—between the two villages and the 11 other villages and they knew that no distinction could really be drawn, as the regular settlement followed what had been done previously. If the first eleven villages were held in trust so were these two.

**LORD MACNAGHTEN.**—That may be or may not be so, but that is not the way it is stated in their defence. They said they sued for and obtained those villages.

**LORD HOBHOUSE.**—There seems to have been a contest about it, but really we do not know the history of the subsequent regular settlement.

**LORD MACNAGHTEN.**—I think very likely these villages are effected by the same trust. Even if it had been mentioned at the time I do not think we should have had materials enough for us to decide it, if they contested it. Very likely they would not contest it.

**Mr. Cohen.**—They did not contest it.

**LORD MACNAGHTEN.**—But it was not raised.

**Mr. Cohen.**—Will your Lordships look at the Respondent's case and see what kind of defence is raised. They might have raised it. As your Lordship notices that appeared from the pleadings. Now let us look at the Respondent's case for a moment. I think your Lordships will see that I am right in saying that they admit there was no distinction. (Counsel here read from pages 2 and 3 of the Respondent's case).

**LORD MACNAGHTEN.**—I do not see any reference whatever to it.

**Mr. Cohen.**—There is no reference whatever, and no distinction drawn at all, not the slightest. I have looked through it most carefully. Look at the reasons given. I pointed out that it was included in the plaint.

**LORD MACNAGHTEN.**—Because he claimed the whole of the estate as heir.

**Mr. Cohen.**—And then I read the statement of defence in which it is stated that the sanad did not comprise the two villages, but at the regular settlement.

**LORD MACNAGHTEN.**—No, it is not the regular settlement. It is very likely you are entitled to this, but it is an absolutely different equity you see. The equity on which you recovered the property comprised in the sanad is because the Government imposed a trust upon it. There is a further equity because, having got this property by reason of the sanad granted on those conditions, you then obtained some further property bound by the same trust. That is a different equity.

**Mr. Cohen.**—They did not raise that point at all, look at the reasons.

LORD MACNAGHTEN.—What seems to me is this, that there would be no materials before us on which we could have decided, unless they had chosen to bring it before us. I do not think you ought to be barred from raising the present question, but I do not see how you could raise it in this stage unless you could get them to agree. There is some danger that *res judicata* may be set up.

Mr. Cohen.—Your Lordships will be inclined perhaps to vary the order, if necessary. It will be unjust to allow the judgment to be a bar.

LORD MACNAGHTEN.—I am inclined to think it would not be, but one wants to be safe.

LORD HOBHOUSE.—It is an *ex parte* application.

Mr. Cohen.—Yes, we gave notice to the other side. We served the petition. So they knew all the facts.

LORD HOBHOUSE.—And they have not appeared.

Mr. Cohen.—They really do not dispute this fact. We served the order in June.

LORD HOBHOUSE.—On the English solicitors.

Mr. Arathoon.—Yes, on the solicitors here who appeared in the other case.

LORD MACNAGHTEN.—Then of course they had no instructions.

Mr. Cohen.—They had ample time.

Mr. Arathoon.—The petition was served on the 1st June and we have given them every opportunity to communicate. They say they have no instructions to appeal.

Mr. Cohen.—We from time to time gave them notice, that this was to have come on at the last sittings.

LORD HOBHOUSE.—Do you mean they returned you no answer, took no notice of the service of the petition?

Mr. Cohen.—They say they have no instructions.

LORD HOBHOUSE.—There is no affidavit I suppose.

Mr. Cohen.—No, they state they have no instructions to appear.

Mr. Arathoon.—I am told by Mr. Wheeler that they have got a vague letter saying they cannot appear—they will not appear. The clients know of it in India.

Mr. Cohen.—They have been served and they say they will not appear.

Mr. Wheeler.—Yes.

Mr. Cohen.—Mr. Wheeler says the answer was they will not appear. The point was never raised and was never intended to be raised.

LORD MACNAGHTEN.—If it had been raised and if they had objected, I do not think we should have been in a position to deal with those two villages at all. You might have expressly reserved your right to sue for them. Whether that would be an advantage or not I do not know.

Mr. Cohen.—But they did not raise it.

LORD MACNAGHTEN.—You did not raise it. Nobody paid any attention to it.

Mr. Cohen.—No, I thought it had often been ruled that your Lordships will not allow either party

to depart from the assumption on which the whole case proceeded. It proceeded on the assumption that if he were entitled to any of these villages he was entitled to the thirteen. Your Lordships on looking at the pleadings, at the judgment of the Court below and at the reasons given by the Respondents cannot help, I confidently submit, coming to the conclusion that the whole case proceeded upon the assumption that if we were entitled to have a share in any of these villages, we were entitled to a share of all. That being the case I should have thought according to the practice uniformly adopted by all Courts, your Lordships would not allow another point to be raised now. They were all in the taluka.

LORD HOBHOUSE.—When you come to execution you find that the document on which your whole case turns does not include these two villages. I think it is very likely if I were at liberty to guess that the sanad is the foundation of the whole title, the two villages would have to share the fate of the eleven.

Mr. Cohen.—When your Lordships delivered judgment if I had been wise enough and quick enough to have told your Lordships that that does not comprise two villages your Lordships would at once have said—

LORD MACNAGHTEN.—We could at once have appealed to the other side and asked what they had to say about it.

Mr. Cohen.—I think not, your Lordships would not have heard the other side, and would not have allowed them to say there was any distinction.

LORD MACNAGHTEN.—There are really two very different equities.

Mr. Cohen.—It was not necessary for us to give any evidence on the point. The whole case proceeded in India and here on the assumption that if we were entitled to eleven of these villages we were entitled to the thirteen.

LORD HOBHOUSE.—I suspect there must have been a further enquiry if you raised the point at the Board.

LORD MACNAGHTEN.—We are asked to alter a judgment.

Mr. Cohen.—Simply to say that the estate comprised in the plaint is so and so.

LORD MACNAGHTEN.—We cannot alter it.

Mr. Cohen.—Yes, there are cases showing that if there has been a mistake in the form of the judgment your Lordships can alter it.

LORD MACNAGHTEN.—I do not think that there is any mistake.

Mr. Cohen.—I should have submitted with deference that we were entitled to a judgment for the villages comprised in the plaint.

LORD MACNAGHTEN.—If you had asked that I should have asked what your title was with regard to these two villages.

Mr. Cohen.—It is not disputed that we are entitled to them, it is only disputed that all these villages were granted absolutely to the Defendants;

that was the argument and the sole argument. We succeeded upon that and are therefore entitled to our share of the 13 villages. At any rate we are entitled to be protected.

**LORD HOBHOUSE.**—The whole controversy turned on the sanad and the circumstances under which the sanad was granted.

**Mr. Cohen.**—No, my Lord. I assure your Lordships not. If your Lordships will look at the judgment delivered, you will find you did not mention the sanad at all, not as a material part of the case, your Lordships will find it all turned on what the Chief Commissioner signed.

**LORD HOBHOUSE.**—It is the sanad that gives the Talukdar the title by which he resisted your claim. The question was whether he got it under circumstances making him a trustee for you. That was the whole controversy decided in your favour. Then it turned out that there were two villages not acquired by the sanad, but acquired by a subsequent claim made at the regular settlement. I think it very likely that the sanad was at the bottom of the whole matter and the two villages must come under the same consideration, but it is possible there were considerations besides that which induced the Collector to make the regular settlement with the Talukdar.

**Mr. Cohen.**—In those proceedings it was assumed that there was no difference between the eleven villages and the two villages as regards the legal position of the Plaintiff and Defendant. That being so would a party be allowed to raise an entirely new point. There is another question looking at the issues at p. 61.

**LORD MACNAGHTEN.**—I think if this had been raised at the time, all we could have done would be to direct some enquiry as to these two villages, with perhaps an intimation of opinion, that if the sanad was really the cause of their being included in the regular settlement, they would come under the same principle of trust, but I cannot conceive that we could have done anything more than that.

**Mr. Cohen.**—I will not trouble your Lordships long, the issues are at p. 61.

**LORD MACNAGHTEN.**—There is no issue about this at all.

**Mr. Cohen.**—None.

**LORD HOBHOUSE.**—It would be a very hazardous thing to go behind the decree.

**LORD MACNAGHTEN.**—I do not think we can possibly alter the decree. I think if it had been raised at the hearing and before the decree was pronounced, it would be a question whether the other side admitted it or not, and if they did not the utmost we could have done would have been to leave it open to you.

**Mr. Cohen.**—An order which your Lordships have made in one or two cases not very dissimilar to this case is this; instead of varying the order to direct that the Plaintiff may claim these two villages and make use of the old record.

**LORD MACNAGHTEN.**—There is no information about

how he got these two villages except that he sued for them after a certain date after he got the sanad.

**LORD HOBHOUSE.**—At the regular settlement a separate claim was made and there appears to have been litigation about it, and a decree was made in favour of the Talukdar.

**Mr. Cohen.**—Yes, I think your Lordships will agree with me on this point. The 3rd section speaks of property acquired afterwards by a decree.

**LORD MACNAGHTEN.**—I think the judgment is quite right in regard to the construction of that. That section is brought to the attention of the Court and what they say is "that section does not provide that the villages or lands which may be decreed to a Talukdar," reading down to the words "when the summary settlement was made." That is all and I think that is right.

**Mr. Cohen.**—I am not quarrelling with the judgment. The 3rd section also says "or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement."

**LORD MACNAGHTEN.**—It does not say they are to be held on the same trust.

**Mr. Cohen.**—That is true. It was assumed throughout that the effect of the decree was exactly similar to the effect of the sanad; that decree followed the sanad and intended to do so, that was assumed throughout. At any rate your Lordships will not hold it to be a bar against bringing an action for the two villages.

**LORD MACNAGHTEN.**—It certainly was not intended that you should be barred.

**Mr. Cohen.**—If your Lordships say that, that is enough.

**LORD MACNAGHTEN.**—We cannot say that you are not barred. It certainly was not intended that you should be, because it really was not raised before us, our attention was not called to it.

**Mr. Cohen.**—The authorities show that we shall not be barred if the question was not raised at all.

**LORD MACNAGHTEN.**—Lord Hobhouse, you agree with that, don't you, that the question was not raised at all before us?

**LORD HOBHOUSE.**—No it was not, there was not a suggestion that such a question existed.

**LORD MACNAGHTEN.**—Not on either side.

**Mr. Cohen.**—So little did the parties think that the case depended on the sanad that the sanad was not sent up at all in the record.

**LORD MACNAGHTEN.**—We know what the sanad was.

**LORD HOBHOUSE.**—It was in common form. If I recollect rightly we asked the same question in that as in other suits as to why the sanad was not here. Oh, it is in the common form.

**Mr. Cohen.**—Your Lordships are of opinion that we ought to institute another suit.

**LORD MACNAGHTEN.**—We cannot advise you.

**LORD HOBHOUSE.**—It is open to you to sue.

**LORD MACNAGHTEN.**—It is open to you to sue; this particular question was not raised before us;



and if it had been and disputed on the other side there were no materials on which to decide it. We cannot go further than that.

*Mr. Cohen.*—I suppose we should have to show that the decree—

*LORD MACNAGHTEN.*—That you obtained this additional land by reason of the sanad.

*Mr. Cohen.*—That is what we shall have to show.

*Mr. Arathoon.*—We can easily show that if we are not barred by limitation.

*LORD MACNAGHTEN.*—There may be a question whether you are barred by limitation, the point was not brought to our attention and most certainly we did not intend to decide it. Perhaps your opponents will be reasonable, I don't know.

*Mr. Cohen.*—I should think they will be reasonable.

C. W. A.

*Application refused.*

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 702 of 1900.

STANLEY J.	}	QUAZIE MOHUMMAR ROHMAN,
1900.		Plaintiff,
6, December.	}	<i>n.</i>
		SARAT CHUNDER DUTT, Defendant.

*Civil Procedure Code (Act XIV of 1882), Chap. XXXIX—Leave to defend, extension of time to apply for.*

This was a suit by the Plaintiff as endorsee for value of a promissory note alleged to have been executed by the Defendant, instituted under Chap. XXXIX of the Civil Procedure Code, on the 30th August 1900. Summons was issued in the form given in Sch. IV, No. 172 of the Code, and the Defendant was given ten days from date of service to appear and apply for leave to defend if he intended to defend the action.

*Mr. A. Chaudhuri* was instructed by the Defendant to apply for leave to defend on the 20th of November 1900, the Defendant alleging that he had been served in the beginning of the month of October 1900, during the close holidays. The Courts re-opened on the 19th of November and the verified petition of the Defendant had been affirmed on that day. Counsel stating that having regard to the date when the application was being made a question of limitation arose, his Lordship directed notice to issue to the Plaintiff. The application was finally heard on the 3rd of December 1900.

*Mr. R. Mitra*, with him *Mr. A. Chaudhuri*, for the Defendant.—The Defendant is a resident of Hooghly, and this Court has held that a person who does not reside within the ordinary original jurisdiction of this Court should get sufficient time to appear and ask for leave, *Groom v. Wilson* (I. L. R. 3 Cal. 539).

*Pontifex, J.*, in that case held, that inasmuch as sec. 532, Civ. P. C., provided that the summons was

to be in the form given in the schedule, or in such other form as the High Court may from time to time prescribe, power to extend the time is given to the High Court by implication.

*STANLEY, J.*—Can a Judge sitting on the Original Side of the Court alter the form?

*Mitra.*—Under sec. 36 of the Letters Patent a single Judge has the same power as the High Court.

He also relied upon *Chandra Kant Roy v. Pogose* (3 B. L. R. O. S., p. 83), *Joseph v. Sokano* (9 B. L. R. 411). He also referred to certain unreported cases.

*Mr. J. G. Woodroffe*, for the Plaintiff.—Under sec. 4 of the Limitation Act, the Court must take the point of limitation, it cannot be waived. Art. 159 of that Act expressly provides that the Defendant is to apply for leave to defend within ten days from the date of the service of summons. We say that the Defendant was served in the fourth week of September. It is very doubtful as to whether the Defendant was not barred even on the 19th of November when the Courts re-opened. He referred to *Ersatkar v. Gyan Moni Dabi* (before Sale, J., 12th March 1895, unreported) and *Madhub Lall Durgur v. Hoopendra Narain Sen* (I. L. R. 23 Cal. 573). The cases referred to by Mr. Mitra all refer to extension of time of service, not the extension of time to appear after service. Sec. 534 gives the Defendant a right under special circumstances to set aside the decree and if necessary to stay or set aside execution, and that is the proper and the only course open to the Defendant.

*R. Mitra* in reply.—Sec. 534, Civ. P. C., supports my contention. If the Court can set aside the decree under special circumstances, such as exist in this case, it is merely a technical objection to say that the Court cannot give leave to the Defendant to defend the action before decree. The Court has got to be satisfied that the Plaintiff is entitled to a decree and there is an inherent power in the Court to order such steps or proceedings to be taken as may lead to the administration of justice.

*STANLEY, J.*, delivered a considered judgment, holding that the Court had no power to extend the time. The cases cited go to the extent of showing that the period of service may be extended under certain circumstances and that execution might be stayed. His Lordship referred to the cases cited and the unreported cases of *Narendra Nath Bose v. Hari Lal Mullick* (Suit No. 599 of 1898. O'Kinealy, J., 22nd December 1898). The proper course was to apply to set aside the decree under sec. 534, Civ. P. C.

S. R. D.

*Application dismissed.*

### \* [ORIGINAL CRIMINAL JURISDICTION.]

MACLEAN, C. J.	}	EMPRESS
1900.		<i>n.</i>
7, December.	}	MUNGROO BHOOJAH.

*Examination of the prisoner by the committing Magistrate—Committing Magistrate, right to call, to*

give evidence—Criminal Procedure Code (Act V of 1898), secs. 255, 287, 342 and 364.

At the close of the case for the prosecution the Standing Counsel tendered the examination of the prisoner by the committing Magistrate.

Mr. E. P. Ghose, counsel for the prisoner, objected to such examination being read to the jury. The statement made by the prisoner in answer to the Magistrate's question was made in Hindustani and I submit that the translation recorded by the Magistrate is not a correct one. Further in this case the prisoner's statement should have been recorded in the language in which he gave it, that is in Hindustani; for it is quite practicable for the committing Magistrate, Mr. Rahim, who is thoroughly conversant with Hindustani to record the statement in that language. See the remarks of the Full Bench in *Queen Empress v. Nilmadhub Mitter*. Again the provisions of sec. 364 have not been complied with, for no answer has been given to the first question. "You have heard the evidence against you." Lastly, in direct contravention of the provisions of sec. 255, sub-sec. (1) of the Criminal Procedure Code, there is nothing in the record to show that the charge was read over and explained to the prisoner before he was asked whether he was guilty or had any defence to make.

MACLEAN, C. J.—If your objection is well founded then in every case at every Criminal Sessions of this Court over which I have presided, and over which other Judges have presided the examination of the prisoner before the committing Magistrate has been erroneously admitted.

Mr. Ghose.—In this case I submit it was practicable for the committing Magistrate to take down the prisoner's statement in the language in which it was made, and that under sec. 364 of the Criminal Procedure Code this ought to have been done.

The Standing Counsel (P. O'Kinealy) for the Crown.—I have never heard this objection raised before; and both the clerk of the Crown and Mr. Hume, who for the last twenty-seven years has been the Government Prosecutor in the Police Court, tell me that they have never heard it raised before. The prisoner was questioned generally on the case by the committing Magistrate as provided for by sec. 342 of the Criminal Procedure Code and under sec. 287 of that Code I am bound to tender the examination of the accused by the committing Magistrate. Every provision of sec. 364 has been complied with. The language both of this Court and the Police Court is English.....(stopped by the Court).

MACLEAN, C. J.—I overrule the objection.

The prisoner's counsel then asked the Court to call Mr. Rahim, the committing Magistrate, and at his request the Court allowed that gentleman to be called. At the close of his examination,

MACLEAN, C. J.—I have allowed the committing Magistrate to be called at the request of the prisoner's

counsel, but I wish it to be distinctly understood that this is not to be regarded, so far as I am personally concerned, as a precedent for calling the committing Magistrate in other cases. I consider that such a course would be open to the gravest objection.

The examination of the prisoner before the committing Magistrate was then read to the jury.

#### [CIVIL APPELLATE JURISDICTION.]

BANERJEE, J.

BRETT, J.

1900.

21, December.

GAUDNA BIBI and others, Decree-holders, Petitioners,

v.

JABANULLA MANDUL, Applicant, Opposite Party.

*Bengal Tenancy Act (VIII of 1885, B. C.), sec. 153—Revisional powers—Jurisdiction—District Judge—Additional District Judge.*

This was a Rule obtained against the order of the Additional District Judge of Jessore, dated the 30th of May 1900, reversing the order of the Munsif of that place, dated the 10th of March 1900.

The facts of the case were shortly as follows:—

The decree-holders abovenamed in execution of a decree for rent obtained by them against their *raiya*, Sadon Mandul and another, put up to sale the *raiya* holding and purchased the same themselves on the 18th of August 1898. Thereupon the opposite party abovenamed, an under-*raiya* holding under the *raiya*, the judgment-debtor, made an application under sec. 311, C. P. C., for setting aside the sale. On the 10th of March 1900, the Munsif before whom the application was made rejected the same on the ground that the applicant being merely an under-*raiya* had no *locus standi* to make the application under sec. 311, C. P. C. Subsequently on an application by the said applicant on the 31st May 1900 the Additional District Judge of Jessore set aside the said order of the Munsif purporting to act under the proviso to sec. 153 of the Bengal Tenancy Act, and remanded the case for investigation into the merits. Against that order the decree-holders moved the High Court and on their behalf it was contended that the Additional District Judge had no jurisdiction to interfere as the proviso to sec. 153 of the Bengal Tenancy Act only empowered the District Judge to exercise revisional powers and the distinction between a District Judge and an Additional District Judge was clear from cl. (a) of the section.

*Held*—The Additional Judge had no jurisdiction to interfere with the order of the Munsif as the law made a distinction between a District Judge and an Additional District Judge.

Babu Sharat Chandra Roy Chowdhury for the Petitioners.

*Rule made absolute.*

S. C. P.

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#### REPORTS (See Index.)

WE UNDERSTAND THAT TWO IMPORTANT APPEALS from the Punjab Chief Court are now pending before the Judicial Committee of the Privy Council. The case of *Ahmed Yar Khan and others* (the Khakwani family of Mooltan) against the Secretary of State for India concerns the Hijwat caudals fifty miles long in the Mailsi Tehsil which were made by that family at a cost of 9 lakhs of rupees in 1861. The Government denies the proprietary right of the Plaintiffs and both Courts have decided in favour of Government. In the other case the present Nawab of Tank, Dera Ismail Khan District, is the Respondent and the Appellant his uncle is claiming one moiety of the Tank Ilaka.

WE NOTE THAT AN APPEAL in *forma pauperis* (*Healey v. New South Wales Bank*) from the Supreme Court of Victoria was heard before the Judicial Committee of the Privy Council on 27th November last. It is satisfactory to find that the appeal although preferred against concurrent decisions on facts was determined by their Lordships after an examination of the evidence. The Board was comprised of five Judges and was presided over by the Lord Chancellor. The Appellant was characterized as a fraudulent knave who had cheated the Bank

and it was stated that the appeal was an audacious one yet their Lordships did not dismiss the appeal before "looking to the evidence for themselves" they were clearly of opinion that the Appellant was not to be believed." After this we may safely conclude that the practice alluded to by the Board with regard to concurrent findings of fact in the case of *Moung Tha v. Moung Pan* (4 C. W. N. 808) is by no means a hard and fast one.

WE ARE UNABLE TO TAKE THE VIEW ADOPTED BY the Court of Appeal in the case of *Franklyn v. Chaplin* we report to-day. The precedent set therein appears to us to be one fraught with great disadvantages and are likely to lend encouragement to actions for breach of promise. The leave to serve the writ out of the jurisdiction appears to us to have been granted on too slender grounds and may be the basis of similar applications by women choosing to harass men who are away from the country and at a great distance, by statements unsupported by anything in writing or by any other corroborative evidence.

## INTEREST AFTER DECREE IN SUITS ON MORTGAGE.

As was pointed out by us some time ago (1 C. W. N. cccix and cccxvii), the doubt and hesitation which had been felt by the Allahabad High Court as to the legality of the practice of awarding interest to a mortgagee beyond the day fixed for payment into Court by the mortgagor of the money due on the mortgage has at last been set at rest by the decision of their Lordships of the Privy Council in *Maharajah of Bharatpur v. Rani Kanno Dei* (5 C. W. N. 137), which we report in our present issue. The Privy Council point out in clear and unambiguous language that if it be held that the effect of sec. 88 of the Transfer of Property Act has been to disallow interest to the mortgagee beyond the day fixed for payment into Court of the mortgage money, it works a startling abridgment of the remedies of mortgagees as previously understood. Their Lordships lay stress on the fact that, with the exception of the Allahabad High Court, it has always been the practice of the

Calcutta and the Madras High Court to allow such interest to the mortgagee and that such practice is in conformity with sec. 97 of the Transfer of Property which is in *pari materid* with sec. 88 of the same Act. It is noteworthy, however, that recently a Full Bench of the Allahabad High Court relying on *Rameshar v. Mahomed* (2 C. W. N. 633; 25 I. A. 179; 26 Cal. 43) may be said to have anticipated the present decision of the Privy Council (*Bakar v. Udit*, I. L. R. 21 All. 361). Their Lordships observe in the course of their present decision that the Allahabad High Court rested a little undue weight on the case of *Rameshwar Koer v. Syed Mahomed Mehdi Hossein Khan and others* (L. R. 25 I. A. 179; I. L. R. 26 Cal. 39; 2 C. W. N. 633) and that the point now in issue had not been raised in that case. Be that as it may, it is satisfactory to note that the controversy which had been started by the case of *Amolak Ram* (I. L. R. 19 All. 174) is now at an end.

We wish we could say the same of another point on which apparently the Courts in India are divided in opinion, we mean the question whether the rate of interest subsequent to the date fixed for payment should be at the contract rate or at what is called a reasonable rate. In the case of *Rameshwar Koer v. Syed Mahomed Mehdi Hossein Khan and others* (L. R. 25 I. A. 179; I. L. R. 26 Cal. 39; 2 C. W. N. 633) the Privy Council upheld the High Court of Calcutta which had altered the rate of interest from 4 per cent. as decreed by Court below to the stipulated rate of 12 per cent. and made it payable from the date of the institution of the suit until realization. Their Lordships observed "the second ground taken for the appeal is that the High Court have altered the rate of interest after the date of suit from 4 to 12 per cent. The Subordinate Judge evidently considered that the case fell within sec. 209 of the Civil Procedure Code which gives a discretion to the Court in such matters. The High Court founded their order on secs. 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. \* \* \* The mortgagor cannot complain if he is made to pay no more than he contracted to pay." These remarks of their Lordships were held by the Allahabad High Court in *Bakar v. Udit*, I. L. R. 21 All. 361, to decide that interest must be allowed at the stipulated rate up to the date of realization. On the other hand, the Madras High Court in the recent case of *Commercial Bank of India v. Ateendralayya*, I. L. R. 23 Mad. 637, have held that by the date of realization the Privy Council could only have meant the date fixed for payment into Court as contemplated by sec. 86 of the Transfer of Property Act. Sec. 86, no doubt, does not expressly provide for the payment of any

interest subsequent to the date fixed for payment into Court but it is doubtful how far that alone would justify any departure from such express dictum of the Judicial Committee as referred to above. Mr. Justice Shephard points out that after the day fixed for payment in the case of a mortgage decree, the rights of parties are merged in the decree and that there is no warrant for giving subsequent interest at the contract rate. The practice in England lends support to Mr. Justice Shephard's view and subsequent interest is there only allowed in those cases where such interest is secured by express or implied contract. (See the cases of *Popple v. Sylvester*, 22 Ch. D. 98 52 L. J., Ch. 54, and *Re Sneyd*, 52 L. J., Ch. 724, also *Fisher on Mortgage*, Art. 1555). In view of this conflict we earnestly wish that the High Courts in India may before long have further light from the Lords of the Privy Council for their guidance.

## Review.

THE INDIAN PENAL CODE with Notes. By J. O'Kinealy, Esq. New Edition, revised by C. P. Caspersz, Esq., I. C. S. Calcutta: Messrs. S. K. Lahiri & Co.

We welcome a new edition of O'Kinealy's commentaries on the Indian Penal Code. The cry of reclaiming this work from oblivion and presenting it to the profession in its present form is due Mr. Caspersz who has bestowed considerable labour on it. Although the larger compilations of Mayne, Starling, Agnew and Hamilton are in much more common use yet this book supplies a want which has long been felt. The annotations in this work are concise and to the point. The arrangement is good and the references to case law is exhaustive including as it does even the decisions of the Punjab Chief Court. The busy practising lawyer will undoubtedly find this handy edition of the Penal Code very convenient to consult in every day work. Messrs. Lahiri & Co. also deserve to be congratulated on the very satisfactory get up of the book.

## English Notes.

COURT OF APPEAL.—FRANKLYN v. CHAPLIN. Before the MASTER OF THE ROLLS and LORD JUSTICE COLLINS. 26th November 1900.

*Service of writ out of jurisdiction—Breach of promise action—Corroborative evidence—Order XI, Rule 1 (e)*

In this case which was a breach of promise action and the Defendant proprietor of an hotel in Griqualand East was away in South Africa, Mr. Justice Day had acceded Plaintiff's request to serve writ of summons on him there. The word "contract" in the above order it was argued, on this application for leave to appeal on behalf of the Defendant

should be understood as meaning an enforceable contract, while in this case it was not so, because beyond her own word regarding the breach she had not produced any corroborative evidence. It was contended that her application for service out of jurisdiction should fail until she satisfied the Court that she had corroborative evidence of which fact her affidavit said nothing.

The Court held that that was not necessary as a matter of law, what the Plaintiff had done was sufficient to give the Court discretionary power and Mr. Justice Day had exercised his discretion and no cause was shown for interference.

Mr. Foa made this *ex parte* application for the Defendant Henry Chaplin.

C. W. A.

*Leave refused.*

COURT OF APPEAL.—*In re THE PERL SETTLED ESTATES.* Before LORDS JUSTICES SMITH, WILLIAMS and ROMER. 25th June 1900.

*Pictures and heirlooms, variation of order concerning same.*

This was an application on behalf of Sir Robert Peel to vary the order of the Court of Appeal made on the 4th December 1899 permitting the sale of certain pictures and heirlooms. The heirlooms sold fetched £67,000 whereas it was anticipated the time that only about £30,000 would be recovered, on that value the trustees of the settlement undertook to secure a house for Lady Peel and her infant son in England and setting apart annually for Lady Peel. As the sale-proceeds were more than double it was sought on behalf of Sir Robert that £1,000 a year should be paid to him personally.

The Court refused to accede to the application, the order sought to be raised was made for the benefit of Lady Peel and the infant and the mere act that a larger sum was recovered was no ground or the desired variation.

The application was refused with costs which was to come out of the income of the heirloom fund.

Sir Edward Clarke, Q. C., and Mr. Lincoln Reed or the Applicant.

Mr. Ellgood for the trustees was not heard.

C. W. A.

*Application refused.*

COURT OF APPEAL.—*SHAW v. TAPP AND BAMBRIDGE.* Before MASTER OF THE ROLLS, LORDS JUSTICES RIGBY and COLLINS. 31st May 1900.

*Company law—Directors' liability—Resolutions of directors—Issue of shares—Measure of damages—Time for ascertaining value.*

The Plaintiffs Shaw and others as also the Defendants Tapp and Bambridge and one Holland were all shareholders in a Company called the St. Helens Development Syndicate Limited. Tapp, Bambridge and Holland were also directors thereof. The two former were the first directors. The questions in

this suit principally arose under cl. 88 of the articles of Association of the Company which authorized the directors and their assigns under certain circumstances to exercise the option within two years of the incorporation of the Company to have allotted to themselves their assigns or nominees ordinary shares but not exceeding 15,000 shares within a certain time. Five thousand shares were issued to them (Tapp and Bambridge) or their nominees in pursuance of the above article. Beyond this further shares were issued to them or their nominees in pursuance of resolutions of the directors which gave the two last-named additional similar options. The Plaintiffs claimed payment by Tapp and Bambridge of £43,000.

Mr. Justice North held that the Defendants were not liable for the allotments under the said cl. 88; but they were liable for those shares which they had secured under the directors' resolutions; these were not lawfully obtained and the directors were liable for misfeasance regarding same.

The appeal of the directors from that decision was dismissed by the Court of Appeal. They held that the said resolutions of the directors were *ultra vires*, and the allotments made in pursuance thereof were invalid. There had been nothing amounting to a ratification by the Company. As regards the proper measure of damages raised by the cross-appeal, the general rule was that a wrong-doer ought to be charged with the maximum price which could be obtained for the property which he had wrongly appropriated while the property was in his control, but because there was evidence that some shares had been sold at a particular price it was not to be assumed that all shares could have been similarly disposed of. Persons standing in a fiduciary position should be charged with the highest value; that was a sound principle, but with not more than the real value, and the value ought not to be ascertained by the price obtained on one occasion by the sale of a few shares, the surrounding circumstances must be taken into account. And the true date for ascertainment of the value of the shares is the date at which the party, who was liable for same, obtained them.

Mr. Eve, Q. C., Mr. Isaacs, Q. C., Mr. Lawson Walton, Q. C., Mr. Griffith and Mr. Craig for the Defendants.

Mr. Eady, Q. C., and Mr. Gregson for the Plaintiffs.

C. W. A.

*Appeal dismissed with costs.*

CHANCERY DIVISION.—*EVAN O'MORE v. MARY HARE.* Before MR. JUSTICE JOYCE. 14th November 1900.

*Vendor and Purchaser Act, 1874—Misedescription of property—Specific performance with compensation.*

*MANSER v. BACK* (6 Hare, 443) approved of and followed.

The applicant asked for a declaration that he was entitled to compensation for misedescription of a lot he had bought at an auction. That lot was described in the catalogue as lot 5. "Four similar houses

adjoining the last lot." Lot 4 was described as "Four capital private houses, each with hall entrance, gardens and outbuildings in the rear."

The applicant had gone over the houses described in lot 4, but as lot 5 was described as similar he did not view them. As a matter of fact lot 5 had not the entrance hall nor the water closets lot 4 had. After making his purchase and signing the contract and making the usual deposit on the 580 the price at which he bought, lot 5 applicant discovered the differences between the houses in lot 4 and lot 5 and at once asked the Defendant for compensation; and that being refused this summons was taken out under the above Act, whereby the Court was authorized to determine "any claim for compensation or any other question arising out of or connected with the contract." It was found on the evidence that the auctioneer at the time of sale pointed out the difference between the two lots, but the applicant did not hear what the auctioneer had said regarding same.

The learned Judge held that the above cited decision was a clear authority for the vendor to be let off his contract in such a case as this. He said that case was approved of in *Tamplin v. James*, 15 Ch. D. 217, and appeared to him to be correctly decided.

He held, therefore, that applicant cannot have specific performance with compensation.

The contract was ordered to be rescinded. Applicant to have costs of investigation of title including examination of auctioneer.

*Mr. Jolly* for the Plaintiff.

*Mr. Hewet* for the Defendant.

*Summons dismissed? Defendant to pay his own costs.*  
C. W. A.

CHANCERY DIVISION.—*KING AND SMITH v. FRICKER*. Before MR. JUSTICE FARWELL. 25th May 1900.

*Fraud of third party—Mortgage executed without knowledge of contents, reliance on solicitor, payment by cheque—Time of payment.*

The question in this litigation was which of two innocent parties must suffer owing to the fraud of a third party, a solicitor called Eldred. The Plaintiff Joseph King had employed Eldred for several years for the purchase of small tenements for him. Plaintiff used also to deposit money with Eldred and receive 10 per cent. interest thereon. The evidence disclosed that Plaintiff trusted Eldred implicitly and signed whatever he told him to sign, he was an ignorant man. In April 1894 Eldred induced Plaintiff to execute an indenture of mortgage of a piece of land to Defendant for an advance of £300 with interest at 5 per cent. The Defendant paid a cheque for that amount to Eldred who cashed it that day and used the money for his own purposes.

Plaintiff now claimed a declaration that that indenture was void and should be cancelled and the

title-deeds delivered up to him. It was also contended that the money having been paid by cheque was not good payment and the deed void because obtained by fraud.

The learned Judge referring to *Hunter v. Walters* (7 Ch. 75) held that the deed though voidable on the ground of fraud was not a void deed. The Plaintiff was aware that he was doing something, though no doubt he never intended to mortgage the property and taking all the disclosed facts as to Plaintiff's previous dealings with Eldred and his absolute confidence in him, he must hold the deed to be valid. Plaintiff was estopped by the same circumstances as rendered the deed valid from denying that Eldred had authority to receive the money (see also sec. 56 of the Conveyancing Act). The law made no distinction between hours of the same day, the cheque in this case was cashed the same day that the deed was produced to Defendants so the payment was a good payment as Defendants were trustees. Plaintiff must pay their costs.

*Mr. Hugo Young, Q. C., and Mr. J. Edwards* for the Plaintiff.

*Mr. Hughes, Q. C., and Mr. G. Henderson* for the Trustees.

C. W. A.

*Suit dismissed with costs.*

CHANCERY DIVISION.—*J. & J. CASH, LIMITED v. JOSEPH CASH*. Before MR. JUSTICE KEKEWICH. 25th May 1900.

*Trade name, imitation—Defendant bearing same name as Plaintiff—Tendency to deceive.*

The name of the Plaintiff Company was well known in Coventry as manufacturers of ribbons, frillings, tapés and other textile goods. In 1895 the old established business of J. and J. Cash was turned into a limited liability company. The Defendant Joseph Cash was one of its directors. The company it was agreed were to secure and exclusively use J. and J. Cash's woven names and initials and their manufactures. In 1898 the Defendant was allowed to retire from the directorate. After an unsuccessful attempt by Defendant to start a similar company under the name and style of Joseph Cash, Limited, he started a private business calling it Joseph Cash & Co.

The present was an action to restrain him from so doing and the Plaintiffs sought an injunction until the trial of the cause. The learned Judge granted it relying on *Reddaway v. Banham* (1896, A. C. 199) and *Sackner v. Apollenaris Co.* (1897, 1 Ch. 893). No person, he said, must sell his goods as J. and J. Cash's manufactures of frillings, ribbons, &c., as that name had been well known in Coventry for years in connection with such business. The case, he thought, was one of gross dishonesty in view of the fact that this Defendant was for years a director of the company; because his name was Cash that did not

entitle him to act as he was doing. No body has any right to represent his goods as that of another.

*Mr. Ellgood for the Defendant.*

*Mr. Warrington, Q. C., and Mr. Sargant for the Plaintiffs.*

*Injunction granted.*

C. W. A.

QUEEN'S BENCH DIVISION.—*LANGLY v. BOMBAY TEA COMPANY, LIMITED.* Before JUSTICES GRANTHAM and CHANNELL. 13th June 1900.

*Merchandise Marks Act, 1887, sec. 2.—“Apply a false trade description.”*

The consideration of this case under the above Act (50 and 51 Vict., c. 28) was under the following facts of the case. Some tea was lying in packets on Defendant's counter at his shop, in Clayton Street, Newcastle. They had stamped in ink “the weight of this package including the wrapper is  $\frac{1}{2}$  a pound.” On 2nd December 1899 the Plaintiff called at that shop and demanded two half pounds of tea a salesman took two packets and gave them to Plaintiff who paid £2 6s. for them. On the inspector of weights and measures measuring the contents of the packets at Plaintiff's request they were found to be less than  $\frac{1}{2}$  a pound, one had even a less quantity than the other one. In each case, however, the weight including the paper was more than  $\frac{1}{2}$  lb. Inside the packet was found a ticket with the information that on presentation thereof the person presenting it would receive some article as a present. Upon those facts the information was laid by Plaintiff against the Defendant under the above Act for selling 2 half pounds of tea to which a false trade description as to weight was applied. The Newcastle justices held that a trade description meant some thing written printed or stamped, and that a description expressed in words or implied by conduct was not sufficient to constitute an offence under the Act and so dismissed the information, a case was however stated.

The revisional Court held that there had been no false description the Defendant had applied a description showing that what they were proposing to sell was less than  $\frac{1}{2}$  a pound. It could not therefore be said that they had applied a description to the effect that what they were selling was half a pound. *Cooper v. Moor* (1898, 2 Q. B. 300) was referred to as showing that the enactment did not apply to verbal descriptions.

*Mr. Robson, Q. C., and Mr. Jacobs for the Plaintiff.*

*Mr. Joseph Watson, Q. C., and Mr. C. Williams for the Defendant, Respondent.*

*Appeal dismissed with costs.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL.—Appeal from the Madras High Court. *IMMUDIATTAM THIRUGNANA S. O. KONDAMA NAIK v. PERIYA DORASAMI AND ANOTHER.* 8th December 1900.

*Alienation—Intention—Consideration—Registration.*

The facts of this case will fully appear from the report of the hearing published in this volume, 5 C. W. N., at p. xxviii (28).

LORD HOBHOUSE in delivering their Lordships' judgment on the 8th of December last observed that though there might have been an intention to transfer the property, it never was effected in the mode required by law; and that the intended transferee could not call for implement of the intention, because he failed to show any contract founded on valuable consideration and that their Lordships therefore advised Her Majesty to dismiss the appeal with costs.

*Mr. Upjohn, Q. C., and Mr. Ross for the Appellant.*

*Mr. Phillips for the Respondent.*

C. W. A.

*Appeal dismissed.*

PRIVY COUNCIL.—Appeal from the Allahabad High Court. *RAI RADHA KISHEN v. COLLECTOR OF JAUNPUR.* 8th December 1900.

*Secs. 108, 595 (a), 594, Civil Procedure Code—Remand—Order final or interlocutory.*

The facts of this case will fully appear from the report of the hearing of this appeal before the Board, published in this volume, 5 C. W. N., at p. xxix (29).

LORD ROBERTSON in giving their Lordships' judgment said the Appellant represented that by the High Court's order the decree in the suit had been set aside and the case remanded to be disposed of on its merits. The Respondent disclaimed any such sweeping effect, and held that what was remanded was merely the application immediately before the Court, namely, the application to set aside the decree, and that it was that application which the Subordinate Judge would, under the remand, proceed to dispose of, by allowing the Respondent to endeavour to satisfy him of the conditions specified in sec. 108 and then, if that be done, by setting aside the decree. Their Lordships were clearly of opinion that the Respondent's was the just construction of the order of the High Court. The next question was whether an appeal lay to Her Majesty in Council, and that depended on whether the order was a final order in the sense of sec. 595 (a) as modified by sec. 594 of the Civil Procedure Code. Their Lordships considered that the order was in no sense final; it was a purely interlocutory order directing procedure. Accordingly their Lordships would humbly

advise Her Majesty to dismiss the appeal. The Appellant must pay the costs.

*Mr. Moyne* for the Appellant.

*Mr. Phillips* for the Respondent.

*Mr. Branson* for the Mortgagee.

C. W. A.

*Appeal dismissed.*

### PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR RICHARD COUCH.

1900.

8, December.

*Special leave—Value of appeal and Appellant's interest.*

The present suit was brought against the Petitioners for cancellation of certain deeds of conveyance on the allegation that the properties the subject-matter thereof were endowed properties of the Temple. The Plaintiffs also prayed for the removal of Basant Das one of the Petitioners owing to alleged breach of trust and the appointment of a new trustee to succeed him.

The Court of first instance dismissed the suit, on the ground that the properties were not trust properties.

On appeal of Plaintiffs to the Court of the Judicial Commissioner, that Court on 27th June 1899 held that it was trust property and that the transferees were not *bona fide* purchasers for value without notice of the trust. Therefore that Court cancelled the conveyances, removed Basant Das and appointed the Plaintiff Jamna Das as trustee.

The value of the subject-matter of the suit and that in the Court of Appeal was Rs. 17,000, but the direct and separate interest of each of the Petitioners was of less value than Rs. 10,000.

The application for leave to appeal to Her Majesty in Council in India was made by only one of the Petitioners; that application was dismissed by the Judicial Commissioner on 8th June 1900, on the ground that the separate interest of the applicant was below the appealable value; that the decree did not involve, so far as he was concerned directly or indirectly, any claim or question to or respecting property of the value of Rs. 10,000 and that the case was not otherwise a fit one for appeal.

*Mr. Degruyther* for the Petitioners submitted that the appeal did involve a claim or question respecting property over Rs. 10,000 in value because a finding in favour of the applicant before the Judicial Commissioner would practically reverse the whole decree.

Their Lordships granted leave to appeal.

C. W. A.

*Leave granted.*

### PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

1900.

Heard, 21, November.

Judgment, 8, December.]

BANARSI PARSAD

v.

KASHI KRISHEN NARAIN

and another.

*Appeal below value, when allowable.*

This was an appeal from a decision of the Allahabad High Court reversing that of the Sub-Judge of Bareilly.

The suit was brought to recover from the Respondents the sum of Rs. 14,332 as due on account of mesne profits and interest thereon. The Sub-Judge gave the Plaintiff a decree for Rs. 13,975-1-9. On appeal by the Respondents to the High Court the decree was varied reducing the amount of mesne profits awarded to Plaintiff from Rs. 13,975-1-9 to Rs. 10,066-15-2. So that the matter involved in the appeal to Her Majesty in Council was entirely limited to a sum of under Rs. 4,000.

The questions raised involved the interpretation of secs. 43 and 44 of the Civil Procedure Code.

*Mr. Ross* for the Appellant contended that those sections had been erroneously construed by the High Court. That the cause of action for the suit decided on 1st December 1890 was not the same as the cause of action for the present suit. That the cause of action for mesne profits was different from the cause of action for recovery of the land. A separate suit for the recovery of mesne profits lies. *Mr. Ross* referred to secs. 43 and 44, C. P. C., relying on 19 Calcutta Series, p. 615, he also referred to I. L. R. 11 Madras Series, those being the cases mentioned in the judgment of the High Court, also to secs. 8, 9 and 10 of Act 8 of 1859.

SIR RICHARD COUCH.—If you sue for mesne profits must you not sue for the whole amount due.

*Mr. Ross*.—I did not sue for *Wasilat* but for 2 years rent.

SIR RICHARD COUCH referred to secs. 211 and 219, C. P. C.

THE COURT.—The appeal is for a sum much under the appealable amount, what power had the High Court to grant leave to appeal.

*Mr. Ross*.—It involves a substantial question of law and it has come up in the usual way. It was not objected to.

No one appeared for the Respondents.

LORD HOBHOUSE delivered their Lordships' judgment advising Her Majesty to dismiss the appeal and observing that the existence of a substantial point of law was not sufficient to give a right of appeal unless it was of proper value or involved questions of great public or private importance.

C. W. A.

*Appeal dismissed.*



## PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

1900.

Heard, 14 &amp; 15, November.

Judgment, 8, December.

RAJA RAMESHAR BUX  
SINGH

v.

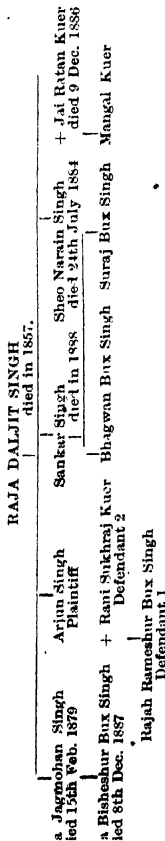
BABU ARJUN SINGH.

*Construction—Grant of villages, if heritable or for life.*

This was an appeal from a decision of the Court of the Judicial Commissioner of Oudh reversing that of the Civil Judge of Lucknow.

The Plaintiff, Arjun Singh, sued to recover possession of the villages Sikandarpur and Samnapur making title thereto as next heir to his brother Sheo Narain to whom it was his case these villages had been orally granted by Raja Bisheshur Bux in 1879.

The following pedigree shows the relationship of the parties :—



In 1865 Raja Daljit gave the village of Bankagarh to Arjun Singh and Davindgarh to Shankar Singh, and for his youngest son Sheo Narain, then

an infant, he set apart the village Nidhan Kuar Khera. At the summary and regular settlements thereafter the villages given to Arjun and Shankar were respectively settled with them but Nidhan Kuar Khera was not settled with Sheo Narain but was included in village Sheogarh and *sanad* given to Raja Jogmohan. This was in 1863. In 1868 Arjun and Shankar sued Jagmohan for half the entire estate of Jagdispur which included the said village Nidhan Kuar Khera. The case was referred to the British Indian Association and their award and the remarks thereon of Colonel Barrow, the then Financial Commissioner, were referred to and relied upon for the Plaintiffs.

On the 15th February 1879, Jagmohan died and was succeeded by Bisheshur Bux soon after the last-named under an oral arrangement placed Sheo Narain in possession of Sikandarpur and Samnapur, and on the 2nd May 1879 he signed applications for the record of Sheo Narain's name in the revenue registers. The material portions of these applications are as follows :—

"That, whereas, agreeably to my verbal promise, I have, after the execution of the deed of relinquishment regarding the village Nidhan Kuar Khera, Pargana Kumhravan, District Rae Bareilly, and other properties left by the late Raja Jagmohan Singh, Talukdar of Kumhravan, given the entire village Sikandarpur valued at Rs. 13,500 (thirteen thousand, five hundred), and Samnapur, valued at Rs. 4,400 (four thousand and four hundred), both situated in the Pargana and Tehsil of Mohanlalganj, District Lucknow, and owned and possessed by me, to my own uncle (paternal), Sheo Narain Singh, for his maintenance and placed him in possession and occupation of both the said villages; and whereas owing to the demise of my father, the said Raja Jagmohan Singh, a case for mutation of names respecting the *Hakkiat* (proprietorship), and *Lambardari* of village Sikandarpur, Pargana and Tehsil Mohanlalganj, District Lucknow, is pending, therefore submitting this application, I pray that when my name is substituted in place of the deceased Raja, the name of Babu Sheo Narain Singh may, in the terms of this application, be substituted and entered in records in place of my name in respect of the *zemindari Hakkiat* and *Lambardari* of the entire village Sikandarpur, Pargana and Tehsil Mohanlalganj, District Lucknow, as its proprietor in perpetuity."

The application for the other village was in somewhat different terms, which was noticed during the course of the argument.

On obtaining the grant of these villages Sheo Narain gave the following deed of relinquishment :—

" . . . . My father, Raja Daljit Singh, had, during his lifetime, given me the *muafi* village of Nidhan Kuar Khera . . . . valued at Rs. 2,000, for my maintenance. I, however, lived jointly with him, the said Raja, and did not therefore take

possession of the Guzara (village). On Raja Daljit Singh's demise the village continued under possession and enjoyment of Raja Jagmohan Singh. It is a small village, and it is not possible for me to maintain myself from the profits thereof. For this reason, Raja Bisheshur Bux Singh . . . granted to me out of his own pleasure village Sikandarpur . . . valued at Rs. 13,500, and village Samnampur, valued at Rs. 4,400 . . . as an exchange for the (Guzara) village Nidhan Kuer Khera, under an oral agreement."

On July 23rd, 1884, Sheo Narain died. His widow's name was thereupon mutated in the revenue register with regard to the 2 villages now in dispute. The widow held for 2½ years until her death in December 1886, after that the name of Bisheshur Bux was placed in the revenue registers.

The last named died in December 1887 and was succeeded by his son the Appellant.

On the pleadings of the parties the substantial question for determination was, "whether by oral grant about May 1872 Bisheshur Bux conferred an absolute heritable estate in the villages in suit on Sheo Narain."

The Civil Judge was of opinion that the surrounding circumstances did not justify the inference that Bisheshur Bux intended to grant an estate of inheritance and therefore dismissed the suit. The Judicial Commissioner held that the intention that Sheo Narain should be granted a heritable estate was sufficiently shewn by the deed of relinquishment, the applications for mutation of names aided by the fact that Sheo Narain had a heritable estate in the village Nidhan Kuar Khera; and by the conduct of Bisheshur Bux in allowing the name of Sheo Narain's widow to be entered in the collector's books. The decree of the Civil Judge was reversed.

In this appeal the arguments were based on the construction to be placed on the abovementioned documents and the acts of Bisheshur Bux.

Mr. Degruyther for the Appellant, having referred to the documents and the judgments, cited.—*Moulvi Mahomed Abdul Majeed v. Mussamat Fatema Bibi* (12 I. A., p. 159, reading at p. 163). Same volume, p. 205, *Toolshi Pershad Singh v. Raja Ram Narain, Anund Lal Singh Deo v. Maharaja Dheraj Gurrood Narayan Deo* (5 Moore I. A., p. 82, top of p. 103).

LORD DAVEY.—That decision was passed on an admission made by the parties and has nothing to do with this case, 4 I. A., p. 223 at 225 (*Babu Lekraj Roy v. Kenhya Singh*). Judicial Commissioner's select case No. 209. The right to maintenance is not heritable. *Roshan Singh v. Bulwant Singh* (27 I. A., p. 51).

He also urged that assuming that the Judicial Commissioner's decision was correct, still Appellant would not be entitled to the property because Sheo Narain's daughter Mangal Koer would take; he contended that the Civil Judge was wrong in finding

that a custom of exclusion of females was proved and the Judicial Commissioner had not determined that point. Moreover even if Mangal Koer was out of the way Appellant would only be entitled to half because his brother Shankar Singh would take the other half.

SIR RICHARD COUCH.—Do you want us now to go into the question of custom? We have not the finding of the Judicial Commissioner.

Mr. Degruyther then referred to certain *Wajit-ul-ur*.

Mr. Mayne referred in the first instance to the *Tagore* case in Sup. Vol., L. R. I. A., p. 65. Then to *Raja Nursing Deb v. Roy Koylash Nath* (9 Moore I. A., p. 55 at p. 64).

LORD HOBHOUSE.—You have the very strong words there *nasun bad nasun*.

Mr. Mayne.—No doubt there are very strong words, but it is the intention that is to be considered and not the words. *Bhavya Ardawan Singh v. Raja Udey Pertab* (23 I. A., p. 64 at 73) which shows that a permanent grant may be inferred even if there are no words conveying that meaning.

LORD HOBHOUSE.—The intention was gathered from the fact that the property was allowed to pass from father to son for two generations.

Mr. Mayne quotes *Lallit Mohun Singh Roy v. Chukkan Lal Roy* (24 I. A., p. 76) refers to the word "Malik" as sufficient to create a heritable estate.

SIR RICHARD COUCH.—That was not a case of maintenance.

LORD HOBHOUSE.—The expression *Malik* in that case was connected with a reference to a future generation.

Mr. Mayne referred to *Maharam Beni Pershad v. Dulh Nath Roy* (26 I. A., p. 216) reads last lines of p. 224 where the word *Dwami* was used.

Mr. Mayne urged that the case cited from 12 I. A., p. 159 had no bearing on this case, referring to p. 163. The passage with the words "always and for ever" "according to several decisions of this Board do not *per se* extend the interest beyond life," he urged that he did not know what "decisions" were there noticed by their Lordships, he submitted it must be the *istemrari mokurari* cases. The case cited from 4 I. A., p. 223, was of that nature. We must assume that a grant in substitution of an absolute grant was also an absolute grant.

Mr. Degruyther replied. He referred to *Muhammed Imam Ali Khan v. Sardar Husain Khan* (25 I. A., p. 1) and to sec. 16, Oudh Land Revenue Act XVII of 1876.

SIR RICHARD COUCH in delivering their Lordships judgment observed that in their Lordships' opinion the decree of the Original Court ought not to have been reversed and that they would humbly advise Her Majesty to affirm it and to reverse the decree now appealed from with costs and costs of the Courts below.

C. W. A.

*Appeal allowed with costs.*

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, JANUARY 14, 1901.

[No. 8

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### REPORTS (See Index.)

WE ARE INFORMED THAT THERE ARE BETWEEN SEVEN hundred fifty to eight hundred cases on the Original Side ready for hearing. The two judges on the Original Side are ordinarily very hard-worked and we do not consider it possible for them in any way to cope with this accumulation. Under the present arrangements, it will take another two years and a half or perhaps longer, to dispose of these cases. But in the meantime new suits will continue to swell the board. Matters have come to such a pass that even simple suits, for liquidated claims, which require a very short hearing cannot be reached. The only way out of the present situation is to have a third Court on the Original Side.

ANOTHER CAUSE OF THE LAW'S DELAYS ON THE Original Side is attributable to the present constitution of the offices connected with the Courts. The present establishment may have been sufficient when there was only one Court on the Original Side but it has for a long time been found insufficient to cope with the business of two Courts. When two Courts for the first time commenced sitting on the Original Side it was not anticipated that both Courts will continue to sit permanently and it was not considered necessary at the time to add to the ministerial staff

of the Court. The result has been that an amount of work has devolved on its officers which it is impossible for them to cope with with the present staff. We have no desire to enter into details to-day. We need only say that in case a third Court is found necessary, a corresponding expansion of the offices should not be overlooked.

OUR ATTENTION HAS BEEN DRAWN TO A WANT OF uniformity in the practice on the Original Side with regard to the granting of interest on simple debts during the period that a suit is pending. It was the practice with some judges to allow interest at the contract rate between the period of filing plaint and the passing of the decree, provided the rate of interest did not exceed 9 per cent. As for interest after decree, the Court has always decreed interest at 6 per cent. from the date of decree. Some of the judges adhere to the old practice but some disallow interest altogether pending suit unless there are exceptional circumstances and others allow interest at the contract rate, no matter what that may be, for the whole period up to decree. The Court has, no doubt, an absolute discretion with regard to decreeing interest pending suit at such rate as may seem to it reasonable, but in view of the time that elapses between the institution of a suit and its hearing, we consider it but equitable that the Court should decree interest pending suit at a reasonable rate. It is much to be regretted if from want of sufficient number of Judges on the Original Side people are kept out of their money for an indefinite time and the debtors are made to pay interest for a period for which they cannot be said to be in default.

IT WILL BE NOTICED THAT IN THE CASE OF *Empress v. Dolegobind Das*, which we report in this issue at p. 169, it has been held, following *Opoorba Kumar Sett v. Prabod Kumary Dassi* (1 C. W. N. 49), that a Presidency Magistrate is competent to revive a complaint on fresh evidence. The absence of any express provision in the Code in this respect has given rise to some conflict amongst the decisions of the Calcutta High Court. Besides those cases referred to by the learned Chief Justice in his judgment we may refer to two others, which were reported in our last volume: *Ram Coomar v. Ranjee* (4 C. W. N. 26); *Damini Dassi v. Hurry Mohun* (4 C. W. N. 46). We note

with satisfaction that a similar point recently came up before the Criminal Revisional Bench and that in view of the conflicting decisions the question has now been referred to a Full Bench. The question for the consideration of the Full Bench is:—"Whether a Presidency Magistrate is competent to revive a warrant case triable under Ch. XXI of the Code of Criminal Procedure in which he has discharged the accused person."

### English Notes.

**COURT OF APPEAL.**—WHYLER v. THE BINGHAM RURAL DISTRICT COUNCIL. Before THE MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and STERLING. 8th November 1900.

*Liability for misfeasance—Distinguished from nonfeasance.*

The action was brought by the widow and administratrix of a public hackney cab driver for damages owing to his death which the Plaintiff alleged was caused by an act of misfeasance on the part of the Defendants who occupied the position of surveyor of high ways. In 1877 the Defendants' predecessors had put up a fence between the road and a stream which ran alongside of it, for the safety of wayfairers along that road in times of flood. As a matter of fact the fence so erected existed for 22 years. In 1899 the Defendants' surveyor reported that the fence was in a bad state of repairs that it was not needed and to put it into proper repair would require considerable outlay. The result being that in January 1900 it was taken down, and the posts which the surveyor had recommended should be put up at each end were in course of erection, before that was done Plaintiff's husband on a night while he was driving along the road, which owing to heavy floods was covered with water, drove into the ditch 7 feet deep and was drowned. Mr. Justice Wills before whom the cause was heard left it to the jury to say whether the removal of the fence, under the circumstances, and as it was done, was consistent with proper regard for the safety of persons using the road. The jury answered that question in favour of Plaintiff and damages were awarded by that learned Judge.

On this appeal by the Defendants the Court said, for an act of nonfeasance Defendants would not be liable; but was not this a case of misfeasance which caused the death in question. The object of the enquiry Mr. Justice Wills made of the jury was to see whether what was done was an act of misfeasance or not. It was an active part on the part of the Defendants in pulling down the fence which caused the accident. On the finding of the jury the Court must hold that it was an act of misfeasance. The application for a new trial must be dismissed with costs.

Mr. Young, Q. C., and Mr. Appleton in support of the appeal.

Mr. E. Smith and Mr. Walker for the Plaintiff.

*Appeal dismissed.*

C. W. A.

**CHANCERY DIVISION.**—TAFF VALE RAILWAY COMPANY v. THE AMALGAMATED SOCIETY OF RAILWAY SERVANTS. Before MR. JUSTICE FARWELL. 5th September 1900.

*Trade unions—Consideration of Trade Union Acts, 1871-6.—Liability for wrongs—Injunction.*

Plaintiffs took out a summons against two secretaries of the Defendant Society, as also against the Society itself, for restraining them from besetting or watching directly or indirectly any of the Plaintiffs' servants employed by or for them at their works, for the purpose of dissuading or preventing or hindering Plaintiffs' servants from working for Plaintiffs, and so breaking their contract. The Court at the first hearing had granted the injunction sought against the two secretaries of the Defendant Society, the general secretary and the organizing secretary, but it had reserved for consideration, whether an injunction should likewise issue against the Amalgamated Society itself. The latter took out a summons to have their name as Defendants struck out on the ground that they were neither a corporation nor an individual and so could not be sued in a quasi-corporate or any other capacity, contending further that if they were wrong in that ground, yet no injunction should be granted against them.

The learned Judge in delivering judgment alluded to sec. 16 of the said Act of 1876 which defined a trade's union, and said that such association owed its validity to the Trades Union Acts, 1871-6. This was an action in tort. The judgment then proceeds to consider what according to the true construction of the Trades Union Acts the legislature has enabled trades unions to do, and what if any is their liability for wrongs done to others in the exercise of its lawful powers. It states that it was competent for the legislature to give to an association of individuals which is neither a corporation nor an individual a capacity for owning property and acting as agents and that such capacity in the absence of express enactment to the contrary, involves the necessary correlative of liability, to the extent of such property for the acts and defaults of such agents. The legislature had legalized such an association and it must be so dealt with. It cannot be that the legislature had sanctioned the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for wrongs they may do to others; giving them a wide capacity for evil without any liability for it. On the contrary, the proper construction of the statutes was, that in the absence of express intention to the contrary, the

legislature intended its creature shall stand on the same footing as the general law would impose on a private individual doing the same thing. For such wrongs arising as they do from the wrongful conduct of the agents of the Society in the course of managing a strike the Court held the Society was liable and they could be sued in their registered name.

*Mr. Williams, Q. C., and Mr. Gregory for the Plaintiffs.*

*Mr. Napier and Mr. Evans for the Defendants.*

*Decision in favour of Plaintiffs:*

*Injunction granted against the Society.*

C. W. A.

**COURT OF APPEAL.**—*Taff Vale Railway Company v. Amalgamated Society of Railway Servants and Others.* Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and STERLING. 21st November 1900.

The Court of Appeal as above constituted have on the appeal of the Society, who were Defendants in the litigation, reversed the decision of Mr. Justice Farwell. They decided that a liability to be sued is not a liability which should be created by implication; a trade union cannot be sued as is now attempted. There was no statute empowering this action to be brought against the union in its registered name, it was not maintainable against the Amalgamated Society of Railway Servants' co-nominee; the Defendants were to be struck out and injunction against them dissolved.

*Mr. Haldane, Q. C., Mr. Robson, Q. C., Mr. Napier and Mr. Evans for the Society.*

*Sir Edward Clarke, Q. C., Mr. Williams, Q. C., and Mr. Bolman Gregory for the Plaintiffs, the Railway Company.*

C. W. A.

*Appeal allowed with all costs*

**COURT OF APPEAL.**—*Rich v. Cook.* Before THE MASTER OF THE ROLLS, LORD JUSTICES COLLINS and STERLING. 19th November 1900.

*Solicitors and speculative action; dictum of Lord Russell of Killowen in Ladd v. London Road, Car Co. (The Times, 24th March 1900) approved of.*

In an action for injury to an infant caused by the negligent driving of the Defendant company's driver, of an omnibus, the jury found for the Defendant, upon which Mr. Justice Darling, before whom the trial had taken place, directed that Plaintiff's solicitor should attend before him. The solicitor did so and was questioned by the learned Judge concerning certain letters which emanated from his office during the progress of the cause under his signature. The learned Judge refused his application for time to enable him to instruct counsel on his behalf and ordered that he should personally pay the Defendants' costs.

On the solicitor's appeal, the Court of Appeal heard his witness and was satisfied that the contents of the letters were satisfactorily explained and the charges formulated on them proved to be baseless. They therefore allowed the appeal and directed the Defendant to pay the costs of it. In the course of the judgment, the Master of the Rolls expressed entire approval of the view which the late Lord Chief Justice in the above case had expressed in summing up to the jury, as regards the duty of a solicitor in a speculative action. There was no impropriety at all in a solicitor's merely conducting a speculative action, otherwise many poor people would be unable to secure their just rights, on the supposition that the solicitor had honestly by careful enquiry satisfied himself that a proper case existed.

*Mr. Wilby, Q. C., and Mr. Drury for the Solicitor.*

*Mr. McCall, Q. C., and Mr. Carrington for the Defendant.*

C. W. A.

*Appeal Allowed.*

**COURT OF CHANCERY.**—*Rake v. Hooper.* Before Mr. JUSTICE KEKEWICH. 6th December 1900.

*Rectification of a voluntary settlement.*

The Plaintiff, Mr. Herbert Rake, a stock-broker, had married in 1872. In 1875 he had one child, the issue of the marriage living. Being about to enter into a partnership for carrying on the business of a stock-broker, he executed a voluntary post nuptial settlement of certain properties. The settlement was for his wife for life and after her death upon trust for his children. The Defendants were the children some of whom are minors and the trustees of the settlement.

Mrs. Rake died on 23rd September 1899. The Plaintiff stated that it was after the decease of his wife that he discovered that the settlement reserved no life interest for himself, the settlor, after his wife's death, so that *quoad* the property settled he was dependent on his children. He, therefore, claimed a rectification of the document on the ground that that was not his intention. The Plaintiff and the solicitor who prepared the deed were examined. The learned Judge held that the Plaintiff had not made out a case which would justify him in granting a rectification. It was settled law that the Court could only rectify a settlement, which was a matter of contract, when it was shown that both parties were in error—that something had been inserted or left out which did not express the intention of either party. The Court must be satisfied before ordering the rectification of a voluntary settlement, that instructions were given and having been given were not followed out. In this case the solicitor's deposition proved that the object the Plaintiff had in view in 1875 was to provide for his wife and children in case the risk he was undertaking ran him into bankruptcy and in the draft deed prepared at the time the remainder for the survivor

of the wife and husband usually inserted was inserted, but was afterwards struck out. In his opinion the Plaintiff had assented to the omission of the life interest to himself. It would be mischievous to allow such a settlement to be amended.

*Mr. Warrington, Q. C., and Mr. Marcy for the Plaintiff.*

*Mr. Dun Lam for the Trustees.*

*Mr. Renshaw and Mr. E. Smith for the children.*

C. W. A.

*Action dismissed.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM THE MADRAS HIGH COURT.]

LORD HOBHOUSE. VASUDEVA PADHI KHADANGA  
LORD DAVEY. GARU, Defendant, Appellant,  
LORD ROBERTSON.  
SIR RICHARD COUCH. MAGUNI (MAGATA) DEVAN\*

1900.

BAKSHI MAHAPATRU LU GARU,

16, November.

Plaintiff, Respondent.

*Gift to a member of joint family, whether gift to individual or family—Burden of proof.*

This was an appeal from a decision of the Madras High Court which reversed a decision of the District Court of Ganjam.

The suit was brought by the present Respondent to obtain a partition of two villages in which he claimed to be jointly interested with the Appellant.

The question for decision was whether a grant made originally in the sole name of the Appellant's father, was made and held for the joint benefit of the grantee and his brother, father of the Respondent, or whether it was made and held for the exclusive benefit of the grantee and his descendants.

The following is the family pedigree:—

Bayana Padhi Khadanga  
(Died before 1858),  
Married Kesaramani.

Gurunatha Padhi  
(Died 1878,  
Married Basini Patram.

Vasudeva Padhi Khadanga  
Defendant, Appellant,  
Born about 1850.

Mangata Devan  
Plaintiff, Respondent,  
Born about 1848.

Kasi  
Viswanatha

The property now in dispute consists of two Inam villages of Rajendrapuram and Brundavana Chandrapuram. These villages the property of the Raja of Chikati were assigned by him to Bayana Padhi, who was the senior member of his own family in 1847 and 1848. The original grants were lost. An *arzi*, dated 23rd July 1847, purporting to be from the zemindar to the Collector was produced informing that officer that he had made certain grants of forest land in those villages to Bayana Padhi.

In 1856 in a suit between the representatives of Bayana and Gurunatha, the Court, as regards the estate of Baruva, held that no division had taken place between the brothers and the property was joint.

The Plaintiffs produced and relied on a power-of-attorney purporting to be executed on 31st August 1858 by the two widows above-named Kesaramani and Basini as mothers and guardians of their respective sons the Plaintiff and the Defendant to certain persons "to look after the whole of the business in respect of our Malukdhari Mokhasas Inams, leasing out lands, etc." This was marked Exhibit A.

The Plaintiff also relied on certain suits brought by the zemindar of Chikati against the parties to this suit for arrears of Shrotrium and road-cess on the two villages now in dispute. These suits were in 1878, 1880, 1882. There were also receipts granted by the zemindar, the last of them being in June 1887 for payment made by Plaintiff.

The Defendant denied joint possession up to 1888, asserted that during his minority the Plaintiff concealed from him the nature of his interest and had been taking a portion of the rents by collusion with the raiyats; that on becoming aware of it he took and retained sole possession since 1878. He claimed sole title under the grant to his father.

The main issues were:—

Whether the grant of the plaintiff villages by Chikati zemindar was to the father of Defendant only, or to the fathers of Plaintiff and Defendant (who were brothers) jointly?

Whether the Defendant has been in possession of the said villages (as he alleges) since 1878, or (as alleged by Plaintiff) only since 1888?

Upon the evidence the District Judge dismissed the suit.

In his judgment he commented on the evidence on both sides and concluded as follows:—

"Finding therefore on the first issue that Plaintiff had entirely failed to make good his contention as to a joint gift of the plaintiff villages originally to his father with the father of Defendant and on the second and third issues that the documentary evidence produced for Plaintiff was on the face of it evidence which had been created for the purpose of this suit and that the oral evidence was under these circumstances worthless, "I did not consider it necessary to call for any evidence for the Defendant beyond what was necessary to render his documentary evidence admissible. For defence therefore only two witnesses were examined whose evidence has been referred to in paragraph 9."

Against this decree and judgment the Plaintiff appealed to the High Court which reversed the decision, the grounds of which they professed themselves unable to understand, and remanded the case so that the Defendant might examine the witnesses whom he had originally named or summoned.

On the further evidence produced on the remand another Judge agreed with his predecessor and came to the following conclusions:—

"On the first issue I find that the suit villages were granted to Defendant's father for his own benefit, on the second issue that the Defendant has

been in possession since 1880 on the third issue that Plaintiff never acquired any title by possession and therefore he had no right to sue and (fourth issue) that the suit was not time barred.

"The result is that the suit is dismissed and Plaintiff ordered to bear his own and Defendant's costs throughout."

On the Respondent again appealing to the High Court the following order was passed on the 25th March 1896 :—

"Assuming that the *Cowle* was made in the name of the elder brother, who was at the time joint with the other members of the family, we think the evidence of the enjoyment of the property is strong to show that the family took, and not the one brother exclusively.

"It is admitted that during the Defendant's minority, that is, before 1870, the Plaintiff was in possession, and if Exhibit A is genuine, joint possession is carried back as far as 1858. This document was accepted as genuine by the District Judge who at first heard the case. It was produced by the Plaintiff, who was not cross-examined about it, and we can see no sign of forgery about it.

"In our opinion the Judge was not justified in finding the document to be a forgery. The letter B is also not altogether without weight. The Defendant was examined as a witness, but he gives no explanation of the Plaintiff's possession. We think that the inference to be drawn is that the *Cowle* was in fact intended to convey the property to the family, and that it was so understood by the parties. We must reverse the decree, and there must be a decree for partition, and for mesne profits for three years before suit, and subsequent profits up to date of delivery. Amount to be ascertained in execution. Respondent to pay costs of both appeals and in Court below."

The present Appellant next filed in the High Court a petition praying for a review, on the ground of discovery of new evidence, the most important among them being a petition by the said two mothers to the Collector which if genuine would go to show that said power-of-attorney of 31st August 1858, Exhibit A was a forgery.

This application was refused by the High Court on the 2nd September 1896. They said :—

"It is not explained why with reasonable diligence these documents which are said to have been recently discovered were not forthcoming before, especially as some of these were to be found in a public office."

The Appellant obtained from the High Court leave to appeal from the order of 25th March 1896 and by an order of Her Majesty in Council, dated 9th December 1899, special leave was granted to Appellant to appeal from the said order of the High Court of 2nd September 1896.

Mr. Branson for the Appellant contended that the decision of the District Judge was correct, the *muk-*

*tiarnamah* was not a genuine document, that there was nothing to justify the High Court in drawing the inference that under the conveyance to the elder brother the family took and not the elder brother alone. Mr. Branson also relied on the new evidence discovered since the decision under appeal.

It was conceded that no motive for the gift was disclosed. Mr. Mayne suggested that in all probability the motive was a semi-religious one, the gift being to a Brahmin or a Brahmin family made for the benefit of the grantor in the future world. Mr. Mayne referred to *Dhurm Das Pandey v. Must. Shama Soondari Debiak* (3 Moore I. A., p. 229 and read at p. 240).

LORD DAVEY.—That is a case of purchase. Is there any authority as to a gift to one member. Is there any presumption that a gift made to one member of a joint family must *primâ facie* be assumed to be for the benefit of the whole family.

Mr. Mayne.—I have not now in my mind any case in which the question arose as to a gift. How far the fact that one member showing that the gift was in his name alone can change the onus has as far as I know not been decided. He refers to sec. 264 of his book, current edition and sec. 299, p. 353, last edition.

LORD HOBHOUSE.—If the manager is in ownership it is *primâ facie* of family property. The zemindar's suits in this case for cesses must go on that presumption.

SIR RICHARD COUCH.—The normal condition of a Hindu family is joint.

Mr. Mayne submitted that the sequence of documents showed an undisputed joint interest and a joint possession of the two villages up to 1887. He urged that the original grant in the name of the senior member carried with it no presumption that it was intended for his exclusive benefit. The evidence alleged to have been lately discovered should not be believed.

Mr. Branson in reply referred to *Fultons' Reports* (1843), p. 164, reads p. 174 and 181. That case was referred to in 6 Moore I. A., p. 539.

LORD HOBHOUSE.—In that case the man had obtained large funds by his own personal exertions. The difficulty here is we don't know what the motive was in making this gift.

Mr. Mayne read the paragraph on his book on "Self-acquisition," para. 342, new edition.

Mr. Branson referred to 8 Bom. H. C. R., p. 153 at p. 176, to *Badul Singh v. Chutter Dhari Singh* (9 W. R. 558), *Lala Madan Gopal v. Krishna Kikenda Koer* (18 I. A., p. 9 at p. 20), *Sheo Gulam Singh v. Baran Singh* (1 B. L. R. 164, A. C., top p. 166).

LORD DAVEY.—There being no satisfactory evidence on either side the question is on whom is the burden of proof.

Mr. Branson also noticed *Sri Raja Chelikani v. Garu and Appa Ram B. Garu* (I. L. R. 20 Mad., p. 207 at p. 220).

C. W. A. Their Lordships reserved judgment.

## PRIVY COUNCIL.

(ON APPEAL FROM THE SUPREME COURT OF HONG KONG.)

LORD HOBHOUSE.

LORD ROBERTSON.

LORD LINDLEY.

SIR F. JEUNE.

SIR FORD NORTH.

1900.

8, December.

HARDOON, Plaintiff,

Appellant,

v.

E. R. BELILIOS, Defendant,

Respondent.

*Trust, what constitutes a—Trustee—Cestui que trust—Legal title—Equitable title—Shares.*

The question raised in this appeal was whether the Plaintiff, Hardoon, who was the registered holder of some shares in a Banking Company (The Bank of China, Japan and the Straits, Limited), which was being wound up, was entitled to be indemnified by the Defendant (The Hon'ble E. R. Belilios, C. M. G.), who was the beneficial owner of such shares against calls made upon them in the winding up.

The Bank was a registered Limited Liability Company under the Companies Act, 1862, and had capital divided into shares not all called up when it went into liquidation in December 1894. Plaintiff was a contributor for fifty shares of £10 each. He had been sued by the liquidator for the calls made which he had not paid and judgment was recorded for £402 odd. This amount he sought to recover from Defendant under the following circumstances:—Those shares were placed in the name of the Plaintiff in April 1891 by his then employers Benjamin and Kelly, share-brokers. Plaintiff never had any beneficial interest in them, but he was registered as the holder on 3rd April 1891. A provisional certificate of ownership was made out and he signed a blank transfer of them and those two documents were held by Benjamin and Kelly who had paid the application and allotment and first call. That certificate and transfer afterwards came into the hands of one Coxon who acted on behalf of a syndicate formed to speculate in shares in another Company. The Defendant financed that syndicate, and the provisional certificate and blank transfer of the 50 shares in question were with the other securities pledged by Coxon with the Defendant as security for his advances. In October 1891 the Plaintiff's provisional certificate was exchanged for the ordinary certificate which the Defendant had ever since held. In March 1892 dividends were paid on those shares and the Defendant as holder of those shares demanded the dividends from Plaintiff for them and received same. The syndicate operations ended in much loss. Their accounts with Defendant were closed and in October 1892 the Defendant became the absolute owner of the shares. In November 1893 a call of £1 per share was made payable by four instalments of 5s. each. The first three were at the Plaintiff's request paid by the Defendant to him and by him to the Bank. The Defendant said that he was not liable to pay them and in his books he had debited the Plaintiff with those payments.

Their Lordships found that there was no evidence that Plaintiff was informed of that, and the fact that at the time Defendant did not debit Coxon with those calls appeared to their Lordships very strong evidence that at that time Coxon's interest in those shares came to an end and the shares belonged absolutely to Defendant.

Correspondence ensued between Plaintiff's and Defendant's solicitors. Defendant refusing to indemnify Plaintiff against the calls made on him the present action was commenced.

Their Lordships' judgment proceeds as follows:—

"It appeared from the evidence as it stood that the defendant became in October 1892, the sole beneficial owner of those shares, the legal title to which was vested in the Plaintiff; assuming that to be established their Lordships were at a loss to understand what more was required to create the relation of trustee and *cestui que* trust between the Plaintiff and the Defendant. The facts that they never stood in the relation of vendor and purchaser, that there was no contract between them, that the Defendant never requested the Plaintiff to become his trustee, were quite immaterial. All that was necessary to establish the relation of trustee and *cestui que* trust was to prove that the legal title was in the Plaintiff, and the equitable title in the Defendant. That might be proved in many ways. The mode of proof was quite immaterial. Being proved, no matter how, the relation of trustee and *cestui que* trust was thereby established. No one could be made the beneficial owner of shares against his Will. Any attempt to make him so could be defeated by disclaimer. But the moment the Defendant accepted the beneficial ownership of those shares he became the Plaintiff's *cestui que* trust and the Plaintiff had no option in the matter. The next step was to consider on what principle an absolute beneficial owner of trust property could throw upon his trustees the burdens incidental to its ownership. The plainest principles of justice required that the *cestui que* trust who got all the benefit of the property should bear its burdens unless he could show some good reason why his trustee should bear them himself. The obligation was equitable and not legal and the legal decisions negating it, unless there was some contract or custom imposing the obligation, were wholly irrelevant and beside the mark. Even where trust property was settled on tenants for life and children the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it was clear and indisputable; although if that which was once one large trust estate had been converted by the trustees into several smaller distinct trust estates the liabilities incidental to one of them could not be thrown on the beneficial owners of the others. That was decided in *Fraser v. Murdoch* (6 A. C. 855). But where the only *cestui que* trust was a person *sui juris* the right of the



trustee to be internified by him against liabilities incurred by the trustee by his retention of the trust property had never been limited to the trust property; it extended further and imposed upon the *cestui que* trust a personal obligation enforceable in equity to indemnify his trustee."

The judgment thereafter referring to a number of decisions continued as follows:—

"The fact that the Defendant did not create the trust on which the Plaintiff held the shares when they were first placed in his name afforded the Defendant no defence to this action. Although the Defendant did not create the trust he accepted a transfer of the beneficial ownership in the shares first as mortgagee and afterwards as sole beneficial owner with full knowledge of the fact that they were registered in the Plaintiff's name as trustee for their original purchasers and their assigns whoever they might be. By that acceptance the Defendant became the Plaintiff's *cestui que* trust; and the Plaintiff could not prevent it or effectually dispute his trusteeship for the Defendant. By that acceptance the Defendant created the trust, for himself. Having done so the Defendant as the beneficial owner of the shares demanded from the Plaintiff and obtained dividends declared in respect of them. The Defendant also paid calls made upon them although he attempted to protect himself from any admission of liability by entering those payments in his books as made on behalf of the Plaintiff. Lastly, when asked by the Plaintiff to procure a transfer of the shares out of the Plaintiff's name the Defendant refused to do so, and thereby compelled the Plaintiff to continue to hold them as his trustee. It was idle after that to rely on the fact that the Defendant did not create the trust in the first instance; and idle to talk of renunciation or disclaimer of those shares by the Defendant. He could not now get rid of the trust for himself which he created by becoming beneficial owner of the shares and which trust he had recognized since as subsisting."

In the result their Lordships advised Her Majesty to allow the appeal and reverse the judgments appealed from with costs and with costs of this appeal. Owing to the judgment appealed from being a judgment of non-suit only, their Lordships were unable to advise Her Majesty to order judgment to be entered for Plaintiff with costs. The Defendant was entitled to a new trial at the risk of costs. But how in the face of his own books and conduct he could reasonably hope for ultimate success their Lordships were at a loss to conceive. If he insisted on his rights he was entitled to have the action remitted to Hong Kong for retrial.

Mr. Latham, Q. C., and Mr. Whinney for the Appellant.

Mr. Joseph Walton, Q. C., and Mr. R. J. Parker for the Respondent.

C. W. A.

*Appeal allowed with costs.*

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

WALTER HENRY MARKS

STANLEY, J.

1901.

9, January.

A. TELLERLE,

and

F. PEACOCK

v.

UMA CHARAN GHOSH.

*Practice—Civil Procedure Code (Act XIV of 1882), sec. 50—Name, description and place of residence.*

Plaints were presented in these two cases. In the first the Christian name of the Defendant was not given, only the initial.

In the second only the Defendant's name and address were given. There was no description.

In consequence of a direction given by order of Mr. Justice Sale that the provisions of sec. 50 of the Code should be strictly followed, these two matters were pointed out by the officer of Court.

STANLEY, J., held that in all complaints the provisions of sec. 50, C. P. C., must be complied with, that is to say, the name, description and place of residence of the Plaintiff must be given and the name, description and place of residence of the Defendant so far as the Plaintiff has been able to ascertain.

That giving the initials of the parties is not a sufficient compliance with the section.

If the Plaintiff after enquiry is unable to ascertain these particulars fully, he should at least include a paragraph in the plaint stating this. There would then be something on record to show that the plaint was admitted after consideration and not per incuriam.

S. R. D.

### [CRIMINAL REVISIONAL JURISDICTION.]

REV. MIS. No. 98 OF 1900.

AMEER ALI, J.

STEVENS, J.

1900.

3, January.

In the matter of RADHA KRISTA

BARAT, Complainant,

v.

GOKULA NUT, Accused.

*Reformatory Schools Act (VIII of 1897), secs. 8, 9, 16—Penal Code (Act XLV of 1860), sec. 379—Theft—Criminal Procedure Code (Act V of 1898), sec. 439—Revision, power of, of an order passed for detention of a youthful offender in a Reformatory School—Sentence when not passed for offence or when conviction or sentence improper—Legality or propriety of conviction, sentence, or order other than those enumerated in sec. 16.*

This was a rule issued on the 14th of December 1900, against the order of B. C. Sen, Esq., District Magistrate of Bogra, on the 23rd of July 1900.

The facts of the case were shortly as follows:—

The complainant, Radha Krista Barat, missed his umbrella valued at 12 annas in a haat (market place). On search it was found in the possession of the accused

Gokula Nut, a boy of ten years of age. About that time a gang of Nuts had come and encamped in the neighbourhood. The accused admitted that the umbrella was in his possession but said that it had been purchased by his father for him. Thereupon the accused was prosecuted and placed on his trial before Babu Mahendra Chandra Mozumdar, Deputy Magistrate of Bogra. The Deputy Magistrate on the 23rd day of July 1900 found that the accused was a boy of ten years of age, that the identity of the umbrella with that of the complainant's stolen one had been clearly proved and that he was guilty of an offence under sec. 379, I. P. Code; but instead of passing any sentence upon him the Deputy Magistrate forwarded and submitted the proceedings to the District Magistrate under sec. 9 of the Reformatory Schools Act (VIII of 1897), he being of opinion that the boy was a proper inmate of a Reformatory School. There was, however, no evidence to shew that the accused either stole the umbrella, or that he knew that it had been stolen.

The District Magistrate on the same day made an order directing the accused to be detained in the Alipore Reformatory School for a period of seven years, without himself passing any sentence on him.

Then the present rule was obtained against that order of the District Magistrate.

*Held*—That sec. 16 of the Reformatory Schools Act does not affect the High Court's jurisdiction to consider the legality or propriety of the sentence or of any order other than that mentioned in sec. 16 nor the legality or propriety of the conviction.

That the law requires that the Magistrate trying the case or to whom the proceedings are submitted under sec. 9 of the Reformatory Schools Act (VIII of 1897) should in the first instance, sentence the prisoner to a term of imprisonment or transportation which he may commute into detention in a Reformatory School for such period as he thinks proper.

That no sentence having been passed in this case the order for detention in a Reformatory School is bad in law.

That there being no evidence to shew that the boy either stole the umbrella or that he knew that it had been stolen he was entitled to be acquitted.

*Sheikh Reasat v. T. Courtney* (unreported, decided by Ameer Ali and Stevens, JJ., on the 28th November 1900) referred to.

No one appeared in this case.

H. P. C. *Conviction and order set aside.*

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NQ. 417 OF 1899.

GHOSE, J. PRATT, J. 1901. 2, January.	}	UDAY KUMARI GHATWALIN, Judgment-debtor, Appellant, <i>v.</i> HARI RAM SHAHA and others, Decree-holders, Respondents.
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*Ghatwali tenure—Attachment of future rents and*

*profits of a Ghatwali estate—Receiver, appointment of, to collect rents and profits falling due.*

This was an appeal preferred on the 19th of December 1899 from an order of C. Fisher, Esq., Officiating Deputy Commissioner of Sonthal Pergunnahs, dated the 12th of September 1899, confirming an order of F. E. Piffard, Esq., Subordinate Judge of Deoghur, dated the 20th of July 1899.

The facts of the case were shortly as follows:—

The decree-holders, Hari Ram Shaha and others, obtained a decree for money against the Ghatwal and in execution of that decree they prayed that the rents and profits that might be due to the Ghatwal *minus* the wages payable to chowkidars and other outgoings should be attached and placed in the hands of a Receiver. The judgment-debtor filed a petition of objection in which she took several objections to the execution of the decree, the principal objection being that the rents and profits could not be attached. The Subordinate Judge in rejecting the petition of objections held that such profits were attachable, and made the following order:—“Let a prohibitory order issue to the Ghatwal not to collect any rents and profits from the raiyats and also to the raiyats not to pay their rents to the Ghatwal.” On appeal the Deputy Commissioner relying upon the case of *Rajkeshwar Deo and another v. Bunshidhur Marwari* (I. L. R. 23 Cal. 873) held that the plea that the proceeds of the Ghatwali were not attachable was untenable and dismissed the appeal of the judgment-debtor, and ordered the attachment of the rents and profits due to the Ghatwal, judgment-debtor, on account of his *Ghatwali* estate.

Against that order the judgment-debtor preferred this second appeal and on her behalf it was contended that what was done by the Subordinate Judge and affirmed by the Deputy Commissioner was to attach future rents and profits; and that that could not be done under the law.

*Held*—That future rents and profits, as such, cannot be attached.

*Hari Das Acharji Chowdhuri v. Baroda Kishore Acharji Chowdhuri* (4 C. W. N. 87) and *Rajkeshwar Deo and another v. Bunshidhur Marwari* (I. L. R. 23 Cal. 873) referred to.

*Semle*—That a Receiver might be appointed to collect rents and profits of a *Ghatwali* estate as they fell due.

*Babu Lal Mohan Das and Babu Jogesh Chunder Dey* for the Appellant.

*Babu Karuna Sindhu Mukkerjee* for the Respondents.

H. P. C.

*Case sent back.*

# THE Calcutta Weekly Notes.

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[No. 9]

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### REPORTS (See Index.)

WE DEEPLY REGRET TO RECORD THE DEATH OF Mr. Justice Ranade of Bombay. His life-work was not confined within the hide-bound pages of the law-reports but extended to a wider circle of usefulness. He rose to his position from the ranks of the Subordinate Judicial Service by a method which is well worthy of emulation by members of that service in these Provinces. It was not by a record list of convictions when sitting as a criminal judge or practising little tricks in shutting out appeals, when acting in a civil capacity that secured him success in life. It was the breadth of his views, the width of his sympathies, his constant solicitude for the good of the people amongst whom he lived and worked that secured him the respect both of the Government and of his own people. He was a man of character and culture and was always zealous in the cause of progress and reform. He was a sound economist, an author of merit, thoroughly independent and public-spirited and his death leaves a gap in society which it will not be easy to fill.

NOW THAT THE QUESTION OF FARM-BURNING IN South Africa is engaging the attention of the leading legal and non-legal journals in England it may be interesting to note the practice in this respect prevalent in the ancient days of Hindu civilization. If we were to recite the laws of war from the *Mahabharata* to shew how much more in advance they

were in point of humanity and fair play than even the Geneva and Hague conventions, modern critics will perhaps put it down as fiction. But when the testimony on this identical question of incendiarism comes from a soldier and a scholar who accompanied Alexander the Great's expedition to India, modern critics will, perhaps, bow their heads in silence.

\* \* \*

MEGASTHENES RECORDS THE INVIOIABILITY OF FARMS and farmers in time of war in the following words :

"Among the Indians, by whom husbandmen are regarded as a class that is sacred and inviolable, the tillers of the soil, even when battle is raging in their neighbourhood, are undisturbed by any sense of danger, for the combatants on either side in waging the conflict, make carnage of each other, but allow those engaged in husbandry to remain quite unmolested. Besides, they neither ravage an enemy's land with fire nor cut down its trees. Nor would an enemy coming upon a husbandman at work on his land do him any harm, for men of this class, being regarded as public benefactors, are protected from all injury."

This is why the bulk of the people of India always lived in peace in spite of all civil wars, revolutions and invasions.

\* \* \*

IT IS, A PITY, HOWEVER, THAT WHENEVER WE HEAR of a European army engaging in war with people whom they regard as uncivilized, they consider it within the legitimate limits of warfare and as a civilized mode of coercing the enemy to submission to set fire to their villages. We would have hardly heard any protest with regard to incendiarism in South Africa had not the Boers been Christians and European by birth. There can be no doubt that when farms are used by the enemy for military operations they cease to become inviolable. But on no principle the practice, common amongst British generals, of firing enemy's villages whenever they are sent off on any expedition against semi-savage tribes can be justified. The Government of India ought to issue orders prohibiting such practices since these make even the aborigines of the East believe that civilization is capable of committing worse barbarity than they can conceive of.

\* \* \*

INTERNATIONAL LAW IS SAID TO BE BASED ON principles of public morality. But we have seen a cynical smile lighten up the soubser faces of the

Orientalists at the seats of Western learning when a learned professor solemnly stated that such moral laws are limited in their operation amongst the civilized nations of Europe. Japan by virtue of her power of offence and defence has only recently been admitted to the comity of nations. But her civilization has not yet risen to that pitch when conscience becomes callous and morality, a mere matter of convenience. Japan still labouring under pristine prejudices, originally imbibed from this country, was very much shocked at the conduct of the European troops in China. But we are afraid Japan will be losing her international prestige by being so squeamish about matters which, by the common consent of the European nations, have the sanction of their moral laws (public or international) so long as the enemy is an Asiatic. Is it not a war in the cause of Christianity and are not the Chinese, Heathens? Japan has yet to be civilized but the Indian troops under European lead seem to be on a fair way towards it, since they freely pilfered private property although they stopped short when it came to committing murder or outrage on women. It is no wonder that the Dowager Empress did not wish that China should join the general march of modern civilization and desired that her people should go back to the learning of Confucius. But international morality would not permit such retrogression and has, since, left nothing undone for the salvation of China.

WE HAVE REMARKED BEFORE THAT THE GOVERNMENT commenced judicial reform at the wrong end. Before restricting the right of second appeal the Government ought to have taken care to secure efficiency of the lower Courts. Otherwise the restricting of civil appeals by reference only to their money value will amount to denying justice to the poor. It is only upon questions of law that second appeals are preferred. And these are preferred against decisions of judges who cannot be said to have received any legal training. Under the present system members of the Civil Service with only some experience as magistrates are at once appointed to be District Judges and as such they have to discharge the duties of a Court of Civil Appeal in intricate questions of civil law of India. It is absurd to invest such Courts with final authority as an appellate Court. The Subordinate Judges who also have to discharge a similar function cannot be said to be more happily situated. No doubt they begin life as *Munsifs* but it is well known that persons who get on in the practice of law do not seek such appointments and the result often is that men, who fail in the profession often get it. With such beginning it cannot always be expected that they would turn out uniformly satisfactory as Civil Judges. Under such circumstances any measure calculated to restrict the right of civil appeal would work positive mischief. Further under the existing weakness of the first appellate

Court it is most undesirable to deprive such Courts of the sense of responsibility under which they at present dispose of first appeals in view of the fact that their decisions are open to appeal. We are very much surprised to find that the commercial community of Calcutta, who in common with us some time ago opposed the measure, concede to it a qualified approval, on the very high moral principle that it does not affect their own interests, although there can be little doubt that it would those of people who are less fortunately situated. They say that they do not mind the measure so long as the right of Reference to the High Court from the Presidency Court of Small Causes is not interfered with.

THE MOST RATIONAL WAY OF SETTING ABOUT ON THE path of judicial reform would be, as we have said, to secure in the first place efficiency of the lower Courts and when that has been accomplished then to consider the question of the shortest way to justice. The first object may be very easily gained by recruiting the judicial officers from amongst the practising members of the profession. Such was the recommendation of the Public Service Commission. The Civil Service need have no grievance if the District Judgeships are filled up in this manner. As it is, members of the Civil Service who may select the judicial line are a much less favoured class of public servants than those who continue in the executive line. When selecting the judicial line they have no doubt, in view the prospect of one day becoming a High Court Judge but how often do we hear of capable men after a career of hard and conscientious work and drawing a less liberal salary retire with a pang for having been mistaken in their choice. On the whole we think it will be a more satisfactory arrangement to put the judicial service on an altogether independent footing. Or if the interests of the Civil Service be in any manner at stake, we think, an early separation of the executive and judicial branches and a longer and uninterrupted training of the judicial officers, commencing life as judges of first instance and of the lowest jurisdiction, with better opportunities of working up their way to the High Court, after a varied experience in the Civil and Criminal Courts of all jurisdictions, will be found more satisfactory. People may then have a sufficient confidence in the first Court of Appeal and Government may then consider if second appeals are but a surplussage. The present proposal of the Government to restrict second appeals in a manner which leave ample temptation to people to go into the expense of preferring them without being afforded any corresponding opportunity of even a patient hearing, is liable to very serious misinterpretation. Anyhow, the bill shows more concern for guarding the revenue derived for the administration of justice than justice itself. The practice of making administration of justice a source of revenue has met with universal condemnation amongst economists.

## A CHAT ABOUT BARRISTERS.

By ONE OF THEM.

THE English Law List discloses the fact that there are over eight thousand gentlemen now living who have been "called to the Bar." Of these, two hundred and twenty-three are Queen's Counsel, the rest being ordinary barristers, known variously as "juniors" or "stuff-gownsmen." The Q. C. wears a silk gown, somewhat plainly made, with a broad and deep collar. Hence the saying that so-and-so "has taken silk." The junior is distinguished by a gown which, though it is made of a less expensive material, is much more elaborately fashioned—reminding one of the old-time smock-frock.

Of late years, the proportion of foreigners appearing in the list has considerably increased, gentlemen bearing the most unpronounceable names (one rejoicing in a string of seven such), and hailing from India, Persia, Egypt, and other parts of Asia and Africa, figuring to about eight per cent. Most of these after being called, return to their native country—for its lasting good, we may reasonably hope.

The number of barristers available for actual work is greatly reduced when we excise those whose practical acquaintance with the Bar ended on their being called. These represent probably one-half of the gross total. Various are the reasons which lead gentlemen to study for the Bar, without any intention of gaining a livelihood by practicing at it: the two most salient being—(1) to thereby fit themselves for Government and other appointments at home or abroad; (2) the desire to advance their social position.

With regard to the first, these gentlemen may be found dispensing justice, according to our ideas, or administering affairs in the name of the Queen, wherever the British flag is unfurled; and a glance at the list of Magistrates for almost any county, shows that many of these names appear also in the bar list. As to the second, the fact of being a barrister is the open sesame to society which would be closed to the man who without it is, say, only a retired tradesman's son.

Not so long ago an officer came to a Police Court to conduct the case on behalf of two of his men who were charged with some civil offence. He was informed that, not being a solicitor, he was debarred from so doing. "But," said he, "I am also a barrister. I was called to the Bar before entering the army, and I appear in that capacity;" and he succeeded in getting the case dismissed.

Those who do intend to practice, choose a circuit at the outset and generally adhere to it. England and Wales comprise seven circuits, and the question of which shall be adopted depends greatly upon circumstances. It is usually considered that a man has a good chance if he or his family is well known to the solicitors in one or more of the towns on his prospective circuit. Marriage with a lady related to an influential solicitor is also a good source of hope; but, as a Lord Chancellor once put it, the man had the best chance who, with brains and an infinite capacity for hard work, had nothing else to rely upon for the necessities of life—which was his own case.

At assizes, to bring in a man from another circuit involves the payment of a heavy additional fee—quite out of proportion to the needs of an ordinary *visi prius* case. This regulation very much narrows down the area of choice to the provincial solicitors; and occasionally the barrister who is supposed to be the best man of the circuit for the particular case in hand, is retained as soon as it is seen that the action is imminent. On our own circuit, there is one gentleman who figures in almost every criminal case of any importance—and nearly always for the defence.

He has the reputation of making a "rattling good speech," and that is always left to him, whatever other part he may or may not be called upon to take. Many a man has he pulled out of the fire by a good speech at the end, attacking and criticising the points urged by the prosecution, and trusting to the effect of his speech on the mind of the twelve good men and true. If he calls no witnesses, he deprives the pro-

secution of the opportunity to reply; thus securing the last word—often of the greatest importance in jury cases.

A fact not generally known, is that, as Queen's Counsel are officers of the Crown, it is necessary, before they can appear for a prisoner against the Crown, to obtain a permit, which is, however, always granted, and costs half a guinea.

It is only the bare truth to say that the really leading men can command their own prices, and even then are pelted with work which it is sometimes impossible for them to properly attend to, notwithstanding the assistance of clerks, pupils, and the system known as "devilling." Like other human beings, they cannot attend to two things at one time.

The Parliamentary Bar suffer terribly in this way. The working days in a year are fewest with them, and in their effort to make their hay, the pressure is felt severely by both themselves and the people (mostly public bodies) who seek their services. It is a common practice to retain three counsel to pilot a private Bill through Parliament. You may then hope to secure the corporeal presence of one or other of them throughout, and perhaps two for the greater part of the time. In connection with one Bill in which I was concerned, we briefed three. The leader came and "opened" and we never saw him again during the five days the committee sat, until the favorable decision was given (for which he, with becoming modesty, took the credit); and he was only once at the daily conferences. Frequently we only had one present, and twice was our counsel's bench empty. Needless to say, they all drew their heavy fees regularly, and with as little diffidence as if they had each and all been in close attendance the whole time.

What can you do? Pay, and look as pleasant as possible. There is nothing else for it.

As in other professions, there are specialists at the Bar. A famous Q. C. (now retired) was related to a well-known musical family, and in consequence, for a generation he appeared in nearly every case involving musical or dramatic copyright.

Not long ago, a county counsel proceeded against a manufacturer for alleged pollution of a stream. The Defendant could not afford a fancy fee. Yet, to lose the case meant ruin to him. He must have a first-class speaker and cross-examiner, and—more important still—one well up in that branch of chemistry associated with sanitary and public health was. So far from being able to pick and choose a man who possessed these two qualifications, he had first to be discovered. Eventually he was found—at a handsome fee; but he justified his reputation, and succeeded—which is the main thing. It pays to be a specialist.

Years ago, there was an agitation inaugurated against the practice of charging a fee for the clerk on top of that paid to the principal. This fee is an additional half a crown upon any fee up to five guineas, five shillings up to ten guineas; and so on up to fifty guineas, upon and above which it is two and a half per cent. Many hard-worked counsel have more than one clerk; while, with the briefless crowd, one boy frequently does duty for several, and his almost nominal services (so far as briefs are concerned, that is) are considered adequately rewarded by ten shillings a week.

From what the reader knows now, he will be prepared to hear that the agitation dropped through. Leading counsel don't sit at their chambers waiting for work, and willing to chaffer about fees. Rather, you have to go cap in hand, and await their pleasure—or run the risk of having your paper returned on any sign of impatience.

It is safe to say that it would be a revelation to those who may wonder at these things, could they but attend a few consultations at the chambers of one of the leading men. To save time, the solicitor will perhaps have prepared a short epitome for present use, in addition to the more or less lengthy "instructions" which were delivered days ago. As likely as not, this will never come out of his pocket, a casual observation from the great man showing that he "knows all about that," and more—knew it, in fact, before the case

began. The all-round knowledge of the world which is stored up in the mind of a leading Q. C. is an eye-opener: it is that which you have to pay so heavily for.

No article on this subject would be complete without a reference to the peculiar—probably unique—relations subsisting between barristers and those whose interests they represent.

You may take papers to “a gentleman of the long robe,” and obtain his opinion—and then you may snap your fingers at him, and refuse to pay. He has no remedy at law. Of course, you would not do it again, either with him or any one of his fraternity—you wouldn’t get the opportunity. Except with a well-known firm of solicitors, or one with whom counsel may have a running account, with half-yearly settlements, the money is left with the papers. Should the amount tendered be considered inadequate, the clerk intimates the fact to the solicitor. Often enough, the fee is not marked by the solicitors, but left to the barrister’s clerk. One never corresponds with the principal about fees. He, theoretically, is quite above such mundane matters—merely working from platonic motives; his sordid clerk is there to protect him from being plucked, and to collect a commensurate honorarium.

To maintain an equipoise in this otherwise very one-sided arrangement, an effectual, though refreshingly simple, law exists, that a barrister is under no obligation to attend to any work which you may take to him—and pay for in advance. He may return your papers, and pocket the fee; or, worse still, he may go into court, and make the most fatal and idiotic arrangement binding upon your client—and you have no legal remedy, such as a layman has against a solicitor. But here, too, the case is highly hypothetical, and in an experience of twenty years, I have never known real harm to ensue from it. The laws of business and common-sense in effect govern this, as all other professions; and a barrister who sought to take advantage of his theoretical rights, would doubtless have but little possibility of repeating it. The whole thing *seems* absurd; but it works well in practice, and probably neither barristers, solicitors, nor clients, if canvassed, would care to alter it.—*The Green Bag*.

## English Notes.

COURT OF APPEAL.—*McCALLUM v. McCALLUM*. Before the LORD CHIEF JUSTICE and LORDS JUSTICES RIGBY and WILLIAMS. 4th December 1900.

*Concealed fraud—Real property—Limitation Act, 1883.*

The 26th section of the above Statute 3 and 4, William IV, C. 27, sec. 26 provides: “In every case of concealed fraud the right of any person to bring a suit in equity for the recovery of any land, or rent of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued, at and not before the time, at which such fraud shall, or with reasonable diligence might have been known or discovered.”

In 1884 General McCallum made over the house he was residing in with his wife and daughter at Cheltenham to his wife. The conveyance was a voluntary one. A very few days after that the wife conveyed it to the daughter, the Plaintiff in this action. This fact was not known either to the General or to the daughter. The wife sent the two conveyances in a sealed envelope and requested a London solicitor not to open it until after her death

and the death of her husband when it was to be made over to Plaintiff.

The wife died on 1888. The General lived in the house after his wife’s death until 1899 when he died. Shortly before his death he had left the house, but received its rent. By his Will he devised the residue of his estate to the Defendant his niece. The house in question was not specifically mentioned in the lease, but Defendant assumed it passed to her and retained possession of the title-deeds. After his father’s death the solicitor in accordance with his instructions from the mother delivered the said envelope to Plaintiff when she for the first time became aware of her title to the property.

In her present action to recover it the Defendant set up the statute of limitations.

Mr. Justice Kekewich had held that the conduct of the mother in wilfully secreting from Plaintiff information regarding her conveyance amounted to a concealed fraud within the above section and the statute did not begin to run until after the death of the mother and so decided on favour of Plaintiff.

The Defendant appealed.

Lord Justice Rigby agreed with Mr. Justice Kekewich that the words of the statute were applicable to every case of a concealed fraud which deprives the owner. The other two learned Judges were of the contrary opinion; they held that fraud contemplated by the section must be fraud of the person setting up the statute or of some one through whom that person claims.

In accordance with the opinion of the majority of the Court the appeal was allowed. In the judgment of the Lord Chief Justice as also in that of Lord Justice Rigby many authorities are mentioned.

*Mr. Kenshaw, Q. C., and Mr. Clarke* for the Appellant.

*Mr. Warrington, Q. C., and Mr. Martelli* for the Plaintiff.

C. W. A.

*Appeal allowed.*

QUEEN’S BENCH DIVISION.—*BOOTS CASH CHEMISTS (LANCASHIRE) LIMITED AND OTHERS v. GRUNDY AND OTHERS*. Before JUSTICES BIGHAM and PHILLIMORE. 21st June 1900.

*Rival traders—Combination—Conspiracy.*

The Plaintiffs and Defendants were both in the same trade; sellers of etchings and engravings. The Plaintiffs complained of a circular marked private and confidential published by the Defendants in combination with others (the circular containing twenty-one signatures) thereby maliciously and without just cause inducing customers not to deal with them.

The defence was that the statement of claim showed no cause of action.

The learned Judges differed in opinion.

MR. JUSTICE PHILLIMORE in the course of his judgment said: “I should hold that all confederacies to

injure a man by committing torts, which would be actionable against individuals committing them separately, become indictable by reason of the combination. It seems further that confederacies to injure without committing actionable torts but by doing acts punishable only in the ecclesiastical Courts are also indictable conspiracies . . . . . If the confederacy in this case for the motives and purposes alleged in the statement of claim were proved as laid it would be indictable and at least equally if not a *fortiori* actionable; in other words given the confederacy, the motive and the purpose make all the difference."

MR. JUSTICE BIGHAM whose judgment prevailed concludes it as follows:—"In the present case I can find no act alleged against the Defendants which amounts to a violation of any right in the Plaintiffs, nor can I find any act alleged against the Defendants which is unlawful as against any other individual or against the public at large. I therefore come to the conclusion that the statement of claim discloses no cause of action." The keynote to the decision appears in the following sentences:—"No conspiracy can give rise to a civil action unless it violates or threatens to violate the rights of an individual as distinguished from the rights of the public at large. If it does violate the rights of an individual, he may sue for damages; if it threatens such a violation he may sue for an injunction. But before any action can lie a right in the individual must be violated or threatened."

Among the cases considered by the learned Judges were those of the *Mogul Steamship Co.* (1892, A. C. 25), and *Allen v. Flood* (1898, I. A. C. 1)

Leave to appeal was granted to Plaintiffs, but the action was dismissed.

*Mr. Joseph Walton, Q. C., and Mr. Colefax* for the Plaintiffs.

*Mr. Rufus Isaacs, Q. C., and Mr. Scrutton* for the Defendants.

C. W. A.

QUEEN'S BENCH DIVISION.—*THURSBY v. ECCLES*. Before MR. JUSTICE BIGHAM. 8th December 1900.

*Contract—Payment of rent—No memorandum of agreement, part performance—Statute of frauds.*

Thursby had let a flat to Eccles. The latter agreed to rent same at £4-10 per week for a certain time. On the day the agreement was entered into Eccles paid down one week's rent. There was no memorandum of agreement. The parties fell out. Defendant never took possession and repudiated the contract.

The question was whether the payment of the week's rent in advance was sufficient part performance of the contract so as to take it out of the statute of frauds, rendering the written memorandum unnecessary.

The learned Judge held that the mere payment

of rent did not take the contract out of the statute of frauds. *Maddeson v. Alderson* (8 App. Cas., p. 479) showed that a payment of part of the purchase money in a contract of sale of lands was not such a part performance of the contract as will take it out of the statute and the learned Judge could see no distinction in principle between that and a payment of rent. The action therefore failed.

*Mr. Baydell Houghton* for the Plaintiff.

*Mr. Cannott* for the Defendant.

*Judgment for Defendant.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [MATRIMONIAL JURISDICTION.]

SUIT No. 1 OF 1900.

HARRINGTON, J.	}	YOU'D
1901.		v.
10, January.		YOU'D.

*Divorce—Conduct after suit, evidence of.*

This was a husband's suit for divorce by reason of wife's adultery with co-Respondents.

*Mr. Knight* for the Petitioner, in course of proving his case, offered evidence that one co-Respondent, on a date after suit was brought, was found at 7 A.M. sleeping half-naked outside the open door of Respondent's bed-room.

THE COURT.—How is that evidence, it is not pleaded?

*Mr. Knight*. It was after suit. It is admissible to show the character of acts between Petitioner and this co-Respondent which are susceptible of indifferent interpretation or of one equally consistent with guilt and innocence; cites *Boddy v. Boddy*, 30 L. J. P. & M. 23, *vide* also Phipson Evidence, 2nd Ed., p. 136.

THE COURT admitted the evidence.

*Messrs. Leslie & Hinds*, Attorney for the Petitioner.

J. G. W.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 780 OF 1897.

HARRINGTON, J.	}	SATYENDRA MOHAN BOSE, Plaintiff,
1901.		v.
17, January.		G. F. ALEXANDER, Defendant.

*Civil Procedure Code (Act XIV of 1882), sec. 295—Money realised after discharge—Rateable distribution.*

An application for distribution under sec. 295 of the money realised by attachment of salary of this Defendant, after his personal discharge, standing to the credit of this suit.

The Defendant obtained his personal discharge on the 7th April 1897, the order being not subject to any condition that this insolvent, who was a Government officer, would pay any portion of his salary to the Official Assignee. Subsequently he again contracted debts and several decrees (which cannot come under his schedule) were made against him: in execution of one of those decrees the moiety of his salary was attached and the money so realized stands now to the credit of this suit.

*Mr. Sinha* applied on notice to all parties concerned for an order that a rateable distribution be made of the money standing to the credit of this suit. He said that he could cite many authorities in support of his contention that the Official Assignee as assignee of the estate of the insolvent is not entitled to the money but that the same should be distributed amongst the holders of the subsequent decrees, but as the Official Assignee is not going to oppose or claim the money under sec. 27 of the Insolvent Act he would be content with citing only *Kristo Komul Mitter v. Suresh Chandra Deb* (I. L. R. 8 Cal. 556).

*Held*—That the subsequent creditors are entitled to have the money rateably distributed among themselves and that the attaching creditors' costs of references are to be added to their respective claims.

*Mr. H. C. Ghosh*, Attorney for the Plaintiff,  
*Babu Kally Mohun Rukshit*, Attorney for the Defendant.

K. K. D

# [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 1384 of 1898.

GHOSH, J.	UMESH CHUNDER DEY and
PRATT, J.	others, Plaintiffs, Appellants,
1901.	v.
8, January.	SHARDESSUR CHUNDER and an-
	other, Defendants, Respondents.

*Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—Judgment in previous suit between the same parties, whether operates as res judicata in a subsequent suit, if all the issues in the former are not decided.*

This was an appeal preferred on the 18th of July 1898, against a decision of H. R. H. Coxe, Esq., Judge of Midnapur, dated the 25th of April 1898, confirming a decree of Babu Girish Chunder Chowdhury, Subordinate Judge of that district, dated the 17th of June 1897.

The question for decision in this appeal was whether the suit out of which the present appeal arose was barred by *res judicata* by virtue of a judgment in a previous suit between the parties.

The present suit was one for an account and for recovery of such sums of money as upon taking of such accounts may be found due to the Plaintiff

from the Defendant, the latter being regarded as the Plaintiff's servant. The judgment, by virtue of which it was said that the present suit was barred, had been passed in a suit in which the Plaintiff claimed, in the first place, the winding up of the partnership business, the Defendant being regarded as a co-partner in the business which was being managed by him; in the second place for an account being taken from the Defendant, he being regarded as the managing partner; and, in the third place, for the recovery of such sums of money as might upon the taking of an account from the Defendant be found due to the Plaintiff. The following issues were raised in the previous suit:—

*First*.—Whether the Plaintiff and Defendant were members of a partnership? If so, what were the terms of the contract of the partnership business, and whether the plaint has been properly drawn up?

*Second*.—Whether the Defendant is liable to the Plaintiff for accounts?

*Third*.—Whether the Defendant was as the Plaintiff's servant remunerated by a share in the profits?

*Fourth*.—What payments, if any, have been made by the Defendant for which the Plaintiff has not given him credit?

*Fifth*.—What amount, if any, is the Plaintiff entitled to from the Defendant?

*Sixth*.—What other relief is the Plaintiff entitled to?

*Seventh*.—Is the suit barred by limitation?

The Subordinate Judge held that the Plaintiff and Defendant were not partners and that the Defendant could not be sued in the capacity of a partner and he therefore dismissed the suit; at the conclusion of the trial the Plaintiff asked that an account might be decreed against the Defendant he being treated as a servant; but the Court did not allow the Plaintiff to change the character of the suit which was accordingly dismissed.

The judgment in the previous suit was held by both the lower Courts to operate as *res judicata* in the present suit.

Plaintiff preferred this second appeal.

Their Lordships were of opinion that it was perfectly clear that in the previous suit the Subordinate Judge meant to deal with the first issue only and not with any of the other issues, he being of opinion, that to regard the Defendant as a servant and to call upon him to render an account in that capacity would be to convert a suit of one character into a suit of a wholly different character; and that the matter involved in the present suit not having been really dealt with and decided in the previous suit, the present suit was not barred.

*Babus Lal Mohun Das* and *Sarat Chandra Dutt* for the Appellants.

*Dr. Ashutosh Mookerjee* for the Respondents.

*Appeal allowed.*

S. C. S.



## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2087 of 1899.

GHOSE, J. SADAI NAIK, Plaintiff, Appellant,  
 PRATT, J. v.  
 1901. SERAI NAIK and another, Defendants  
 9, January. and Objectors-Respondents.

*Landlord and Tenant Procedure Act (X of 1859), sec. 161—Rent suit, where claim is for amount less than Rs. 5,000—Second appeal, against judgment of District Judge, if lies—Code of Civil Procedure (Act XIV of 1882), sec. 584—Practice. Inferences from facts—Second appeal, grounds of—Lease, termination of, on death of grantor, of itself—Voidable or void.*

This was an appeal preferred on the 17th of November 1899, against a decision of W. B. Brown, Esq., District Judge of Zillah Cuttack, dated the 14th September 1899, reversing a decision of Babu Nayaranjan Bhuttacharjee, Sub-divisional Officer and Deputy Collector of Bhadruck, dated the 13th May 1899.

This appeal arose out of a suit for rent instituted under Act X of 1859. The claim was in respect of rents for the year 1305 (Uriya style 24 Bhad. 1304 to 12 Bhad. 1305, B. S.). The suit was contested by the Defendants, the tenants, upon the ground that the Plaintiff had no right to recover it and they were supported in that respect by a third party, who had intervened under the provisions of sec. 77 of Act X of 1859.

The facts of the case were as follows:—

It appears that a certain zemindari belonged to three ladies Adhoremoni, Giribala and Nistarini, each being entitled to a one-third share thereof. Nistarini executed an *ijara* pottah in respect of her one-third share in favour of Adhoremoni and Giribala, and it was for a period commencing from 1289 and ending with 1304, B. S. Nistarini died in Falgoun 1303, B. S., corresponding to some date in February 1897, and Matungini, the intervenor Defendant—the daughter of Nistarini—succeeded to the estate. In the meantime Adhoremoni and Giribala had sublet their *ijara* interest in favour of the present Plaintiff. Shortly after the death of Nistarini the revenue payable on account of her share in the zemindari fell due, and it was paid by the Plaintiff in April 1897, and not by Matungini.

That one of the terms of the *ijara* lease was that out of the rent payable by the *ijardars* to the lessor, the former should pay the Government revenue on account of the lessor's share in the zemindari, and apparently, it was with reference to this condition in the *ijara* pottah that the payment in April 1897 was made by the Plaintiff.

In Kartik 1304, B. S., corresponding to some date in October 1897, two notices were issued by Matungini one of the notices being to the tenants on the property, and the other to Adhoremoni and Giribala.

No allusion was there made as to the *ijara* having either expired or been brought to a termination; and there was nothing in either of these notices indicating that Matungini had determined the *ijara*.

In the next month, November 1897, another *kist* of Government revenue fell due, but Matungini took no steps to pay the *kist*, just in the same way as she had made no payment in respect of the April *kist*.

The Deputy Collector who tried the suit was of opinion that the Plaintiff was entitled to recover the rent, and accordingly passed a decree in his favour. On appeal the District Judge reversed the judgment of the Deputy Collector upon the ground that the Plaintiff was not entitled to recover the rent claimed. He held that upon the death of Nistarini the *ijara* came to an end by itself, and that the failure on the part of the intervenor to pay the revenue either in April 1897 or in November 1897 could not and did not indicate that it was her intention to allow the lease to run on until the year 1304, B. S.

The Plaintiff thereupon preferred this second appeal, and at the hearing a preliminary objection was taken on behalf of the Respondents-Defendants—upon the ground that no second appeal lay to the High Court against the judgment of the District Judge, the suit for rent being for an amount less than Rs. 5,000.

*Held*—That a second appeal lies to the High Court against a judgment and decree of the District Judge passed on appeal in a suit for rent under Act X of 1859, when the amount claimed is less than Rs. 5,000.

*Hallodhur Biswas v. Mahesh Chandra Halder* (Sudder Dewany Decisions for the year 1861, Act X of 1859 Rulings, p. 8) followed; *Rajah Nilmoney Singh Deo Bahadur v. Tara Nath Mukerjee* (I. R. 9 I. A. 174) referred to; and *Khedon Mahato v. Bulhun Mahato* (4 C. W. N. 333) distinguished.

That the lease could not and did not come to an end by itself upon the death of Nistarini. *Modhu Sudan Singh v. E. G. Rooke* (I. R. 25 Cal. 1).

That the lease was voidable and the intervenor was at liberty to bring it to a termination but neither by the notices nor by any other act or conduct on her part she having done so, and she having allowed the *ijardars* to pay the Government revenue on more occasions than one, the legitimate inference is that the *ijara* was not brought to a termination but was allowed to run on.

*Balu Boinya Nath Dutt* for the Appellant.

*Dr. Ashutosh Mukerjee*, with *Babus Jnanendra Nath Bose* and *Biraj Mohan Morumdar*, for the Respondents.

*Appeal allowed.*

H. P. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 2457 OF 1898.

GHOSE, J.  
PRATT, J.

PURNA CHANDRA SARKAR,  
Plaintiff, Appellant,

1901.

10, January.

NILMADHUB NANDI, Defendant,  
Respondent.

*Civil Procedure Code (Act XIV of 1882), secs. 375, 426, 429 (c)—Compromise decree, jurisdiction to pass, when the compromise relates to matters outside the scope of the suit—Review, admission of, presented out of time—Reasons, sufficient for admission—Review, granting of, on ground not taken in the application and upon ground untenable—Registration Act (III of 1877) sec. 77.*

This was an appeal preferred on the 6th of December 1898, against a decree of Babu Chandi Charan Sen, Additional Subordinate Judge of Burdwan; dated the 29th of September 1898, passed on appeal from the decision of Babu Bepin Behari Ghose, Additional Munsif of Ranigunge, dated the 31st July 1895.

The suit out of which this appeal arose, was brought by one Srimanjuri Dassi, for registration of a *kabuliyat* under sec. 77 of the Registration Act. The Plaintiff stated in her plaint that there was a dispute between her and the Defendant Nilmadhub Nandi; that the Defendant afterwards proposed to settle the matter amicably and promised to pay Rs. 100 as compensation and to execute a *kabuliyat* for enhanced *jama* of the lands held by him under the Plaintiff; that the Defendant then executed the *kabuliyat* in suit in her favour on the 16th Kartick 1301, B. S., and promised to register the same after payment of the compensation which was to be paid after the paddy was reaped; that the Defendant not having registered the *kabuliyat* at the appointed time, she presented it for registration at the Sub-Registry Office when the Defendant denied execution of the document and the Sub-Registrar refused to register the same; she thereupon appealed to the Registrar and her appeal was disallowed on the 3rd June 1895. Then Purna Chandra Sarkar and Uttam Chandra Sarkar, on the death of their mother Srimanjuri Dassi, were substituted in her place as Plaintiffs in this suit for registration of the document.

The Defendant contended that he did not execute the *kabuliyat* in suit and did not agree to pay enhanced *jama*; that he did not consent to pay Rs. 100 for compensation; that he did not promise to register the *kabuliyat* as stated in the plaint and that he did not settle the dispute amicably as alleged in the plaint.

The first Court decreed the Plaintiffs' suit. While the appeal was pending, the parties came to a compromise and filed a petition of compromise on the 31st January 1898. In that petition it was set forth

that the *kabuliyat* in suit would be upheld; that the Plaintiffs would withdraw certain pending suits; that they would grant a settlement to the Defendant of certain Noabad lands and waste lands, and would admit him as the holder of certain other *mal* lands. A decree was passed in accordance with the compromise on the 3rd February 1898, the terms of the *Solenamâ* being embodied in full in the decree. On the 8th June 1898, the Defendant presented an application for review after 90 days. The application which was based on the ground of fraud, deceit, coercion and failure to carry out the terms of the compromise, was admitted on the ground that both parties misunderstood the terms and meaning of the *Solenamâ* and ultimately the compromise decree was set aside and the appeal reheard, the result being that the decree of the first Court was reversed, and the suit dismissed.

Then this second appeal was preferred by the Plaintiff, and the principal grounds urged before the Court were:—(1) That the review was admitted after the expiration of the period of limitation prescribed therefor, and without sufficient cause, and (2) that the review was admitted on a ground not stated in the application.

*Held*—That a review presented after the expiration of the period of limitation prescribed therefor cannot be admitted when no sufficient reason is alleged and found for presenting the review out of time.

That a Court is not competent to admit a review upon a ground not expressly taken in the application for review nor when the ground is clearly untenable.

That a decree upon a compromise cannot be regarded as *ultra vires* simply because the deed of compromise referred also to matters outside the subject-matter of the suit.

*Babu Nalini Ranjan Chatterjee* for the Appellant.

*Babus Lal Mohan Das and Debendra Chandra Mullick* for the Respondent.

*Appeal allowed: Compromise decree affirmed.*

H. P. C.

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

WE DEEPLY MOURN TO RECORD THE DEATH OF Her Gracious Majesty, Victoria, Queen of the United Kingdom of Great Britain and Ireland and Empress of India, which sad event took place at Osborne, at 6-30 P.M., on Tuesday the 22nd of January last. It is not for us to recount all the virtues that God had blessed her with, or record the blessings of her reign. It will suffice to say that both in her private life, and in her public duties she had lived, and acted up to the ideals of the people over whom she had been called upon to rule. She was devoted as a wife, loving as a mother, simple, frugal and virtuous in private life and the very ideal of a constitutional monarch. The Victorian period occupies a position in history, which for the growth and progress of philosophical thought, scientific skill, commercial activity, enlightened legislation and the reformation of the Courts and the institutions of Government has, perhaps, never been surpassed in the history of the world. That she directly and indirectly contributed a great deal towards the progress and prosperity of her people cannot be gainsaid. Progress in its true sense is only possible under peaceful and moral conditions of society, such as she throughout endeavoured to maintain. India came under her direct rule in 1858 and she ever since evinced a personal solicitude for her welfare and sorrow in her sufferings.

ON RECEIPT OF THE NEWS OF HER MAJESTY'S DEATH the Lords of the Privy Council and others assembled at St. James's Palace and declared the Imperial Crown of the United Kingdom of Great Britain and Ireland to have rightly come to the High and Mighty Prince Albert Edward and proclaimed His Most Gracious Majesty, King Edward VII, King of the United Kingdom of Great Britain and Ireland, and Emperor of India. The Governor-General in Council announced this proclamation by notification in the *Gazette of India* of the 26th of January 1901, and on that day in the afternoon, at 5 P.M., the Sheriff of Calcutta read the proclamation and the declaration made by His Majesty subsequent thereto, from the steps of the Town Hall. The proclamation is identical in form with that made at the accession of the late lamented Sovereign and the most important announcement in His Majesty's declaration is his determination to be a constitutional monarch in the strictest sense of the word. The importance of this assurance we shall explain below.

IT MUST NOT BE SUPPOSED THAT THE KING OF England is by law a constitutional monarch. Under the laws of England, the King up to this day enjoys very high privileges and prerogatives. Under the written constitution, the King is the Chief Executive. He has co-ordinate powers of legislation and can veto the Bills passed in Parliament. He can call, prorogue, dissolve Parliament. He can appoint or discharge Ministers at his will. He can raise or disband the army and navy and holds supreme command over them. He is the "Fountain of Honour," and can create Peers and confer titles, dignities and offices of all kind. He is the head of the National Church and controls the clergy. He is the only legal Sovereign known to the Foreign powers and has the sole right of accrediting or receiving ambassadors, of entering into offensive or defensive alliances of making treaties or of declaring war or peace. In contrast to these direct statutory powers there are but a few indirect statutory limitations to them. Of these latter kind the most prominent are that he cannot keep a standing army in time of peace without consent of Parliament or suspend laws or dispense with their operation. These were the only limitations imposed by the Bill of Rights. To these the Act of Settlement only added the independence of the Judges by making them removeable only

by a vote of both Houses of Parliament and not at royal pleasure, as before. The Act of Settlement further settled the succession to the throne of the Hanoverian Kings but in no other respect imposed any limitations on the royal prerogatives, the abuse of which had brought about the Revolution of 1688. The process by which the prerogatives of the Crown have, since the Revolution, been brought under constitutional control is matter of long history. But without entering into any details it may safely be said that the most effective of this control is financial. The King has since the Revolution been deprived of the power of appropriation or expenditure of revenue and is now dependant on an allowance called the Civil List for his personal expenses and the expenses of the royal household.\* He has no power to maintain the army or navy except by the annual vote of the House of Commons, nor can his officers maintain discipline in the army or navy except under the Mutiny Act, passed annually by Parliament. These are no doubt very effective checks over the high privileges and prerogatives of the Crown enumerated above. But still experience has shown how a monarch like George III, determined to rule as a King, could set the authority of the Parliament at naught and played with the ministers and the political parties as he liked. With another monarch, the means to an end, may not be a wholesale corruption of the Commons but it may be some pretence for the glory of national arms which has, at all times and ages, paid with the populace. The rights of the Sovereign to dissolve Parliament, to discharge Ministers, to create Peers, are such potent factors in the constitution of England that they may any day be exercised, for good or evil, by an ambitious King to establish a personal rule. Mr. Gladstone with all his regard for the constitution was conscious of the rocks ahead and observed in his *Gleanings of Past Years*:—"It will be an evil and a perilous day for the monarchy were any prospective possessor of the Crown to assume or claim for himself final, or preponderating, or even independent power, in any one department of State." But it may equally be a perilous day for the constitution of England. But England has been singularly fortunate in her late lamented Sovereign and to have now in Her successor a King whose ambition it is to be a constitutional monarch in the strictest sense of the word. His Majesty has watched the working of the constitution and the political life of his people during the better part of the last half century and his determination is, no doubt, the dictate of his wisdom. He is sure to be as good a King as his mother was a Queen.

## DEATH OF HER MAJESTY THE QUEEN.

### PROCEEDINGS IN THE HIGH COURT.

To-day on the reopening of the High Court after the *Sri Panchami* holidays the Full Court assembled at 11 A.M., in the Chief Justice's Court. The Chief Justice and the judges were all robed in scarlet and were in full mourning. All the branches of the profession were strongly represented and the Court room was filled long before 11 o'clock and many had to wait outside for want of room. The Chief Justice, referring to the death of Her Majesty, spoke with great feeling and all the judges remained standing while his Lordship spoke.

THE CHIEF JUSTICE addressing the Bar said:—

MR. ADVOCATE-GENERAL AND BABU RAM CHARAN MITTRA.—We are assembled to-day in the gloom of a great national sorrow, the death of our great, good and most beloved Queen, the mighty monarch of a mighty Empire. Our grief, genuine and spontaneous, will be shared not only by those who owed allegiance to Her Royal and Imperial sway, but by every nation of the civilized world.

The reign of Her late Most Gracious Majesty was unsurpassed, in point of length, in the annals of the British Crown: it has become identified, with the march of progress, of civilization, and of social advancement: it has been signalized by the ever-increasing power and prosperity of the British Nation. The events of the last trying, and to many, most distressful year, have displayed to the world how united was our Empire in the assertion of its rights: I am satisfied that to-day that Empire will be equally united in its expression of heartfelt grief at the death of the Most Illustrious and Gracious Lady, so recently our revered and beloved Queen.

Historians have written of great Kings and of great Queens, but the Historian of to-day will have to chronicle a reign conspicuous in the feature of the deep love of a Queen for her people, and of the equal love and reverence of that people for their Queen. Years, as they have rolled swiftly onward, have tended only to strengthen and to intensify that sense of mutual attachment and of affection, but it was the ever womanly sympathy of Her late Majesty which inspired this feeling in the beginning, and caused it to become national in the end. Truly did this Most Gracious Lady share with her people their joys and their sorrows, as they, in all loyalty, sympathised with her many trials and bereavements. Whenever calamity befel them, whether in England or in India or in the Colonies, a Royal message was at once flashed along the wires, replete with the expression of Her Royal condolence and womanly tenderness. It was this manifestation of Her late Majesty's most sympathetic nature which went so direct to the heart of the nation.

To the people of India the news of Her late Majesty's death will be inexpressibly sad, for there was, perhaps, no portion of Her vast dominions which

attracted more closely Her Royal regard, whilst again and again she has evinced her deep and gracious interest in the welfare of its people, and unstinted sympathy with their many troubles. The highest and the lowest in India, the Ruling Prince and the toiling peasant, will mourn alike the loss which the nation has sustained.

I must detain you no longer. I might, perhaps, have paid a most respectful tribute, one of true admiration, to the remarkable qualities which distinguished Her late Most Gracious Majesty as a constitutional Sovereign, and as the fountain-head of Justice, to her uncompromising championship of its purity and impartiality. But at this moment such reflections would be somewhat out of place. I would prefer to hope, weak and ineffective as my words may have been, that I have at least illustrated how deeply rooted, during her life, was the love and affection of her people towards our late Gracious Queen, confident as I am, that, after her death, there will ever remain enshrined in their hearts the memory of Her unrivalled public and private, Queenly and womanly, virtues, the recollection, of her long, her glorious and most beneficent reign.

THE ADVOCATE-GENERAL, then addressing the Bench on behalf of Bar said:—

MY LORD CHIEF JUSTICE, MY LORDS THE JUDGES OF THIS COURT,—The death of our lamented Queen-Empress has plunged her people into grief. There is in the hearts of all, who but lately owned her beneficent sway, a deep and ever-abiding sense of that irreparable loss which the Empire has sustained by her departure. In that deep, that widespread grief, India largely shares. India, as my Lord has most truly observed, has ever been the special object of Her late Majesty's most sincere concern, Her most sympathetic interest, and in her sorrow we too, who have, some of us for many years, been privileged to practise in this High Court, Her Majesty's own foundation—so long the supreme interpreter of Her laws and the guardian of the liberties of Her subjects on this side of India—have our share and desire to testify to its sincerity.

My Lord, during Her reign, the longest perhaps known to history, as it is to the annals of England, the Indian Empire, of which she was pleased graciously to assume the title of Empress in 1877, has been greatly augmented and wisely consolidated and what is perhaps of greater import to those more immediately concerned, the condition of the people of this country, be they Hindus, Mahomedans, Buddhists or Christians and of the various towns and tribes that owned Her sway, has, by good Government, equal laws and impartial administration of justice, been immeasurably improved. But over and beyond the great debt of gratitude which India owes on this account to Her late lamented and Most Gracious Empress, there is the deep bond of sympathy arising out of Her late Majesty's heartfelt concern for the welfare of Her

subjects. From that great, that womanly virtue, queened in her, she has never swerved. She has shared in all the sorrows and calamities which have from time to time befallen Her Indian subjects. It is fitting, therefore, my Lord, I crave leave to say, that in this Court there should be expression given to the keen sense of bereavement with which the whole Empire is inundated. You, my Lord, have, may I be permitted to say, well and nobly voiced the feelings of us all. You have in fitting words given utterance to the sorrow of the Bench. I would fain express the sorrow of the Bar and of the Vakeels and Attorneys of this Court on whose behalf and at whose request, I speak. Of very truth, my Lord, as your Lordship has so well observed, the reign of Her departed Majesty, coeval with the larger part of the greatest century of the Christian era, has been one of progress, progress upon progress in every direction that made for the greatness, the glory and the good of the Empire. Upon Her tomb, there may in justice be inscribed—“She wrought Her people lasting good.” Nor were the private virtues of that Most Gracious Lady, whom we mourn, unequal to the greatness of Her public record. Nay, rather their effulgence bathes it in inextinguishable light. Her life was pure. She made Her royal residence a model home. Her charity was instituted in all her people's trials. Victoria the Great and Good, as to future ages she will be known, has with the large heart of a mother shared in all the sorrows in all the trials and calamities that have befallen Her people and they, in their turn, have shared in such measure as they might, in the trials which have befallen that Most Gracious Lady and witnessed that every sad stroke of sorrow but brought Her into nearer relation with themselves, into most assiduous concern for the well-being of the Empire. And so she reigned in the hearts of Her people and established in reverential love, the broad foundations of that throne to which the King, Her son, has succeeded. Now she rests from Her labours and has, as we trust, for a temporal obtained an eternal Crown. But for us, for Her sorrowing subjects, throughout the length and breadth of Her great Empire, aye, and for many more who have not owned Her sway, there remained but sorrow, a sorrow heartfelt and sincere, “for Her in whom a thousand claims to reverence closed as mother, wife and Queen.”

THE CHIEF JUSTICE.—The Court will now adjourn.

## English Notes.

HOUSE OF LORDS.—*COOKE v. CHARLES VOGELER & Co.* Before the LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD JAMES OF HEREFORD, LORD BRAMPTON and LORD ROBERTSON. 14th December 1900.

*Bankruptcy Court—Jurisdiction over foreigners residing abroad but trading in London.*

The Respondents' firm was constituted of two partners named Devries, citizens of America, residing in Baltimore where the principal business of manufacturers of Patent medicines was carried on. A branch business was carried on in the Farringdon Road, city of London, by their manager, one Geddes, under a power-of-attorney. The Manager at Baltimore was one Dularey. There were other branches, one at Paris, one at Sydney and elsewhere. In carrying on the London business the Company had contracted debts in England, and they had assets in England. On December 18th, 1899, the Company made a conveyance and assignment of all their property wherever situated to Dularey as trustee for the benefit of the creditors generally. On January 6th, 1900, they gave notice to a creditor that they were about to suspend payment of their debts.

Immediately after two of the English creditors of the Company filed a bankruptcy petition against the Company in the High Court alleging that within 3 months from the date of the presentation of the petition the firm had committed two acts of bankruptcy, viz., the assignment and the said notice.

The debtors opposed the making of a receiving order, mainly disputing the jurisdiction of the Court.

The Registrar following *Ex parte Blain* (1879, 12 Ch. D. 522), *Ex parte Crispin* (1873, L. R. 8 Ch. 274) and *In re Pearson* dismissed the petition on the ground that the objection against the jurisdiction was sound.

The Court of Appeal affirmed that decision (1900, 1 Q. B. 541) deciding that the Company was not a debtor within the meaning of the Bankruptcy Act and following the ruling of *In re Pearson*.

The House of Lords now unanimously affirmed that decision. The Lord Chancellor in his judgment, *inter alia*, referred with approval to the decision, given in *Ex parte Blain*, he said:—"The question in debate came before a Court consisting of Lord Justice James, Lord Esher and Lord Justice Cotton and upon principles which I think were established by *Ex parte Crispin* they held on terms that an act of Bankruptcy must be a personal act or default, and it cannot be committed through an agent, nor by a firm as such; and that the English statute could only affect English subjects or foreigners who came either permanently or temporarily within the allegiance of the English Crown."

Then referring to *In re Pearson*, the Lord Chancellor said the Bankruptcy Act of 1883 made no difference in the law. As Lord Justice Fry had

pointed out the word "debtor" in sub-sec. 1 (g) of sec. 4 did not mean a debtor all over the world, but only a debtor who is subject to the law of England and such a debtor must be found before an act of Bankruptcy can be committed.

Lord Davey pointed out that in *Ex parte Crispin* it was laid down that a foreigner trading in England is subject to the Bankruptcy law, but that it is the act of Bankruptcy which gives the Court jurisdiction, and that in the case of a foreigner that act of Bankruptcy must be committed in this country, or be an act intended to operate according to the law of this country. The principle enunciated is equally applicable whether the foreigner be brought within the reach of the Bankruptcy law by his residence in this country, or from the fact of his trading here. In the present case the only act which could be relied on as an act of Bankruptcy was the assignment, but that was executed at Baltimore and was intended to have effect according to the law of Maryland and not of this country. There was no evidence of any authority from the Respondents to Dularey, to give notice of suspension. Dularey's instructions to Geddes, from whom notice was given to creditors, must be taken to have been given by Dularey as assignee and not as agent of the Respondent Company.

*Sir Robert Reid, Q. C., and Mr. Herbert Reid, Q. C., and Mr. Muir Mackenzie* for the Appellants.

*Mr. Russell, Q. C., Mr. Danckwerts, Q. C., and Mr. Carrington* for the Company.

C. W. A.

*Appeal dismissed with costs.*

COURT FOR CROWN CASES RESERVED.—*REGINA v. LUDWIG KANE.* Before the LORD CHIEF JUSTICE, MR. JUSTICE BRUCE, MR. JUSTICE RIDLEY, MR. JUSTICE BIGHAM and MR. JUSTICE DARLING. 20th December 1900.

*Larceny Act (24 and 25 Vict., c. 96, sec. 75)—Interpretation of "or other agent."*

THE QUEEN *v.* PORTUGAL (16 Q. B. D. 487) followed.

The question in this case which was reserved by Mr. Justice Ridley at the trial of the prisoner, on the 13th December 1900, at the Central Criminal Court, was whether the prisoner who was found guilty by the jury, was an agent within the meaning of the first part of sec. 75 of the Larceny Act; a question was also raised whether the cheque and receipt hereinafter mentioned constituted such a direction in writing as to come within its intent. This last point was not decided.

One Mrs. Williamson and the prisoner were both guests or lodgers at an hotel in London. The prisoner was a conjurer and thought reader. On the 13th of last November he drew Mrs. Williamson's attention to an advertisement regarding the projected Baker Street to Waterloo Railway and induced her to consent to take shares therein. He told her that he was himself going to apply for shares amounting to £60. Mrs. Williamson fell in with his suggestion

and forthwith drew a cheque for £60 in the prisoner's favour in order that he may apply on her behalf for shares of a like amount.

He also suggested to her not to cross the cheque because the list of applications was closing that afternoon. She did as was desired by him. It was proved at the trial that the prisoner cashed the cheque that afternoon and made no application for the shares. At her request that afternoon prisoner gave her a receipt as follows:—"Received of Mrs. Williamson £60 for the application of 60 shares in the Baker Street and Waterloo Railway to be returned if those shares are not obtainable." Professor L. Kane, 13th November 1900."

At the trial the question for consideration was whether the prisoner was an agent and it was urged for the prosecution that the cheque and receipt together, indeed that the latter alone, contained such a direction in writing as to bring his offence within sec. 75 of the above Act, *The Queen v. Christian* (L. R. 2 C. C. R., p. 94). Those were the questions argued. The learned Judge told the jury that on both points the case fell within the meaning and intent of the said section. The prisoner was convicted, but admitted to bail, the points being reserved. Upon the cause coming up before the Court for Crown Cases Reserved as above constituted, it was admitted by the counsel for the prosecution, that in the said case of *Regina v. Portugal* it had been decided, that a person must be one who follows the vocation of an agent, that is, one whose occupation is similar to those enumerated in the section in order to be an agent within the purview of that section. The prisoner could not, therefore, be brought within its meaning and so the conviction could not be supported.

THE COURT quashed the conviction in accordance with the ruling in the last-mentioned cases, observing as regards the second question that it will have to be argued out when it arose again.

Mr. W. C. Mathews for the Prosecution.

Mr. Humphreys for the Prisoner.

C. W. A.

Conviction quashed.

CHANCERY DIVISION.—*WETT v. VAN TRAMP*. Before Mr. JUSTICE BYRNE. 31st July 1900.

*Voluntary settlement—Rectification at the instance of a volunteer.*

In this case a niece sought the rectification of a voluntary settlement made by a Mr. Peter Stewart MacIver in 1891 by which a large sum of money was settled on the settlor's grandson and his issue. The grandson died in 1898 a bachelor, having by Will left him property including the voluntary settlement funds to his mother who had after the death of his father married a Mr. Broadley.

The law upon the matter was considered by the learned Judge who referred to *Thompson v. Whitmore* (J. & H., sec. 273) as an authority for the right of a volunteer to have an error rectified. In

*Lester v. Hodgson* (L. R. 6 Eq., see p. 34) it was laid down that if a voluntary settlor died and it was then discovered that beyond all doubt the deed was not prepared in the exact manner which the settlor intended, the deed may be reformed or those particular provisions needful to bring it into accord with his intentions may be introduced. Upon an examination of the evidence Mr. Justice Byrne did not find any sufficient intention contrary to that actually expressed by the deed. The Court should not act upon any but the clearest and most certain demonstration of error and actual intention.

Mr. Eady, Q. C., Mr. Rowden, Q. C., and Mr. Shelford for the Plaintiff.

Mr. Warrington, Q. C., Mr. Levell, Q. C., Mr. Drace and Mr. Boroll for the Defendants.

Action failed: Suit dismissed with costs.

C. W. A.

CHANCERY DIVISION.—*WHITTAKER v. PALMER*. Before Mr. JUSTICE COZENS HARDY. 31st July 1900.

*Administration of insolvent estates—Rules of Bankruptcy—Judicature Act, 1875, sec. 10, voluntary debts.*

This matter was before the Court by way of summons and raised the question whether in the administration of an estate which is insufficient for the payment in full of all debts, those which are voluntary should be postponed to those for valuable consideration. The claimants were the trustees of a voluntary settlement made in favour of a lunatic son; they urged that they were entitled *pari passu* with the creditors for value.

The learned Judge after a consideration of sec. 10 and various decisions on the subject held that by the authorities he was bound to find that voluntary debts must rank with other debts precisely as they would do in bankruptcy, and that the old rule of the Court of Chancery whereby such debts were deferred must be regarded as abrogated by the section under consideration.

Mr. V. Smith, Q. C., and Mr. Druce for the claimants.

Mr. Capron for the testator's personal representatives.

Mr. Eve, Q. C., and Mr. Ford for the creditors for value.

C. W. A. Decision in favour of claimants.

QUEEN'S BENCH DIVISION.—*MOHROS DE ARROZ v. MUMFORD*. Before Mr. JUSTICE BIGHAM. 28th June 1900.

*Marine Insurance—Loss caused by war owing to being "requisitioned."*

Plaintiffs were owners of two rice mills in North Manila. The Defendant Mumford is an underwriter. In August 1898 Manila was captured by the Americans during their war with Spain and they took possession of the Philippine Islands. During the war the natives of that Island led by Aquilando had assisted the Americans. In December 1898 at

a time when the relations between the Americans and the natives of that Island were in a very unsatisfactory condition, the policy on which this suit was based was executed for a limited period of 12 months on the Plaintiffs' said two Mills. The Phillippinos in their struggle with the Americans were thereafter driven back in the direction of Luzon where the mills in question were situate, which necessitated the managers of the mills vacating them in May 1899; they cleared out under orders of Aquilando, the Commander, and by whom the produce was "requisitioned."

The present action was brought under the said policy to recover the value of a large quantity of produce in the mills so "requisitioned" by Aquilando. The claim was for £16,219 as loss caused by war. The main defence was that the loss was not "directly" caused by the war and therefore not covered by the policy. The learned Judge on a consideration of the policy held that the loss was directly caused by the war within the meaning of the policy. Judgment was given for Plaintiffs for £15,000 owing to the loss caused through the taking away of the rice, but the claim for loss owing to deterioration by reason of its having been kept too long in the mills was not allowed.

*Sir R. Reid, Q. C., and Mr. Scrutton for the Plaintiffs.*

*Mr. J. Walton, Q. C., and Mr. Hamilton for the Respondent.*

C. W. A.

*Judgment for Plaintiffs.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

Suits Nos. 516, 352 & 328 OF 1900.

RAM PRASAUD and others,

v.

NUR MAHOMED and others,  
and

STANLEY, J. } HEM CHUNDER ROY and others,  
1901. } v.

22, January. } DWARKA DASS and others,  
and

HURCHAND ROY and others,  
v.

MANGAL CHAND.

#### *Practice—Costs—Infant Defendants.*

The first was a suit against four persons carrying on business in co-partnership. Two of the Defendants being infants, a guardian *ad litem* was appointed and the suit was placed on the defended board. Decree was made but the question as to the scale on which costs should be given was reserved, as it

had been in the other suits, his Lordship expressing a desire to look into precedents in order to have a uniform practice in the matter. In some of the other suits the guardian *ad litem* had filed written statements submitting the infants to the protection of the Court.

On this day his Lordship delivered judgment and

*Held*—That where there are infant Defendants and there is no contest in the suit, costs should be allowed on scale No. 1.

That the guardian *ad litem* is entitled to file a written statement submitting the infants to the protection of the Court. In that case also costs should be awarded on scale No. 1, but costs of filing the written statements should also be allowed.

S. R. D.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 17 OF 1898.

HARRINGTON, J.	}	SIDDESSURY DASSEE
1901.		v.
15, January.	}	JANARDAN SIKKAR.

*Civil Procedure Code (Act XIV of 1882), secs. 131, 132—Notice under sec. 131, Civ. P. C.—Documents, right to use, not disclosed.*

This suit came on for hearing on Friday the 11th January and evidence on behalf of the Plaintiff was gone into. On Saturday the 12th, notice was given by the Defendant to the Plaintiff's attorney that he intended to make use of certain account books from 1292, B. S., to 1297, B. S., and that the Plaintiff could have inspection thereof on Monday the 14th at 10-30 A.M. On Monday the suit was not reached. On the suit being called on this day,

*Mr. Knight* (with him *Mr. S. R. Das*) for the Plaintiff.—We received this notice only on Saturday. I ask for a direction of the Court now, either that the Defendant is precluded by sec. 131, Civ. P. C., from using these books now or that, if he is entitled to make use of them, the case should be adjourned and time given to us to inspect them. The Defendant filed his affidavit of documents on the 4th May 1898, but did not disclose any books of account. On the 9th June 1898 we asked him to produce his books of account for our inspection. On the 10th he replied that he had no books of account. On the 5th January 1899 we served upon him a notice under sec. 131, Civ. P. C. On the 30th January he writes to us another letter which, I submit, shows that he had some books, but did not choose to disclose them. On the 1st February he wrote to us to say that he had no books of account and if there were any books we were not entitled to see them. On the 15th March 1899 they served us with a reply under sec. 132, Civ. P. C., to our notice. In that they again repeat they have no books. Under these circumstances the Defendant is not entitled to use these books.



*Mr. R. Mitra* (with him *Messrs. Sinha & H. D. Bose*) for the Defendant.—I had no notice that this application was going to be made now. The books we are producing are not covered by the notice under sec. 131, Civ. P. C. Under that section, the books required to be produced must be specified, but in the notice served upon us, the only books that are specified are those for the years 1295 to 1300. The 2nd para. of the schedule to that notice "all books of account and documents relating to matters in this suit" does not comply with the terms of this section. The necessity for producing these books now has arisen from the evidence given by the Plaintiff. Till her evidence was given these books were not necessary. It is only to contradict her that we require these books.

*Mr. Knight*.—These books ought to have been produced before. We could have supported our allegation from these books if we had inspection of them. They cannot now use these books without giving us an opportunity of using them also and they must make a further and better affidavit. For all we know they may have other books.

THE COURT held that the Defendant not having disclosed the books before were not entitled now to make use of them.

*Babu N. C. Ray*, Attorney for the Plaintiff.

*Babu R. C. Mitter*, Attorney for the Defendant.

#### [CIVIL APPELLATE JURISDICTION.]

##### APPEAL FROM APPELLATE DECREE

No. 291 of 1899.

BANERJEE, J. UMESH CHANDRA PRAMANICK and  
BRETT, J. others, Plaintiffs, Appellants,  
1901.  
15, January. MATHUR MOHAN HALDAR and others,  
Defendants, Respondents.

*Suit for recovery of money due under a mortgage deed—Usufructuary mortgage—Mortgage security impaired by decree obtained by third party—Personal decree—Succession certificate, if necessary—Debt due to the estate of the deceased or to the heirs—Succession Certificate Act (VII of 1889), sec. 4—New objection taken in appeal for the first time.*

This was an appeal preferred on the 6th of February 1899, against the decree of C. P. Caspersz, Esq., District Judge of 24-Pergunnahs, dated the 2nd of September 1898, reversing a decree of Babu Bulloram Mullick, Subordinate Judge, 1st Court, Alipur, dated the 11th of November 1897.

This appeal arose out of a suit brought by the Plaintiffs-Appellants to recover money due under a mortgage deed executed by the Defendants in favour of the predecessor-in-title of the Plaintiffs, and for certain other sums of money claimed as damages, on the allegation that the mortgage security has been impaired by reason of a decree obtained by one Bhagaban Chandra Naskar against the Plaintiffs,

and that the Plaintiffs had to incur expense in the litigation with Bhagaban Chandra Naskar.

The defence, *inter alia*, was a denial of liability, on the ground of no money having been borrowed on the mortgage deed, and also on the ground that the Plaintiffs' prayer for foreclosure and sale was illegal, and on the further ground that the mortgage security was not impaired by any wrongful act on the part of the Defendants.

The first Court held that the mortgage was a usufructuary one and that the Plaintiffs were not entitled to any decree for sale of the mortgaged property, but that they were entitled to a decree making the Defendants personally liable for the amount claimed by reason of the mortgage security having been impaired through the wrongful conduct of the Defendants.

Against that decree the Defendants preferred an appeal, and they were allowed by the Appellate Court to take the objection, not raised by them either in the first Court or in their memorandum of appeal, that the Plaintiffs were not entitled to any decree by reason of their not having taken out a certificate under the Succession Certificate Act (VII of 1889); and the lower Appellate Court gave effect to that objection and dismissed the suit under sec. 4 of the Succession Certificate Act.

Then the Plaintiffs preferred this second appeal and on their behalf it was contended that the Court of Appeal below was wrong in holding that sec. 4 of the Succession Certificate Act was a bar to the maintainability of the suit, and that the Court of Appeal below was further wrong in allowing the objection under that section to be raised in the appellate stage of the case, without giving the Plaintiffs an opportunity of producing a certificate under the Succession Certificate Act.

*Held*.—That the money for which the suit was brought was not a debt due to the estate of the deceased mortgagee within the meaning of sec. 4, sub-sec. 1, cl. (a) of the Succession Certificate Act (VII of 1889).

Their Lordships observed as follows:—

That the mortgage being a usufructuary mortgage and the case being one in which if the security had remained unimpaired, the right to demand payment of the money would never have accrued to the mortgagee or his legal representatives, and the right to obtain a personal decree against the mortgagors arising only upon the happening of a contingency which might never have happened, *viz.*, the obtaining of a decree by Bhagaban Chandra Naskar which deprived the mortgagees' heirs, the Plaintiffs, of part of the mortgaged property, and the decree having been obtained not against the original mortgagee but against the Plaintiffs themselves, the right to demand payment of the money accrued for the first time to the Plaintiffs and that sec. 4 of the Succession Certificate Act was no bar to the Plaintiffs obtaining a decree in this suit.

That it is doubtful if the District Judge was right in allowing the objection under sec. 4 of the Succession Certificate Act to be taken in the appellate stage of the case, when the objection was not raised before the first Court, without giving the Plaintiffs an opportunity of meeting it by producing a succession certificate.

*Dr. Ashutosh Mukerji and Babus Jnanendra Nath Bose and Biraj Mohun Mojumdar for the Appellants. Babus Saroda Charan Mitter and Dasarathi Sanyal for the Respondents.*

*Appeal allowed.*

H. P. C.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1928 of 1899.

GHOSE, J. GOPI NATH BISWAS and ors.,  
PRATT, J. Defendants, Appellants,  
1900. v.

Heard, 21, December. RADHA SHYAM PODDAR,  
Judgment, 10, January.] Plaintiff, Respondent.

*Bengal Tenancy Act (VIII of 1885, B. C.), secs. 159, 161, 164, 165, 167—Sub-division of tenure by act of parties—Decree in rent suit embodying terms of sub-division—Purchaser in execution of such a decree, right of—Mortgage created by some of the tenure-holders—Annulment of incumbrance, not registered and notified—Notice of such incumbrance—Right of action—Subsequent knowledge of incumbrance.*

The facts of the case were as follows:—

One Lakhan was the holder of a separate 8 annas share of a *mokurari* tenure under Kailash Misra, the rent-free proprietor. Lakhan had two sons, Goday and Becharam, the interest of the latter being inherited by his four sons. Kailas sued Goday and his nephews for arrears of rent of the 8 annas *mokurari* in question; and a compromise decree was passed whereby it was agreed that the half share of Goday should be separated from the other half share of Becharam's sons, each moiety being deemed an independent tenure. That decree was dated the 23rd March 1889. In execution of the decree the 4 annas share belonging to Becharam's sons was put up for sale and was purchased on the 21st June 1890 by Surja Narain Gossain. Subsequently Kailash sued Surja Narain for arrears of rent, and in execution his 4 annas interest was purchased by the Plaintiff on the 22nd January 1894.

The Plaintiff brought this suit, out of which this appeal arose, for possession of the 4 annas interest on the allegations that he had been put in possession by the Court in May 1894 and dispossessed by the Defendants in the subsequent month of August.

The principal Defendants, Appellants in this appeal, had in April 1876 obtained a mortgage from three of Becharam's sons of their interest in this tenure

and recovered a mortgage decree on the 4th September 1890 against two of these sons (neither Surja Narain nor the Plaintiff being made a party to the suit), and in execution thereof on the 23rd May 1894, themselves purchased the interest of these two sons representing one-fourth of the original 8 annas *mokurari* tenure. The Defendants pleaded that the Plaintiff was not entitled to deprive them of the interest thus acquired because he had, not annulled the incumbrance in the manner and within the time required by law. They also contended that the rent decree in execution of which the Plaintiff purchased the property was a decree in respect of only a share of the tenure, and had therefore only the effect of a money-decree, the sale in execution of which would pass no more than the right, title and interest of the judgment-debtor.

Both the lower Courts held that these pleas were invalid and gave the Plaintiff a decree.

Thereupon this appeal was preferred by the principal Defendants and on their behalf the same contentious as were raised on the lower Courts were urged in the High Court, as also this that the *solenamah* decree, so far as it went beyond the scope of a rent decree and recited a separation of shares between the Defendants was invalid.

*Held*—That the landlord and the tenure-holders were at perfect liberty to divide the tenure by mutual agreement, and they having done so, the agreement was a binding one between the parties and its validity was not impaired by its being incorporated in the decree; and the separated share in the tenure having been duly and effectively recognised by both landlord and tenants, the Plaintiff's purchase must be regarded as that of an entire tenure.

That the Plaintiff, not being aware of the incumbrance until it was pleaded in the written statement in this suit, and neither he nor his predecessor in interest being made a party to the mortgage suit, and the Plaintiff having been put in possession of the property under his purchase, had a good cause of action and was entitled to recover the property from the Defendants, subject to the condition that the incumbrance would stand good if not annulled within one year if the Plaintiff becoming aware of its existence.

That the Plaintiff's right of action having been good and valid when the suit was brought it could not be taken away by what was brought to his notice for the first time in the Defendants' written statement.

*Babu Digam'bur Chatterjee for the Appellants.*

No one appeared at the hearing for the Respondent.

*Appeal dismissed.*

H. P. C.

# THE Calcutta Weekly Notes.

Vo. V.]

MONDAY, FEBRUARY 4, 1901.

[No 11.]

## Contents.

### NOTES.

#### EDITORIAL NOTES—

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### REPORTS (See Index.)

HIS EXCELLENCY THE VICEROY, ON THE 26TH OF January last, sent the following message to the Secretary of State for India for submission to His Majesty the Emperor of India:—

"The Government of India have heard with profound sorrow of the death of Her Majesty the Queen-Emress. From every quarter of India news continues to arrive of unaffected grief and lamentation among all races and creeds. The Government, the Princes, and the people, are one in mourning the death of a Sovereign who was revered here as no previous monarch has been, and to whom loyalty had merged in love. The feeling is that India has lost not merely a Queen, but a mother. On behalf of all classes we beg you to convey to His Majesty the King-Emperor assurance of these sentiments, and to offer to him our respectful homage upon his accession to the throne of the British Empire."

The Secretary of State communicated in reply the following message from the Emperor, dated the 29th of January 1901:—

"I am commanded by the King-Emperor to transmit to your Excellency the following answer, which His Majesty has been graciously pleased to make to the address communicated to me by Your Excellency for submission to His Majesty on behalf of the Government, the Princes, and the people of India:—

I recognise in Your Excellency's message the affection and loyalty inspired by the Queen-Emress Victoria throughout all classes of her subjects in India by the wisdom and justice of her long reign, and by her earnest personal solicitude for their welfare, and I am deeply touched by this expression of their universal sorrow for her death. I desire that my acknowledgments of the homage tendered to me on my accession may be made known to the Chiefs and people of India, whose country I have

seen, in whose attachment to my throne I have full confidence, and whose prosperity and happiness will always be to me of the highest interest and concern."

WE INVITE ATTENTION OF THE LOWER COURTS TO the observations of Ameer Ali and Brett, JJ., in the case of *Surjmoni Dasee v. Kali Kanta Das*, reported in our last issue (5 C. W. N. 195), in connection with the practice, not uncommon amongst Subordinate Judicial Officers, of examining only one or two witnesses a day in heavy contested suits and thus protracting the proceedings or what is, perhaps worse cutting them short on some supposed default of the parties. The practice disapproved of by the learned judges is highly inconvenient to the parties and is often a source of great hardship to them. To keep on a number of witnesses in attendance for any length of time means heavy cost to the parties. Witnesses who come from a distance or have other businesses to attend to, cannot, even with the best efforts of the parties, be persuaded to stay on. The compensation that witnesses ordinarily get, is not sufficient to recompense them for loss of business. Under such circumstances it is not right that Courts should refuse reasonable adjournments and proceed to dispose of cases in the absence of witnesses.

Their Lordships in delivering judgment in the above case (5 C. W. N. at p. 205) remarked:— "This may occasionally suit the convenience of the presiding officer of the Court or may seem to him to be necessary having regard to the other current and possibly urgent work of the Court. But it is a course which this Court has always discouraged, and amongst its other and many disadvantages, it has the effect of leading the parties to believe that not more than one witness or possibly two witnesses if their evidence is likely to be short, will be examined in a day and so to lead them, in order to save expense, not to keep all their witnesses in attendance but to bring them up day after day as it seems likely that they will be examined."

We are sure these observations of their Lordships will have a great salutary effect on the Subordinate Courts. But we may be permitted to point out that it is not always the Subordinate Judicial Officers who are at fault. The system under which they have got to submit periodical returns to the High Court and the fact that their work is often estimated by its quantity and not the quality, are responsible for many

of the shortcomings of the lower Courts, of which we have to complain from time to time. The return and its dreaded consequence is always uppermost in their mind and whenever a heavy case comes up before them they are in mortal fear that it will perhaps take up the best part of their time and energy and yield a poor return and in the result, perhaps, merit the censure of the authorities. This, we are sure, will at once give an insight into the practice complained of and will account for the reason why the Subordinate Judicial Officers always take care to dispose of short cases during the best part of the day and take up the heavy ones at its sag end. If the judges would go on circuit and sit with the officers, they would know all the weak points in our system of administration of justice and then be able to suggest considerable improvements in it.

#### RESTITUTION OF CONJUGAL RIGHTS.

Notwithstanding the observations of learned judges as regards suits for restitution of conjugal rights being repulsive to civilized notions, (see *per MELVILL, J.* in *Ardesir v. Avabai*, 9 Bom. H. C. 293; and *per MARKEY, J.* in *Gatha v. Mochita*, 23 W. R. 182) and the fact that the Hindu law books do not recognise a compulsory discharge of marital duties, it can hardly be gainsaid, after a perusal of the careful and elaborate judgment of Ameer Ali and Brett, JJ., in *Surjiamoni Dasee v. Kali Kanta Das*, reported in our last issue, that such a suit lies between Hindus. It is interesting to note that the practice of allowing suits for the restitution of conjugal rights is peculiarly of English origin and is a transplantation from England into India. A suit for restitution is not a creature of the English Common Law or the English Court of Equity but owes its origin to the Ecclesiastical Courts. The principle on which the Ecclesiastical Courts proceeded was that it is the duty of married persons to live together, and that this duty should be enforced by the decree of the Court. In this connection, the words of Blackstone may be appropriately quoted:—"The suit for restitution of conjugal rights is brought whenever either the husband or wife is guilty of the injury of subtraction or lives separate from the other without any sufficient reason, in which case they will be compelled to come together again, if either party be weak enough to desire it, contrary to the inclination of the other." Mr. Justice Pinhey, in *Dadaji v. Rukhmabai*, 1, L. R. 9 Bom., p. 534, traces the process by which gradually such suits were introduced into the Courts in India. In America, however this practice of the English Court did not find favour, as will appear from the following observations of a learned American writer:—"Over England, but not over this country, walks still that spawn of a dark age whose mission it was to keep conjugal sinners in the strait performance of

holy matrimonial duties, termed the suit for the restitution of conjugal rights" (Bishop on Marriage and Divorce, 4th Ed., Vol. I, p. 30). In India such suits are very rare [1 Ind. Jur. (N. S.) 318]. Still it may now be said to be settled law supported by a long series of decisions ending with the case reported in our last issue that there is no legal bar to the maintainability of such a suit between Hindus. The only point about which there was some doubt and divergence of views was as to the mode in which the decree in such suits should be enforced. (See Mayne on Hindu Law and Usage, 6th Edition, p. 117). In England the practice till 1884 was that the decree was enforced by attachment and the case of *Weldon v. Weldon*, L. R. 9 P. D. 52, was the last instance where an order for attachment was granted, Sir James Hannen regretting that the law did not allow any exercise of discretion to the Court. The pressure of public opinion however had begun to be felt and soon after, the Statutes 47 and 48 Vic., Cap. 68 abolished the old practice of enforcing the decree and confined the consequence of disobedience of such a decree to an order for periodical payments in lieu of attachment. In India, the legislature instead of progressing with the times seems to have moved in the opposite direction. The Civil Procedure Code of 1859 did not contain any express provision for making the Court's decree in such cases obeyed. But the idea, peculiar to English Law, that woman may be classed with goods and chattel, furnished perhaps the excuse for the Courts in this country to make such decree obeyed under sec. 200, which related only to immoveable property. In the Code of 1877, however, remedies were expressly provided against the disobedience of decrees for restitution and they were made enforceable by attachment or imprisonment under sec. 260. The Code of 1882 made no alteration in the law in this respect. The procedure followed in the Calcutta High Court for the enforcement of decrees for the restitution of conjugal rights will appear from the case of *Troylako Nath Dutt v. Radharani Dasi* (3 C. W. N., pp. xxxix and lxxxviii) and the cases referred to therein.

#### English Notes.

HOUSE OF LORDS.—WALLASEY UNITED TRAMWAYS COMPANY v. WALLASEY DISTRICT URBAN COUNCIL. Before the LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND and LORD ROBERTSON. 13th December 1900.

*Effect of a private statute on a public one. The General Tramways Act is one of 1870. Wallasey has a local Tramways Act of 1878.*

The question for consideration was whether this private Act operated to override the provisions of the said General Act of 1870. The General Act, 1870, sec. 43, empowered the local authority at the end of 21 years to purchase on terms therein stated the undertaking of a Tramway Company after

serving proper notices. For the Appellants, the United Tramways Company, who sought a declaration that they were not compelled to sell their undertaking, it was urged that the terms of the local Act were very different from and opposed to the provisions of the General Statute of 1870.

Mr. Justice LAWRENCE had on such application granted an interim injunction which was continued by Mr. Justice RIDLEY until the trial of the action.

Two Judges of the Court of Appeal, who heard it by consent, arrived at the conclusion that the injunctions should not have issued and therefore reversed the orders of the Court of first instance.

The United Tramways Company appealed. The House of Lords dismissed the appeal. It was held that the provisions of a public statute could only be varied by clear and express enactment or clear implication in a private Act. There was no real variance between the two statutes, no inconsistency between them, and the well settled principle must prevail.

Mr. Browne, Q. C., and Mr. Danckwerts, Q. C., for the Appellant.

Mr. Cripps, Q. C., Mr. Pickford, Q. C., and Mr. Horridge for the Respondent.

C. W. A. *Appeal dismissed with costs.*

### Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 226 of 1900.

STANLEY, J. } SARAT CHANDER DAWN and others,  
1901. } v.  
11, January. } KRISTO DHONE DAWN and others.

*Change of Attorney on behalf of infant—Practice—When application should be granted.*

Mr. Shelley Bonnerjee, instructed by Babu Sarat Kumar Sircar, Attorney, applied on behalf of the Plaintiffs, who are infants for change of Attorney from Mr. N. C. Bose, the Attorney on the record for the infants.

The application was supported by an affidavit of one Kristo Dhone Kundu, the brother of Sm. Saroda Sundary Das, the next friend of the Plaintiffs. The affidavit alleged amongst other things that the present Attorney did not take his instructions from the next friend but from a person who was a near relation of one of the Defendants and that certain necessary proceedings had not been taken and that the conduct of the suit should be taken off his hands.

Mr. Bonnerjee referred to the case mentioned in Belchambers' Practice, p. 263, and the case of *Ram Chander Roy v. Poorno Chunder Roy*, decided by Sale, J., and reported in 4 C. W. N., p. cxxxv, in which the former case was followed and contended that a case for change had been made out on the grounds which he had placed before the Court.

Mr. N. C. Bose contra.—I appear to place the facts of the case before the Court and have an affidavit of myself, which I propose to read. It is the settled practice of the Court that a change of Attorney on the application of the next friend of an infant party would be granted only when the Court upon consideration of all the facts is satisfied that the order sought for should be made in the interests of the infant.

Reads affidavit traversing allegations made against him and says he leaves the matter in the hands of the Court.

*Held*—An application for change of Attorney by next friend is not granted as a matter of course. Good grounds must be shown. As no valid ground has been shown, application refused.

Babu S. C. Sircar, Attorney for the next friend.

Mr. N. C. Bose, Attorney on the Record.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 553 of 1899.

HARINGTON, J. } JADU NATH GHOSH  
1901. } v.

19, January. RADHA RAMON MUKERJEE.

*Practice—Taxation of costs—Application to make second mortgagee party, costs of—Notice—Registration.*

On the application of Babu Kally Nath Mitter, on Thursday, the 17th instant, this case was set down this day for argument on the exceptions to the bill of costs allowed by the taxing officer.

Babu Kally Nath Mitter, stated that his client as the first mortgagee filed this suit for recovery of the mortgage money. He subsequently came to know that there was a puisne mortgagee and accordingly applied to bring him on the record which was granted and the suit was heard in due time and decided. Now in taxing his bills the taxing officer disallowed the costs of this interlocutory application apparently on the authority of *Jankiprasad v. Kishen Dat* (16 All 478) on the ground that inasmuch as registration of document amounts to notice to the people at large the Plaintiff ought to have searched the Registration office and made the puisne mortgagee a party at the first instance and that if his costs of and incidental to that application were allowed then the Plaintiff would be allowed to reap the benefit of his own laches.

He then argued that registration does not amount to notice, though different High Courts in India have taken different views; for instance, the Allahabad and Bombay High Courts take the American view, viz., that registration is notice and the Madras and the Calcutta High Courts take the English view, viz., that registration is not notice. He referred to *Churaman v. Balli* (I. L. R. 9 All. 591), *Mata Din Kasodhan v. Kazim Husain* (I. L. R. 13 All. 432), *Jankiprasad v. Kishen Dutt* (I. L. R. 16 All. 478), *Lakshman Das v. Darrat* (I. L. R. 6 Bom. 168), *Narayan Lakshman v. Bapu Valad Hasbatarav* (I. L. R. 17 Bom. 741), and to *Doorga Narain Sen v.*

*Bansy Madhub Mozoomdar* (I. L. R. 7 Cal. 199), *Inderdewan Pershad v. Gobind Lall Chowdhry* (I. L. R. 23 Cal. 790), *Madras Building Co. v. Rawlandson* (I. L. R. 13 Mad. 383), *Shan Maun Mull v. Madras Building Co.* (I. L. R. 15 Mad. 269).

He submitted that notice as defined in sec. 3 of the Act does not make it obligatory on the 1st mortgagee to search the Registration office, for in that case sec. 81 as to marshalling of securities would be entirely meaningless. He argued that if it were so then the costs of the first mortgagee, of properties situated in different parts of the country, in searching the records of the various registration offices would be immense, to allow which would be very hard against the mortgagor. The table of fees provides for no such costs.

He further argued that when the application was made this Court thought it proper and made no order as to costs which means that the costs will be the costs in the suit. He referred to Morgan, on Costs, p. 47, Gay and Johnson, Vol. II, p. 458, Dalings' Report, p. 418.

*Held*—That the whole question turns upon the question whether registration of a document amounts to notice to all concerned. The application being *ex parte*, in the absence of the argument on the other side and upon the authority of *Inderdewan Pershad v. Gobind Lall Chowdhry* (I. L. R. 23 Cal. 790) which held that Registration did not amount to notice of mortgage. The Court is not prepared to bind the Plaintiff with notice.

Registration of itself is not notice, under sec. 85 of Act IV of 1882, to the mortgagees of the existence of subsequent encumbrances and consequently the costs of and incidental to the application under reference will be allowed.

K. K. D.

*Costs allowed.*

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL SIDE

No. 11 of 1900.

MACLEAN, C. J. THE ROYAL INSURANCE CO.,  
PRINSEE, J. Defendants, Appellants,  
HILL, J. v.

1901.

OKHOY COOMAR DUTT and others,

8, January. Plaintiffs, Respondents.

*Practice—Report of Registrar, Exceptions to—Exceptions to report—Time for giving notice of motion—Belchambers' Rules and Orders, Rule 615 (565, 1st Ed.)—Belchambers' Rules and Orders, Rule 615 (567, 1st Ed.)—"Fraud, surprise or mistake or such other special ground," meaning of—Appeal.*

This was an appeal from an order of Sale, J., refusing to make absolute a rule, which had been issued by him under circumstances mentioned below to shew cause why the filing of certain exceptions to a report of the Registrar should not be taken and deemed to be due notice of motion to discharge or vary the report or, in the alternative, why the report should not be re-opened on the ground of surprise or mistake or such other special ground as may appear.

The suit was instituted against the Defendants to recover certain sums secured on various fire policies. On the 8th April 1899, an order was made in the suit referring it to the Registrar to ascertain the value of certain things therein mentioned with other directions. The Registrar made his report on the 8th October 1899 and the same was filed on the 2nd March 1900. On the 9th March the Defendants' solicitors were informed of the filing of the report, and on the 15th March they filed certain objections, but they did serve any notice of motion to discharge or vary the report. It was alleged by the Defendants' solicitor that this was due to a *bonâ fide* mistake on his part, as he was not aware till the 27th March 1900, when he became aware of the decision in the case of *Lutchmee Narain v. Burjath Lohia* (I. L. R. 24 Cal. 437),\* to the effect that it was necessary to give notice of motion within the time allowed by Rule 565 (Rule 615, Belchambers' Rules and Orders, 2nd Ed.). On the 28th March 1900, the Defendants applied before Ameer Ali, J., for further time within which to apply by motion, upon notice to discharge or vary the Registrar's report. The application was refused on the ground that it was made too late. No appeal was filed against that order. On the 5th April the Defendants applied before Sale, J., for a rule in the terms above stated, but their application was refused. Subsequently however, it being pointed out to Sale, J., that by refusing to grant a rule the Defendants might be prejudiced, if they wished to take the opinion of a Court of Appeal on the point, the learned Judge granted a rule but refused to make it absolute. Hence this appeal.

*Messrs Hill, Henderson and Knight* for the Defendants Companies.

*Messrs. Garth and Chackerbutty* for the Plaintiffs.

*Held*—That the filing of the exceptions cannot be taken or deemed to be notice under Rule 615 (565, 1st Ed.).

That Rule 615 must be strictly followed if it is desired to discharge or vary a Registrar's report.

That the words "fraud, surprise, mistake or such other special ground" in Rule 617 (1st Ed.) refer to fraud or surprise or mistake or some other special ground, incident to or connected with or which has resulted in the making of the certificate or report itself, and not to something which has occurred quite outside and independent of the certificate or report.

That a mistake in not complying with the procedure laid down in Rule 615 might have been rectified by the Court allowing further time to apply by motion under that section. Such a mistake, however, is not a special ground for re-opening the report under Rule 617.

*Quære*—Whether an appeal lies from an order refusing to make absolute such a rule.

*Messrs. Watkins & Co.* for the Appellants.

*Messrs. S. D. Dutt and Gupta* for the Plaintiffs.

S. R. D.

*Appeal dismissed.*

\* It was published in 2 C. W. N. long before that date (p. 57).—*REP.*

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### REPORTS (See Index.)

## Notification.

### GOVERNMENT OF INDIA.

No. 510.

Calcutta, 5th February 1901.

HIS MAJESTY THE KING, EMPEROR OF INDIA, has been pleased to send the following letter to the Princes and People of India:—

"TO THE PRINCES AND PEOPLE OF INDIA,—Through the lamented death of my beloved and dearly mourned mother I have inherited the Throne which has descended to me through a long and ancient lineage. I now desire to send my greetings to the Ruling Chiefs of the Native States, and to the inhabitants of my Indian dominions, and to assure them of my heart-felt wish for their welfare. My illustrious and lamented predecessor was the first Sovereign of this country who took upon Himself the direct administration of the affairs of India, and assumed the title of Empress in token of Her closer association with the Government of that vast country.

"In all matters connected with India the Queen-Empress displayed an unvarying deep personal

interest, and I am well aware of the feeling of loyalty and affection evinced by the millions of its peoples towards Her throne and person.

"This feeling was conspicuously shown during the last year of Her long and glorious reign by the noble and patriotic assistance offered by the Ruling Princes in South African War, and by the gallant services rendered by the Native Army beyond the limits of their own country.

"It was by Her wish, and with Her sanction, that I visited India, and made myself personally acquainted with the Ruling Chiefs, the people, and the cities of that ancient and famous Empire.

"I shall never forget the deep impressions which I then received, and I shall endeavour, following the great example of the first Queen-Empress, to work for the general well-being of my Indian subjects of all ranks, and to merit, as She did, their unflinching loyalty and affection.

(Sd.) EDWARD, R. AND I."

WINDSOR CASTLE;  
4th February, 1901.

## QUEEN'S PROCLAMATION OF 1858.

We are happy to have the King's message of good-will towards his Indian Empire. His Majesty has, no doubt, inherited the English Throne through a long and ancient lineage but the Crown of India has descended to him from his illustrious mother.

His Excellency the Viceroy opening the proceedings of the Legislative Council on the 1st of February last and alluding to the death of our late lamented Sovereign rightly said that the Proclamation of 1858 is the "Magna Charta of India."

This Proclamation is not merely the great charter of Indian citizenship, but is also the first and the foremost title of the British Crown to the supreme sovereignty of this country. It followed the removal of the last vestige of that waning sovereignty from which the East India Company had, in the course of a century, acquired a derivative title to the government of their growing Indian possessions.

We need not here enter into the intricate question of the territorial rights of the East India Company or their title to the sovereignty of this land. The sovereignty of the British Crown over the Indian Empire was only expressly established after the removal of the last shreds of Mogul

sovereignty after the Mutiny and Revolt of 1857 by the Queen's Proclamation of 1858 to the Princes and People of India and by the appointment of the first Viceroy in Her name to administer on Her Majesty's behalf the territories so long governed by the East India Company. Those who may be disposed to disregard this constitutional aspect of the Proclamation need only go through the charters, statutes, treaties, firmans, grants, judicial decisions and other records of the East India Company, to be convinced of the chaotic foundation of the Company's rights, titles and jurisdictions in the acquired possessions.

While on the one hand the Proclamation of 1858 established finally and for good the sovereignty of the British Crown over the people of India: on the other hand, it conferred on them in the fullest measure the rights of British citizenship. The Proclamation says in the most unequivocal terms:

"We hold ourselves bound to the natives of our Indian territories by the same obligations of duty which bind us to all our other subjects, and those obligations, by the blessing of Almighty God, we shall faithfully and conscientiously fulfill."

It went further. Over and above this equality, it guaranteed to the children of the soil non-interference in all that they had inherited from their ancestors, be that religion, laws, customs, usages or land.

The Proclamation was issued in times of trouble for the pacification of the country. The restoration of peace and order with the aid of the Princes and People amounted to a most active acquiescence on their part to this declaration of sovereignty by the British Crown.

The Proclamation may thus be regarded as the corner-stone of our constitution on which the superstructure of the sovereignty of the British Crown and the allegiance of the Indian subjects may be said to rest.

It is binding on the successors and representatives of the Crown and the Viceroy rightly said that it was the "golden guide to their conduct and aspirations."

## English Notes.

COURT OF APPEAL. *BARNETT v. THE CORPORATION OF ECCLES*. Before LORDS JUSTICES SMITH WILLIAMS and ROMER. 25th June 1900.

*Public Health Act, 1875* - "Full compensation."

In this appeal the Court of Appeal agreeing with the Divisional Court held that "Full compensation" to which a person is entitled under sec. 308 of the Public Health Act, 1875, who is damaged by the exercise of the powers of the Act, did not entitle him to recover as part of that compensation the difference between taxed costs and costs as between solicitor and client in the proceedings before the petty sessions, quarter sessions and the Queen's Bench Division. That "Full compensation" only

entitled him to what the law allowed and not to what the law did not allow. The case of *Barter v. Birkenhead Corporation* (1893, 1 Q. B. 679) did not apply. The complaint of the Appellant Barnett was that his actual expenses reasonably and properly incurred largely exceeded the amount allowed on the taxation as between party and party.

*Mr. Marshall, Q. C., and Mr. Hall* for the Appellant.

*Mr. Danckwerts, Q. C.,* for the Respondent.

C. W. A.

*Appeal dismissed.*

COURT OF APPEAL. --*GORDON v. FOWLER*. Before LORDS JUSTICES A. L. SMITH and VAUGHAN WILLIAMS. 19th July 1900.

*Unconscionable bargain*--Leave to defend under Order XIV.

In this matter Leopold Gordon, the administrator of the deceased well-known money-lender Isaac Gordon, was the Plaintiff, and the Defendant was Charles Fowler, a farmer. The action was brought on two promissory notes given by Defendant on which Plaintiff claimed a balance of £300 as due. From an affidavit of Defendant it appeared that he had in all received £510 from Plaintiff and had repaid £915 in cash in little more than 3 years time.

This was an appeal from an order of Mr. Justice Bucknill at Chambers directing that Plaintiff was at liberty to sign final judgment.

Defendant appealed and asked for directions to be allowed to defend the action on the ground of unfair and unconscionable dealings on the part of the money-lender with one not in a position from weakness or ignorance to cope with him.

The Court of Appeal arrived at the conclusion that the affidavit disclosed a case of abominable and gross extortion which was sufficient for the Court to allow under Order XIV leave to defend. The decision of Mr. Justice Bucknill was reversed with costs.

*Mr. Ashton Cross* in support of the Appeal.

*Mr. Shearman* for the Plaintiff.

C. W. A.

*Appeal allowed.*

PROBATE COURT.--IN THE GOODS OF EMMA ALDERSON SHAW. Before MR. JUSTICE BARNES. 30th July 1900.

*Presumption of death.*

This was an application to swear the death of Mrs. Shaw under the following circumstances which were somewhat peculiar. The last that was heard or known of her was on 19th August 1898. On that day, having written a letter to her husband with whom she was on affectionate terms and having telegraphed to her solicitors to destroy her Will, she had driven from Kensington, where she had been staying at an hotel, to a hospital at Fitzroy Square with the object of consulting one of the resident medical men. The man she wanted to



consult was not in; she made enquiries as to where to dine and then drove to Charing Cross station. Enquiries made on the Continent and elsewhere failed to find any clue about her. The matter was also advertised but without leading to any discovery concerning her movements since she was at the last-named station. She was married to Mr. John Shaw in April 1889 and there were two children born, one in 1890 and the other in 1894. On each occasion she was seriously ill after child birth and suffered from hysteria. For cure she went in November 1897 to Wiesbaden, returning to London in June, 1898. At this time Mr. Shaw was in Derbyshire. The letter of 19th August, which, as aforesaid, she wrote to Mr. Shaw indicated that she was tired of life: she said she craved for death with passionate hope of peace. "If there is a God at all I refuse like Lord Sherbrook to believe he is infinitely worse than I am; one would not torture poor souls, would one?"

Mr. Shaw had on hastening up to London ascertained that his wife had wired to her solicitor to destroy the Will as she said she had done in her letter to him. He also ascertained that on that day she had sent a doll to one of the children.

MR. JUSTICE BARNES was satisfied from the affidavits that leave to swear the death on or since August 19, 1898, should be given and ordered accordingly.

*Mr. Willcock* appeared in support of the application.

C. W. A.

*Application allowed.*

QUEEN'S BENCH DIVISION.—WILLIAMSON *v.* TIERNEY. Before the LORD CHIEF JUSTICE, MR. JUSTICE KENNEDY and MR. JUSTICE PHILLIMORE. 19th December 1900.

*Merchandise Marks Act, 1887—Watch described as "English Lever."*

This matter came up upon a case stated by Mr. Chapman, one of the Metropolitan Police Magistrates. Informations were preferred against certain persons, of whom the Appellant was one, charging them with having unlawfully and with fraudulent intent sold certain watches described as English Lever and enclosed within cases which bore on them the English hall-mark. That description was alleged to be false and contrary to the provisions of the above statute. Those watches were made under Appellants' orders; various component parts of the watches were manufactured abroad and sent over to Appellants in an unfinished condition. These had to be finished and worked precisely so as to fit in with other parts of the watch, which were wholly made in England.

The mounting and adjusting the watches and making them complete articles took place at Appellants' factory at Coventry; upon such facts the Court as above constituted decided as follows:—If the Magis-

trate has held as a matter of law that because some parts of the watches other than the main-spring, hair-spring and screws, were partly manufactured abroad, he was bound to convict the Appellants of applying in the term "English Lever" a false description, his decision cannot be supported. If on the other hand he has arrived at his conclusion as a determination of fact upon evidence of the meaning of "English" in the watch trade, or upon any other facts what that term as applied to watches denoted, then his finding could not be reversed; for the ascertainment of what his decision was based on, the case was remanded before its final determination. At the same time the learned Judges would not countenance the argument for the Appellants, that the watch never existed until the several parts were adjusted and put together in the case and therefore the conviction should be quashed. They held that such argument could not be sustained.

*Mr. Moulton, Q. C., and Mr. Thomas* for the Appellants.

*Mr. Lawson Walton, Q. C., and Mr. Bodkin* for the Respondents.

*Case sent back to be restated.*

C. W. A.

## Notes of Cases.

(The important one to be fully reported hereafter.)

## CALCUTTA HIGH COURT.

### [APPEAL FROM ORIGINAL JURISDICTION.]

NOS. 465 OF 1889 AND 34 OF 1900.

MACLEAN, C. J. DINENDRA NATH DUTT, Appellant,  
PRINSEP, J. T. H. WILSON & Co., Respondents.  
HILL, J. DINENDRA NATH DUTT  
1901.  
6. February. J. KALLY PROSONNO GHOSH.

*Application for change of attorney by a next friend on behalf of an infant Plaintiff—Grant of such application as a matter of course.*

On the 19th September last an application was made to the Vacation Judge, Mr. Justice Pratt, on behalf of the Plaintiff, who is an infant, for change of attorneys from Messrs. Wilson, Chatterjee and Mitra to Babu Preo Nath Sen.

When the Registrar's summons for the application was served, it was not accompanied by any grounds. On the returnable date of the summons, the applicant's counsel obtained an adjournment in order to put in grounds. Later on an affidavit was filed by the next friend making certain allegations against the infant's attorneys on the record. The attorneys filed an affidavit in reply to meet these charges. Mr. Justice Pratt held, that the charges made against the attorneys had been satisfactorily answered and following a case mentioned in Belchambers' Practice,

p. 283, held that no case had been made out for a change and refused the application with costs; against this order the Plaintiff through his next friend appealed.

*Mr. Garth* (with him *Mr. A. Chaudhuri*) for the Respondents.—The appeal is wrongly entitled; it should be headed, In the matter of an application in the suit. Besides there is no appeal from such an order, which is a mere matter of procedure.

*Sir Griffith Evans* (*Mr. Knight* appearing with him) for the Appellant contended that there was an appeal under cl. (15) of the Letters Patent. (See 8 B. L. R. 433 & 13 B. L. R., p. 91). The decisions, following which the order appealed against was made, were unsound in law. No practice of the Court can override the right which every suitor has to change his attorney when he desires so to do, and the position of a next friend is not different from of an ordinary suitor.

*Mr. Garth*.—There has been a series of decisions of this Court from the time of Norman, J., that the next friend is in a fiduciary position and cannot be allowed to change from one attorney to another without sufficient cause. See *Ram Chunder Roy v. Poorno Chunder Roy* (4 C. W. N., p. clxxv), *Sarat Chunder Dawn v. Kristo Dhone Dawn* (5 C. W. N., p. lxxxiii). Leave of the Court is necessary under the rules to obtain a change of attorney, and any order asked for in an infant's suit should be shown to be for the benefit of the infant. Here the charges made against the attorney have been proved to be without any foundation. They are merely colorable. The attorneys on the record do not want to continue, but they are anxious that they should be discharged of the imputations made against them.

*Held*.—That the decisions above referred to were not well founded in law. A next friend was in the same position, as regards this particular matter, as an ordinary suitor who was *sui juris*. It was difficult to hold that there were no appeal from such an order. The charges made against the present attorneys of the next friend were merely colorable. Having regard to the series of decisions on the question, the costs of all parties ordered to be paid out of the estate of the infant. The appeal should have been entitled as in the matter of an application in the suit.

*Babu Puro Nath Sen*, Attorney for the Appellant.

*Messrs. Wilson, Chatterjee and Mitra*, Attorneys for the Respondents.

S. C. M.

# [CALCUTTA SMALL CAUSE COURT REFERENCE.]

No. 4 of 1900.

MACLEAN, C. J.

PRINSEP, J.

HILL, J.

1901.

JOOGAL KISSORE

v.

SEWMUKH ROY and others.

7, February.

*Security for costs of reference to High Court—Presidency Small Cause Courts Act (XV of 1882), sec. 70—Time within which such security must be furnished—Rule 36 of the Rules of Court.*

This was a reference made by Mr. Ormond, the Officiating Chief Judge of the Calcutta Small Cause Court, at the request of the Attorney for the Defendant under sec. 69 of the above Act. The suit was decreed in favour of the Plaintiff contingent upon the opinion of the High Court. The decree was passed on the 28th May 1900 for Rs. 1,578-4-6 and costs amounting to Rs. 231-15. The reference to the High Court was signed by the Officiating Chief Judge on the 13th July 1900, and was received at the High Court on the 16th July 1900.

On the 30th May 1900, Defendants deposited Rs. 1743-2-6 in Court as in full under Rule 47.

On the 23rd June 1900, the balance of the decretal amount and costs, viz., Rs. 66-1 was deposited in Court, but not the costs of the reference.

On the 14th November 1900, it was ordered by the Chief Judge, on the *ex parte* application of the Defendant, that the costs of the reference to the High Court be received subject to any objection that might be taken by the Plaintiff. Accordingly Rs. 323, being the costs of the said reference, were deposited in Court.

*Mr. W. Garth* (with him *Mr. A. Chaudhuri*) for the Plaintiff took the preliminary objection, that the reference could not go on, inasmuch as the Defendants had not deposited the costs of the reference until about six months after the date of the judgment, and that they must be treated as having submitted to it under the provisions of sec. 70 of the Presidency Small Cause Courts Act (XV of 1882), 14 B. L. R. 180. He referred to and contended that the old Act XVI of 1864 did not contain the proviso which the present Act contained in the last para. of sec. 70 and that the present was a much stronger case. The Small Cause Court had no power to extend the time to furnish the requisite security, and no application was made to it to extend such time. Rule 36 fixes the amount to be deposited.

*Sir Griffith Evans* (with him *Mr. J. G. Woodroffe*).—The delay was due to the Small Cause Court officer having taken a long time to calculate the amount to be deposited. No notice was given to us of this objection. The delay has not been the Plaintiff's.

*Held*—That the preliminary objection must prevail. The section requires security to be furnished "at once." This was not done. The reference cannot be proceeded with. Defendants should pay Plaintiff the costs of the reference.

*Messrs. Wilson, Chatterjee and Mitra*, Attorneys for the Plaintiff.

*Messrs. Pugh & Co.*, Attorneys for the Defendants.

S. C. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

Suit No. 880 of 1899.

STANLEY, J.	}	BHUGWAN DAS SUREKA
1901.		v.
4, February.		HEERA LAL.

*Administration suit—Receiver—Discharge of Receiver pending administration suit.*

This was a suit instituted by the next friend of the Plaintiff, who was then a minor, for the construction of the Will of his grandfather Sewbux Sureka and to have the validity of certain trusts under the Will, and the rights of the parties ascertained and declared. The plaintiff also asked for an inquiry as to what the estate of the grandfather consisted of, for the appointment of a Receiver and the usual relief sought for in an administration suit.

On the 28th January 1897 a Receiver was appointed by the Court of the moveable properties, of the rents issues and profits of the immoveable properties and of a certain business carried on by the grandfather.

On the 16th March 1899, a preliminary decree for administration was made and it was further directed that the Receiver should be continued; the Court reserved consideration of all further directions and costs till after the Registrar's report.

The Plaintiff, who had subsequently attained majority, now applied for an order that the Receiver do pay to the Petitioner's attorneys their costs not otherwise disposed of and after making certain other payments mentioned in the petition, that he should be directed to make over the properties including Government securities of the value of over a lakh of rupees to the Plaintiff and that he should then be discharged upon passing his accounts. Plaintiff urged that there was no contest in the suit that he was the sole beneficiary under the Will and that he was therefore entitled to all these properties. It appeared that the accounts directed by the preliminary decree had not yet been taken, and no advertisements had been published in the papers for the creditors to come in, but the Plaintiff and the Defendant, the surviving executor, put in affidavits stating that there were no debts due from the estate.

*Mr. Pugh* for the Plaintiff.—There being no debts and no contest as to the Plaintiff being entitled to estate, his application should be granted.

*Chief, J.*—There being an administration decree, can I discharge the Receiver? I don't ask

the Court to touch the decree. The Receiver holds for the parties and not creditors, *see Kerr on Receivers*, 2nd Ed., p. 187; *Davis v. Duke of Marlborough* (2 Swanston 176); *Bainbridge v. Blair* (3 Beav. 421, 423), and *Hoskins v. Campbell* (W. N. for 1869, p. 59).

*Mr. Sinha* for the surviving executor left the matter in the hands of the Court.

*Held*—That the administration decree not having been completed, the Plaintiff's title has not yet been declared by a Court and he is not entitled to the order asked for.

*Messrs. Kally Nath Mitter and Sarbadhicary*, Attorneys for the Plaintiff.

*Messrs. G. C. Chunder & Co.*, Attorneys for the Defendant, the surviving executor.

S. B. D.

*Application refused.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1012 OF 1900.

AMEER ALI, J.	}	KAMALA PRASAD, Petitioner,
PRATT, J.		v.
1901.		

31, January.

THE EMPRESS.

*Accomplice—Evidence Act (I of 1872), secs. 114, ill. (b), 133.—Admissibility of the evidence of accomplice—Corroboration, when and in what way necessary—Principles underlying the law of corroboration—Primary and secondary accomplices, distinction between—Amount of corroboration necessary in each case—Conviction based upon testimony of secondary accomplice when not in expectation of reward or punishment.*

This was a rule issued on the 13th November 1900, against an order of the Deputy Magistrate of Gaya, dated the 6th of September 1900, confirmed on appeal by the Sessions Judge of Gaya on the 11th of September 1900.

The facts of the case were shortly these:—On the night of Monday, the 26th March 1900, there was a burglary of a serious character in the house of one Brindabun. A box or trunk was taken out of the house. It was afterwards broken open and a considerable amount of money in cash and gold and silver ornaments and clothes were abstracted therefrom. Information was given to the Thana on the 27th with a list of the articles missing. The Police took up the enquiry, and the steel trunk was found broken in a corner of the garden towards the north of the house. Suspicion, naturally, fell upon the servants of the house, but the Petitioner Kamala Prasad was not suspected. His position in the house was one of some trust, he being a sort of *mohakeb* to the complainant who used to take his meals with him. On the 29th March, Dosain's house was searched and two silver bangles were found in his house and identified as part of the articles stolen. The enquiry into the case

proceeded for some time with the object of discovering more articles and connecting the different people whose names Dosain gave as having been perpetrators of the burglary. The case was sent up on the 18th of April and on the 19th Dosain was convicted under sec. 411, I. P. Code, and sentenced to imprisonment and a small fine of Rs. 5. On the 20th April, warrant was issued against Kamala Prasad. Dosain's statements were taken on two previous occasions and after he had served out his period of imprisonment his evidence was taken afresh regarding the facts to which he had deposed. His evidence in substance amounted to this, that on the night in question, he went out of the house of Brindaban, where he used to sleep and, hearing some trampling on dry leaves, went towards the spot and found the Petitioner engaged either in opening a box or standing near the box which had been apparently broken open. Two of his companions had gone a little distance on hearing Dosain's footsteps. He enquired what they were there for, and the accused in order to obtain his silence, gave him the two bangles which he produced or which were found in his house on the 29th of March. On trial, Kamala Prasad was convicted by the Deputy Magistrate of Gaya under sec. 381, I. P. Code, and sentenced to undergo 2 years' rigorous imprisonment and to pay a fine of Rs. 100, or, in default of payment, to undergo six months' further imprisonment. On appeal, the Sessions Judge of Gaya confirmed the conviction and upheld the sentence.

The Petitioner then applied for and obtained the present rule to show cause why the conviction and sentence should not be set aside on the ground that the evidence of the accomplice Dosain, upon which the judgments were based, had not been sufficiently corroborated in law and also on the ground that there was no sufficient evidence to support the conviction. It was argued on behalf of the Petitioner that the matters which had been used for the purpose of holding that the evidence of the accomplice had been corroborated did not in law amount to corroboration.

*Held*—That although a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars, and such evidence should be accepted with a great deal of caution and scrutiny.

That the amount of criminality is a matter for consideration, and when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of a person who is an actual perpetrator with the principal offender.

That in dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Court must exercise careful discrimination and look at all the

surrounding circumstances in order to arrive at a conclusion, whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice.

That Dosain, the receiver of the stolen property, who had already suffered imprisonment and had now no hope of reward or expectation of punishment, was an accomplice in a secondary sense and that there was no reason shown to disbelieve his direct testimony.

*Mr. P. L. Roy* (with him *Babu Dasarathi Sanyal*) for the Petitioner.

*Mr. Leith* for the Crown.

*Rule discharged.*

H. P. C.

# [CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 952, 968, 1034, 1035 OF 1900.

AMEER ALI, J. KALI KANT BISWAS and others,  
PRATT, J. Petitioners,  
1901.

5, February.

THE EMPRESS.

*Indian Penal Code (Act XLV of 1860), sec. 193—False evidence—Contradictory statements in cross-examination—Evidence, absence of, to support commitment—Commitment, powers of High Court to quash—Criminal Procedure Code (Act V of 1898), sec. 215.*

In these cases rules were issued on the District Judge of Rungpore to show cause why the proceedings for perjury and the commitments should not be quashed, or in the alternative why the cases should not be transferred to some other Sessions Court.

The facts of the case were as follows:—

Ram Gopal Byragi complained to the Police against Samiruddin Nasya, Kefaitulla Nasya and others, alleging that while he was taking his wife Genda Dasya in a cart from her father Nabu Mistry's house to his own house, 10 or 15 persons (including the accused) stopped the cart and forcibly carried off Genda Dasya.

Charges were framed under secs. 366, 147, 343 and 379, I. P. C., and the case was committed to the Sessions. At the Sessions trial the Sessions Judge concurring with the assessors acquitted the accused.

The Sessions Judge thereupon framed proceedings against the Petitioners under sec. 477, Criminal Procedure Code, and committed them for trial under sec. 193, I. P. Code, at the next Sessions.

In No. 952.—*Mr. C. P. Hill* (with him *Babus Sarat Chandra Khan* and *Manmatha Nath Mukherjee*) contended that there was no contradiction on the

face of the statements and therefore there was no case to go to a jury so far as his client was concerned.

In No. 968.—*Babus Sarat Chandra Khan and Manmatha Nath Mukherjee* argued upon the same lines.

In Nos. 1034, 1035.—*Mr. Caspersz* (with him *Babu Mohini Mohan Chakravarti*) for *Nabu Mistry* and *Ram Gopal Byragi* referred to *In the matter of Munni Buksh* (3 C. W. N. 81) and argued that regard should be had to the fact that these statements, though confused and apparently inconsistent, were made under the stress of cross-examination and that no intention to commit perjury was made out. The Court should therefore quash the commitments.

*Held*—That absence of evidence to warrant a commitment is a point of law and may furnish a good ground for the quashing of a commitment.

That under the present Code of Criminal Procedure a Court of Session does not possess the power to withdraw a case from the jury on any ground whatsoever.

That where the case is such that the Sessions Judge would, if he possessed the power of withdrawing the case from the jury, exercise that power, the High Court will exercise its powers of revision.

*Rules made absolute: Conviction set aside.*

H. P. C.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 383 of 1897.

RAMPINI, J.  
SALE, J.  
1901.  
22, January.

JOGESHUR BHAGAT and others,  
Defendants, Appellants,  
v.  
GHANASHYAM DAS, Plaintiff,  
Respondent.

*Transfer of Property Act (IV of 1882), sec. 71—Mortgage—Sale proceeds at Revenue Sale—Limitation Act (XV of 1877), Sch. II, Arts. 120, 132—Interest—Damages.*

This was an appeal proffered on the 27th November 1897, against a decree of *Babu Gopi Nath Mettay*, Sub-Judge of Chapra, Zillah Sarun, dated the 28th of August 1897.

The suit out of which this appeal arose was brought for the recovery of Rs. 6,000 principal and Rs. 6,200 interest, due on a mortgage bond executed by the Defendants Nos. 1 and 2 and the mother of Defendant No. 3 in the name of the *furzidar* of the Plaintiff and the Defendants Nos. 16 and 17. The Plaintiff alleged that the bond had fallen to his share by private partition. The Plaintiff's mortgage bond was dated the 3rd February 1888, the due date specified for payment was the 20th September of the same year; after the execution of the bond the property mortgaged was sold for Rs. 6,200 for

arrears of Government revenue and was purchased by one *Rajendra Pershad*. The sale took place on the 29th of November 1899; after deducting the Government demand, Rs. 6,175 remained in the collectorate as sale proceeds. Defendants Nos. 4 to 6, who were certain creditors of Defendants, the mortgagors, in execution of a decree for money obtained by them withdrew the sum of Rs. 1,367-12 from the collectorate on the 4th of July 1890, and the Defendant No. 7 who was another creditor similarly withdrew Rs. 289-4 on the 18th of October 1892. The present suit was brought on the 5th of October 1896.

The present appeal was preferred by the Defendants Nos. 4 to 6 and the Defendant No. 7 against whom decrees for part of the sale proceeds were made; the Defendants Nos. 4 to 6 were made liable for Rs. 1367-12 which they had taken out of the collectorate in execution of their money decree; and the Defendant No. 7 was made liable for Rs. 289-4 which he similarly had taken from the collectorate.

The following were the contentions of law raised on behalf of the Appellant:—*First*, that the suit was barred by limitation, and that Art. 120 and not Art. 132 of Schedule II of the Limitation Act was applicable and therefore the suit at least against Defendants Nos. 4 to 6 was barred; *secondly*, that the Plaintiff was not entitled to interest; *thirdly*, that the claim for interest was barred.

*Held*—That Art. 132 of Sch. II of the Limitation Act was applicable. [Their Lordships observed:—It is true that the property has been converted into cash owing to its having been sold for arrears of Government revenue, but under sec. 73 of the Transfer of Property Act, the charge which attached to the property now attaches to the sale proceeds.]

*Kamala Kant Sen v. Abdul Bahul alias Habibulla* (I. L. R. 27 Cal. 180 at p. 184) referred to.

*Held*—That the Limitation Act should be interpreted liberally so as not to curtail or restrict rights unless it is clear that the Legislature intended that this should be done.

That Plaintiff is not entitled to interest but entitled to damages for the acts of the Defendants which have deprived him of the use of the money, and although the Plaintiff did not expressly claim damages, the same may be awarded instead of interest.

*Lala Chhajmal Das v. Brij Bhukan Lal* (22 I. A. 199).

That under Art. 120 of Sch. II of the Limitation Act Plaintiff cannot claim damages for more than six years previous to the institution of the suit.

*Dr. Asutosh Mukherjee* for the Appellant.

*Babu Joges Chandra Ray* for the Respondent.

S. C. S.

*Decree modified.*

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DEORNE

No. 2037 of 1898.

BANERJEE, J. } RAMMOY HAZRA, Plaintiff, Appellant,  
 BRETT, J. } v.  
 1901. } PREM CHAND NASKAR and  
 21, January, } others, Defendants, Respondents.

*Mortgage—Transferres from mortgagor—Transfer of Property Act (IV of 1882) sec. 85—Parties—Contribution.*

This was an appeal preferred on the 13th of October 1898, against a decree of Babu Rajendra Kumar Bose, Subordinate Judge of Zillah 24-Pergunnahs, dated the 22nd of July 1898, affirming a decree of Babu Nagendra Nath Mitra, Officiating Munsif of Alipur, 2nd Court, dated the 2nd of April 1898.

The facts of the case as disclosed in the plaint are thus stated by the first Court:—One Behary Lal Ghosh since deceased, executed a mortgage bond for Rs. 200 on 8th Kartick 1294, B. S., in favour of the Plaintiff creating a charge on his properties described in schedule (*ka*) and (*kha*) of the plaint and subsequently sold the properties described in schedule (*kha*) of the plaint to one Raj Krishna Mondal free from Plaintiff's mortgage on payment of Rs. 100 to him with Plaintiff's concurrence, in Bysack 1306, B. S. After the death of Behary Lal this Plaintiff instituted suit No. 791 of 1894 against Noni Lal Ghose, the son and heir of Behary Lal and Srimonto Bachareh and Prosunno Moyi Dassi, the purchaser of certain portions of the mortgaged property, and got a decree on this mortgage bond. In execution sale under that decree, the Plaintiff purchased the properties described in schedule (*ka*) for Rs. 175 on 18th July 1896 and obtained delivery of symbolical possession from Court on 17th December 1896. Thereafter when the Plaintiff went to take actual possession of the land in Choitra 1303, B. S., he was resisted by the Defendants who were the purchasers of lands given in schedule (*ga*) and (*gha*) respectively, and by Defendant No. 2 as a tenant of plot 2 of schedule (*ga*) under Defendant No. 1. The Plaintiff not having known of this alleged purchase of the Defendants from Behary Lal did not and could not make them parties in that case. Hence the Plaintiff instituted this suit for declaration of Defendants Nos. 1 and 3's rights of redemption to the properties described in schedules (*ga*) and (*gha*) of plaint and for declaration of Plaintiff's absolute right over those properties on the failure of Defendants Nos. 1 and 3 to pay off the whole mortgage money within a fixed time, and for *khas* possession of these properties.

Both the Courts below dismissed the suit. The lower Appellate Court held that the suit in the form in which it was brought was not maintainable, that the suit was bad as neither the heirs of the original mortgagor nor the purchaser Raj Krishna by whom the (*kha*) lands which formed a part of

the original mortgaged premises were purchased subsequent to the purchase of the Defendants Nos. 1 and 3, were not made parties, that the provisions of sec. 85 of the Transfer of Property Act were imperative and it was therefore obligatory on the mortgagee in a suit relating to mortgage to join the mortgagor and all subsequent purchasers and encumbrancers as parties. It was further held that both the portions of the property (*ka*), which was held by the Plaintiff in right of purchase, as well as the portion of (*ka*) which was specified in schedules (*ga*) and (*gha*) should contribute to the mortgage debt payable to the Plaintiff, and which was claimed in suit No. 791, and that the suit was not framed on that line.

Plaintiff preferred this second appeal.

Two questions were raised on behalf of the Appellant, *first*, whether the Court of Appeal below was right in dismissing the suit on the ground of defect of parties, and, *second*, whether that Court was right in dismissing the suit on the ground of its having been wrongly framed.

*Held*—That there was no defect of parties.

That as regards the heirs of the mortgagor it could not be said that they were necessary parties, as the Plaintiff had already obtained a decree on his mortgage against them, and had, in execution of the mortgage decree, already sold the mortgaged property and purchased it himself; as regards Raj Krishna, he too, was not a necessary party as he purchased a portion of the mortgaged property with the consent of the Plaintiff.

With regard the second point their Lordships observed:—The learned vakil for the Appellant freely admits that the only relief that the Plaintiff can be entitled to in this suit will be a decree for an apportionment of the mortgage debt on the property purchased by the Defendants Nos. 1 to 3, account being taken in that apportionment as well of the property purchased by Raj Krishna as of the portion of the mortgaged property purchased by the Plaintiff himself. The prayers in the plaint are not very distinct in asking for this relief, though at the same time we cannot say that they are incapable of being viewed as seeking for any relief of the sort we have indicated above.

The case was, therefore, remanded to the Court of first instance with reference to the points indicated above.

*Dy. Asutosh Mukerjee* for the Appellant.

*Babu Bhuban Mohun Das* for the Defendants.

*Case remanded.*

S. C. S.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, FEBRUARY 18, 1901.

[No. 13]

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The constitution of the Division Courts, to take effect on and from Monday, the 18th February 1901, and until further orders, will be as follows:—

**PRESIDENCY GROUP.**—The Hon'ble the Chief Justice, Mr. Justice Banerjee and Mr. Justice Brett.

**RAJSHAHYE GROUP.**—Mr. Justice Prinsep and Mr. Justice Hill.

**PATNA GROUP.**—Mr. Justice Rampini and Mr. Justice Sale.

**BURDWAN GROUP.**—Mr. Justice Ghose and Mr. Justice Stevens.

**CRIMINAL BUSINESS.**—Mr. Justice Ameer Ali and Mr. Justice Pratt.

**PRIVY COUNCIL DEPARTMENT.**—The Hon'ble the Chief Justice, Mr. Justice Banerjee and Mr. Justice Brett.

On the Original Side the arrangements will continue as before.

IT IS REMARKABLE THAT THE CALENDAR OF CRIMINAL cases last sessions would have gone blank but for two theft cases by old offenders. This is a better record than that of July last and reflects great credit on the city.

IT HAS BEEN ANNOUNCED THAT A THIRD COURT is going to sit on the Original Side from the 4th of March next. This will certainly relieve the congested state of the board and will be welcomed by the suitors and the profession alike. But the absence of a third Court was not the only grievance with reference to the business on the Original Side. For instance we have had frequent complaints with regard to the delay in the Taxing office. It is said that attorneys have to wait months before they get any chance of getting their bills taxed and then when their turn comes they experience the greatest difficulty in getting the taxation done rapidly. We are told that even the simplest bills take an incredibly long period in passing through the Taxing office. That this is so, is no fault of any particular officer but is due to the disorganised state of the Original Side offices generally. We have already noticed in these columns how with the growth of work on the Original Side, the establishment has not only been not increased but has, in course of time, been considerably curtailed. We have before now given an account how such important offices as that of a Taxing Officer, that of a Master, an Accountant-General and some other important offices came to be abolished and their duties transferred to the Registrar.

NOW IN VIEW OF A THIRD COURT WE ARE COMPELLED to re-open the question of strengthening the staff in the Registrar's office and of a more systematic division of duties. The existing staff is admitted on all hands to be inadequate for the current work of the two Courts now sitting. In the Order Department the men are overworked and the drawing up of orders and other proceedings are unavoidably delayed to the detriment of the business of the Courts and the great inconvenience of suitors. The question also arises as to whether the business of the Registrar himself should not be divided. It is impossible, as we have often urged, for one man to discharge all the duties of that office satisfactorily; a large number of orders and decrees has to be settled in the morning; a whole heap of summonses and subpoenas has to be signed and sealed; urgent references and accounts have to be taken, the accounts in the Accountant-General's Department have to be daily examined and cheques issued; the various departments of that office have

to be supervised and controlled and, in addition to all this, a very considerable portion of that officer's time has to be devoted to the disposing of ordinary references. The result of it all is that orders are not settled and signed as expeditiously as they should be; certificates of death duties, which are always very urgent, are delayed to the great inconvenience of the representatives of deceased testators or intestates, as the case may be, and sometimes to the serious loss of the estates concerned; settlement of bills are delayed, and we are told, that there is a growing feeling of dissatisfaction amongst the suitors and the profession with regard to the state of things generally on the Original Side. However much the present Registrar may try to cope with the work, and we are assured that he is a very hard-working officer, it is physically impossible that he should be able to discharge all the duties of his office proper, and those of a Taxing Officer, Master, Official Referee, Controller-General in addition, to the satisfaction of the profession and the public within the ordinary space of time. A third Court will increase all this difficulty, and if a reconstitution of the offices is not taken in hand at once, it will be a further source of embarrassment to the officers and the profession alike. The public look up to the present Chief Justice to carry out the reforms which have been felt to be urgently called for for some time now; and when his Lordship has succeeded in effecting them he will have earned for himself the lasting gratitude of the whole profession and the public of the capital of India.

AMONG THE OTHER COMPLAINTS WHICH FREQUENTLY reach us from the attorneys, one that deserves immediate attention is the inordinate delay in the Translators' Department on the Original Side. The business in this department is said to be in a chronic state of arrears. A practice prevails in this department by which translators are allowed to charge Re. 1 per folio of 90 words as expedition fee. As translations in the ordinary course means always considerable delay, suitors are obliged to pay this expedition fee. As it is, the ordinary fee for translation on the Original Side of the High Court, viz., Rs. 2 per folio of 90 words is very high, and an additional fine of Re. 1 per folio means a great deal to suitors of modest means. The anomaly is all the more curious when we find that on the Appellate Side of the "very same High Court the translation fee is only Re. 1 for 200 words. We are not aware of the suitors on the Appellate Side being required to pay expedition fees for getting the translation done. The practice of levying expedition fees, which go to the officers, is sure to lead on to showing preference for taking work which carries extra gain and to the neglect of ordinary duties. We fail to appreciate why the

payment of extra money by suitors for getting any ordinary work done on the Original Side within a reasonable time should be made into a regular institution. With special reference to translation, we may point out that more rapid translation always means more money to Government, out of which extra officers, if necessary, may be paid for or increments, when deserved, allowed. But on no principle can the practice of public officers showing preference for any particular work from a desire for personal gain be supported. In the mofussil and also on the Appellate Side of the High Court expedition fees are sometimes paid for obtaining copies very urgently required. But such fees go to the Government and is not open to similar objections.

THE JANUARY NUMBER OF THE *Law Quarterly Review* contains an article from the pen of Mr. E. J. Trevelyan, lately a Judge of the Calcutta High Court and at present Reader of Indian Law at the Oxford University. The article is entitled "The Training of District Judges in India." The extract we give below will indicate what the writer considers the shortcomings of the present system. It cannot be denied that, barring a few exceptionally clever men, the District Judges find themselves in an anomalous position when they are promoted to that office from that of a Magistrate and are called upon to hear civil appeals before they have acquired any experience in the procedure or administration of civil law. This fact furnishes the strongest argument against the proposed restriction of second appeals and Mr. Trevelyan is also of that opinion.

A District Judge is the supreme judicial authority in a district. He has power to transfer to his own list any suit pending in his district. He does not try civil suits, as his Appellate work and his work as a Sessions Judge take up most of his time; but, although when he first gets his appointment he has less knowledge of the law than any judicial officer in his district, the cases which he tries as a judge of first instance are of the most important description. He sits on appeals from the decisions of men who have had a thorough training in law and have had great experience in its administration. In such appeals his decision on questions of fact is final, whether or not he differs from the Court below. In questions of law there is a further appeal from his decision, but the fact that there is such an appeal does not excuse the incapacity of the Court from which there is an appeal. It may be noticed in passing that the Government of India now contemplates limiting the right of appeal. It is true that after a time the majority of District Judges acquire a certain knowledge of their work, but this knowledge is necessarily acquired at the expense of many suitors and also at the risk (as will presently be pointed out) of undesirable comparisons.

ON THE 12TH INSTANT THE FOLLOWING QUESTION, which had been referred by Maclean, C. J., and Banerjee, J., in the case of *Khadem Hossein v. Emdad Hossein*, was argued before a Full Bench:—"Whether in an appeal against the final decree in a partition



sult, it is open to the Appellant to question the correctness of the preliminary order or decree for partition, when no appeal was preferred against such order within the time allowed by law." Their Lordships' judgment was reserved.

### English Notes.

COURT OF APPEAL.—THE VALENTINE MEAT JUICE COMPANY v. THE VALENTINE EXTRACT COMPANY. Before the MASTER OF THE ROLLS, LORDS JUSTICES RIGBY and COLLINS. 23rd July 1900.

*Established use of a name being same as that of the person carrying on the business.*

The distinguishing feature of this case was that the Plaintiffs did not complain that the Defendants had so got up their goods as to resemble that of the Plaintiffs but objected to the Defendants making use of the word "Valentine" in such a way as to deceive the public into believing that the goods sold by them were articles manufactured by Plaintiffs.

Mr. Justice Sterling held that the Plaintiffs had not proved that that was as Plaintiff alleged but being of opinion that there were suspicious circumstances connected with the case, did not allow Defendants their costs.

The Court of Appeal arrived at a different conclusion, relying on the law being well emphasized in *Reddaway v. Burhan* (1896, Q. C. at p. 204) by the Lord Chancellor and at p. 210 by the late Lord Herschell; they said that the only difficulty was to apply those principles. The distinction attempted to be made by Respondent's counsel between the name used, which was all that was complained of, being the name of the person who was carrying on the business and a case where such name was not of the person carrying on the business, had no foundation in principle. For an exposition of the law on the very point *Jameson v. Jameson* (15 Pat. Off. Rep., see p. 193) was noticed; all that it pointed to was that in a case like the present it was more necessary than in any other for Plaintiff to establish more clearly the fact that the name in question had come in the market to denote Plaintiff's goods. Plaintiff must establish that the name in question had acquired a "secondary meaning" as denoting his goods. The evidence was overwhelming, supporting the statement that "Valentines meat juice" or "Valentine" alone was used in the market as distinguishing Plaintiff's preparations. The established use of that name was mentioned and consequently that name should be protected as much as any fancy name. The evidence moreover indicated that Defendant was aware of the great reputation the article had acquired in the market and he adopted that name to secure for himself some of that benefit. Held that Plaintiffs were entitled to the injunction extending to the word "Valentine."

Mr. Moulton, Q. C., Mr. Eady, Q. C., and Mr. Sebastian for the Plaintiffs.

Mr. Upjohn, Q. C., and Mr. Sims for the Respondents.

C. W. A.

*Appeal allowed with costs.*

CHANCERY DIVISION.—*STOHWASSER v. HUMPHREYS*. Before MR. JUSTICE FARWELL. 21st December 1900.

*Validity of patent—What constitutes sufficient investigation—The Puttee leggings.*

The question for determination in this litigation was whether Plaintiff's patent was a valid one, and whether it had been anticipated. Plaintiff had derived title from one John Pullman who had taken out Letters Patent No. 24893 of 1896, for Puttee leggings. The complete specification was filed in June 1897. Those leggings were largely used, in fact adopted as the regulation leggings for the British Army; their usefulness was consequently not disputed. Plaintiff claimed merit for improvement into existing leggings, combining the advantages of the legging and the Puttee, a perfect fit with a novel mode of fastening by means of a strap which passed round the leggings several times, doing away with the usual straps and other fastenings formerly used.

For the defence, in answer to Plaintiff's claim for injunction restraining Defendants from infringing their patent for improvements in the manufacture of leggings and for damages, the infringement was not contested, but Defendants questioned the validity of the patent and alleged that it had been anticipated, in other words it was denied that the invention was new, and the result such as would justify the grant relied upon by the Plaintiff.

The learned Judge found that the gaiter, at the time of the grant had not been previously used and in that sense it was new. The large sale achieved was proof that it was useful, but he could not hold that it was an invention. The strap or other band had been for long in common use, and to apply such a thing to a gaiter to hold it in position did not appeal to him to involve a substantial invention. The adjustability of the strap did not make any difference. It was nothing more than using a strap as it was commonly used.

Each case depended on its own facts and therefore previous decisions, several of which had been cited, did not in such a conflict render much assistance in arriving at a right conclusion.

He could distinguish this case from that of *Thomson v. The American Braided Wire Co.* (H. of L. Patent cases, Vol. VI, see p. 528, decided 3rd June 1889)\* which case went as far as any, be-

\*Lord Herschell in his judgment said:—"If the demand of the Public for a particular article of dress be better met by a new combination than it has been by the articles previously in use, and if this combination, though in its component parts be not new, required some exercise of the

cause the subject-matter of the present patent did not require any exercise of the inventive faculty to produce it and on the evidence the learned Judge also found that the anticipation relied on for the defence was proved.

*Mr. Moulton, Q. C., Mr. Bousefield, Q. C., and Mr. Walter* for the Plaintiff.

*Mr. Terrell, Q. C., and Mr. Salter* for the Defendants.

C. W. A. *Judgment for the Defendants.*

QUEEN'S BENCH DIVISION.—GORDON v. LONDON and MIDLAND BANK. Before MR. JUSTICE BUCKNILL. 19th December 1900.

*Bills of Exchange Act, 1882, secs. 82 and 60—Liability of Bank for stolen cheques received by them.*

One Alfred Jones was ledger Clerk to Plaintiff Gordon, who carried on business at Birmingham under the name and style of Gordon and Munro. Jones had not any authority from Plaintiff to endorse any cheque sent to Plaintiff by his customers or to deal with it in any way, nevertheless, during Plaintiff's absence from his business, Jones not only opened his letters which he had permission to do, but stole 116 cheques of the value of £2,067. He took these out of the letters for Plaintiff arriving by post and having endorsed them as "Gordon and Munro" took them from time to time to the Defendant Bank's branch at Sparbrook in Birmingham; at this branch Jones, who traded as Jones & Co., had an account. The Defendants used to, when these cheques were paid in with the forged endorsement "Gordon and Munro" also bearing the endorsement "Jones & Co.," place them to Jones & Co.'s credit and at the same time the Defendants crossed them, whether the cheques were or were not crossed previously, "London and Midland Bank Limited to head office London" in order that they may be payable through the head office only. So that the cheques were collected in the London Bank and the amount placed to the credit of their Sparbrook branch.

In this action of the Plaintiff for damages for conversion by Defendants of the above cheques or for their value aforesaid, the Defendants had paid into Court £110 and the jury found that the Defendants in the collection of the above cheques had acted *bona fide* and no negligence had been established against them.

The learned Judge held that the Defendants had acted as the agent of Jones and had received the stolen cheques to collect as for him on his behalf. The money was received by Defendants not on their own account. He decided in favour of Plaintiff with reference to sec. 82 of the above act, so far as the cheques were drawn on other banks than the Defendant

inventive faculty to produce it, I think it can be protected by a patent, though it may be impossible to say that the invention is important or necessary for the public good."

ants in favour of "Gordon Munro and Co., or order" or "bearer" and which were uncrossed when paid in and received by them. *Bessill & Co. v. Fox Brothers* (51 L. T. N. S. 663), *Fine Art Society v. Union Bank* (1886, 17 Q. B. D. 705). The claim as to the remaining cheques was rejected under the provisions of sec. 60 of the same Act.

In the result as Defendants had virtually paid in £110 out of the £114 found due to Plaintiff the action was dismissed with costs.

*Mr. Lawrence, Q. C., and Mr. Leslie* for the Plaintiff.

*Mr. Henriques* for the Defendants.

*Judgment for the Defendants.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

## CALCUTTA HIGH COURT.

### [APPEAL FROM ORIGINAL CIVIL JURISDICTION.]

No. 15 of 1900.

MACLEAN, C. J. SREEMUTTY MOKHODA DASSEE,  
PRINSEP, J. Plaintiff, Appellant,  
HILL, J. v.  
1901. NUNDO LAL HALDAR, Defendant,  
8, February Respondent.

*Hindu Law—Bengal School—Maintenance—Daughter, sonless widowed Marriage, effect of, on the status of a daughter.*

This was a suit by a daughter, who was a sonless widow, against the heir of her deceased father, for a declaration that she was entitled to separate maintenance during her natural life out of her late father's estate. The facts of the case as well as the judgment of Ameer Ali, J., are fully reported in 4 C. W. N. 669. There was practically no dispute in the case as to the facts except as to the indigency of the Plaintiff. It may here be mentioned that the present representative of her father-in-law's family offered her a home and food and raiment and a similar offer was made, during the trial of the case before Ameer Ali, J., by the Defendant, but what she desired to secure was separate maintenance.

*Messrs. R. Mitra and B. C. Chatterji* for the Appellant.

*Messrs. W. C. Bonnerjee and S. P. Sinha* for the adult Respondents.

*Messrs. B. Chakravarti and B. C. Mitter* for other Respondents.

*Held*—That the Plaintiff was not bound to reside in the house of her father-in-law.

*Rajah Pirthi Singh v. Ranee Raj Kowar* (20 W. R. 21) followed.

When a Hindu maiden marries, she becomes incorporated into her husband's family and it is to

that family that she must, in the first instance, look for her maintenance on becoming a widow.

She is not, any way, entitled to demand successfully maintenance from her father's heir, who has succeeded to his estate, unless and until it can be satisfactorily shewn that she is unable to obtain maintenance from the family into which she has married; even then, however, it is doubtful if she can succeed as against her late father's estate.

*Bai Mungal v. Bai Rukmini* (I. L. R. 23 Bom. 291) referred to.

When an offer has been made by her late father's heir to provide her with a home and food and raiment she is not entitled to separate maintenance apart from his house and in a house of her own.

*Quære*—Whether there is or is not a legally enforceable right by which a widowed daughter's maintenance can be claimed as a charge on her father's estate in the hands of his heirs.

*Khetramoni Dasi v. Kashinath Das* (2 B. L. R. A. C. 15) and *Bai Mungal v. Bai Rukmini* (I. L. R. 23 Bom. 291) referred to.

*Messrs. N. C. Bural & Co.*, Attorneys for the Appellant.

*Messrs. Swinhoe & Co.*, and *Messrs. Ghosh & Kar*, Attorneys for the Respondent.

*Appeal dismissed.*

S. R. D.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

HARRINGTON, J. In the matter of Malchand Pareck, a  
1901. minor under the age of 18 years  
31, January. governed by the Mitakshara  
School of Hindu law.

*Hindu Law—Mitakshara—Guardian of a Mitakshara infant, appointment of.*

This was an application in Chambers on behalf of Balchand Pareck, the only brother of the infant above-named, for an order that a fit and proper guardian may be appointed of the properties of the infant during his minority and to that end an enquiry may be directed as to who would be such fit and proper person to be so appointed with all necessary or proper directions.

The facts of the case as stated in the petition briefly are these:—One Gonesh Das Pareck died some time ago leaving the said infant and his said brother, two sons, and one widow, Sreemutty Parina Bibee and leaving considerable properties the same being the joint estate of himself and his said two sons. On his death Balchand Pareck as *karta* of the joint estate took possession of the joint estate and has since been carrying on the joint business. The Petitioner alleged that under the evil advice of some designing person the Petitioner's mother, who is an old lady not conversant with business, tried to get possession of the infant's share and accordingly the immoveable properties and some moveables were partitioned amongst the brothers and the infant's

share was given over to the mother, the business only remaining joint, but that, not satisfied with that, she was now trying to get hold of the share of the assets of the business, which she is likely to dissipate.

*Babu Ashutosh De*, who made the application, contended that the case of *Sham Kuar v. Mohanunda Sahoy* (I. L. R. 19 Cal. 301) which held that a guardian could not be appointed of the properties of a minor governed by the Mitakshara law, could be clearly distinguished inasmuch as here there are properties of the infant which are quite separate and that the principle underlying that case is the apprehension of the interference to the *karta's* management by the appointed guardian, which is wanting in this case where the *karta* himself applies.

*Held*—under the special circumstances of the case such an application is entertainable and notice under sec. 11 of the Act was directed to be issued to the infant and her mother returnable 6 weeks hence.

K. K. D.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 823 of 1899.

STANLEY, J. HENRY BIRKMYRE and others,  
1901. Plaintiffs,  
7, February. v.  
DEEP NARAIN SINGH,  
Defendant.

\* *Civil Procedure Code (Act XIV of 1882), sec. 363*  
—*Revival of suit—Death of one of several Plaintiffs*  
—*Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 171 and 178.*

This was an application in Chambers on behalf of Archibald Birkmyre, as executor of the Plaintiff Henry Birkmyre and as administrator to the estate of William Birkmyre, under sec. 363 of the Code, to revive the suit in his name, as such legal representative, and in the names of the two surviving Plaintiffs.

The Plaintiff, Henry Birkmyre died in Scotland on 4th May 1900 and his Will was proved in Scotland by five of the executors on the 23rd of June 1900. The Plaintiff, William Birkmyre, died in France on the 19th of April 1900 and his Will was also proved in Scotland by seven of the executors on the 26th of June 1900.

The applicant who was one of the executors of Henry's Will obtained probate in this Court on the 6th of December last and on the 12th of January last he obtained Letters of Administration with the Will annexed to the property and credits of the Plaintiff William Birkmyre as the constituted attorney of the seven executors who proved the Will in Scotland.

*Mr. Sowton for Messrs. Sanderson & Co.* submitted on behalf of the applicant that sec. 363 enabled the Court to revive the suit where two of several Plaintiffs have died. Under Art. 171 of the Limitation Act a period of 60 days from the date of the Plaintiff's death was allowed to his

legal representative to come in and revive the suit, but this provision in the Limitation Act was repealed by sec. 66 of Act VII of 1888, the Civil Procedure Code Amendment Act. The Legislature in repealing Art. 171 of the Limitation Act as applicable to sec. 363 of the Will did not make any fresh provision dealing with cases where two of several Plaintiffs have died and consequently the period of limitation applicable to the case was three years from the time when the right to apply accrued under Art. 178 of the Limitation Act.

THE COURT granted the application.

Messrs. Sunderson & Co. for the Plaintiffs.

K. K. D.

#### [TESTAMENTARY AND INTESTATE JURISDICTION.]

STANLEY, J.	} In the goods of •	
1901.		AMRITA LAL MOOKERJEE,
10, January.		Deceased.

*Probate and Administration Act (V of 1881), sec. 7—Executor by implication—Will addressed to applicant—Bengalee Will—Probate.*

This was an application in Chambers on behalf of Sreemutty Haridasi Debi, the widow of the deceased above-named for grant of probate of the Will executed by the deceased.

Babu Peari Lal Halidar for the applicant submitted that though she is not expressly appointed an executor to the Will, the fact of the same being addressed to her, as is commonly done in deeds and documents in the Bengalee language, and the fact of the testator bequeathing his immoveable property to her and giving her a right to sell the property in the following terms: "I bequeath the said property to you. You shall be competent to give away sell or mortgage the said property or otherwise deal with (the same) just as you will wish; my sons shall not have any right whatsoever therein" are sufficient to make applicant an executor by implication.

Held—That the language of the Will is not clear enough to make the applicant an executor by implication and the mere fact of the Will being addressed to her does not entitle her to obtain probate; hence Letters of Administration with Will annexed was granted to her.

K. K. D.

#### [TESTAMENTARY AND INTESTATE JURISDICTION.]

HARINGTON, J.	} In the goods of RAJ COOMARI DASSI,	
1901.		Deceased.
2, February.		

*Probate and Administration Act (V of 1881), sec. 7—Probate, application for—Executor by implication.*

This was an application on behalf of Srimati Mukhodaini Dassi for grant of probate to her as executrix by implication of a Will in the Persian character executed by the deceased at Brindabun.

The translation of the portion of the Will upon which reliance was placed was as follows: "Mussamut Mokhodaini Dassi shall become the owner and enter upon possession of whatever might be saved after supply of food to and enjoyment by myself (out of) all my aforementioned properties and shall bring the same into her custody and enjoyment and deal with them as she might like and shall cause my funeral ceremonies and the rites at Gaya, &c., to be performed, but out of the estates to be left by me, she shall on my behalf distribute the undermentioned amounts as per details below."

Babu Peari Lal Halidar for the applicant submitted that although the testator did not appoint an executor expressly, yet she having directed the applicant to distribute certain amounts the applicant was constituted an executrix by implication.

Held—That the directions to cause funeral ceremonies to be performed and to distribute the amounts are sufficient to constitute the applicant an executor by implication and accordingly probate should be granted to the applicant.

Messrs. Banerjee and Halidar for the Applicant.

K. K. D.

#### [CIVIL APPELLATE JURISDICTION.]

[Full Bench.]

APPEAL FROM APPELLATE DECREE

No. 2562 of 1898.

MACLEAN, C. J.

PRINSEP, J.

BANERJEE, J.

AMEER ALI, J.

RAMPINI, J.

1901.

12, February.

MABRURA BIBI and others,

Plaintiffs, Respondents,

v.

SRIMATI MATANGINI DEBI and others, Defendants, Appellants.

*Bengal Tenancy Act (VIII of 1885), secs. 67, 179—Interest on arrears of rent—Permanent mokurari lease—Effect of sec. 179 on sec. 67.*

This was an appeal against the decree and judgment of J. Windsor, Esq., District Judge of Burdwan, dated the 7th September 1898, modifying those of Babu Gobinda Chandra De, Munsif of Katwa, dated the 20th November 1897.

This case was referred to a Full Bench by Rampini and Pratt, JJ., with the following opinion:—

"In this case the question is whether the Plaintiff is entitled to interest on arrears of rent at the rate specified in the *ijara kabuliyat* executed in his favour by the Defendant, viz., Rs. 3-2 per month or whether he is restricted to the rate of 12 per cent. per annum, allowed by sec. 67 of the Tenancy Act. The lease is a permanent *mokurari* lease, and it is contended on behalf of the Plaintiff that sec. 179 of the Tenancy Act renders the provisions of sec. 67 inapplicable to such leases. The Judge in the Court below has held on the authority of the case of

*Atulya Churn Bose v. Tulsi Das Sarkar*, (2 C. W. N. 543), that the Plaintiff is entitled to the rate contracted for with him by the Defendant. The ruling in this case fully supports the view held by him. On the other hand it is urged by the learned pleader for the Appellant, that this case is in conflict with that of *Basanta Kumar Roy Chowdhury v. Promotho Nath Bhattacharji* (I. L. R. 26 Cal. 130), in which it has been laid down that a contract by a tenant holding under a permanent *mokurari* lease to pay interest on arrears at a higher rate than 12 per cent. per annum is not enforceable in law. The rulings in the two cases are in direct conflict. We are therefore bound to refer this case to a Full Bench, which we accordingly do.

We may add that we are of opinion that the ruling in the case of *Atulya Churn Bose v. Tulsi Das Sarkar* (2 C. W. N. 543) is correct. One of the members of this Bench was a party to the decision in *Basanta Kumar Chowdhury v. Promotho Nath Bhattacharji*, but he concurs in the opinion that that case was not rightly decided.

We are fortified in the view we take of the question at issue by the ruling in the case of *Krishna Chunder Sen v. Sushila Sundari Dasi* (I. L. R. 26 Cal. 611), which, though not directly in point, yet lays down that the provisions of sec. 74 do not control sec. 179, but the contrary.

The questions we propound for the decision of the Full Bench are—

*First.*—Whether the Plaintiff in this case is entitled to interest at the rate specified in the *kabuliyat* executed by the Defendant, or whether sec. 67 of the Tenancy Act controls the provisions of sec. 179 of the same Act; and

*Second.*—Whether the case of *Basanta Kumar Roy Chowdhury v. Promotho Nath Bhattacharji* had been rightly decided."

*Held* by Maclean, C. J., Prinsep, J., Banerjee, J., and Rampini, J. (Ameer Ali, J., dissenting)—That the Plaintiff is entitled to interest at the rate specified in the *kabuliyat* executed by the Defendant.

That sec. 179 of the Bengal Tenancy Act controls the provisions of sec. 67 of the Act and is not controlled by it.

That the case of *Basanta Kumar Roy Chowdhury v. Promotho Nath Bhattacharji* (I. L. R. 26 Cal. 130) was wrongly decided.

*Dr. Rash Behari Ghosh* and *Babu Natini Ranjan Chatterjee* for the Appellants.

*Mr. O'Kinealy* and *Moulvie Serajul Islam* for the Respondents.

H. P. C.

[CIVIL REVISIONAL JURISDICTION.]

[Full Bench.]

RULE No. 1217 OF 1900.

MACLEAN, C. J. }

PRINSEP, J.

BANERJEE, J.

AMEER ALI, J.

RAMPINI, J.

1901.

13, February.

AMRITA LAL BOSE,

Decree-holder, Petitioner,

NEMAI CHAND MUKHOPADHYA

and another,

Claimants, Opposite Party.

*Bengal Tenancy Act (VIII of 1885), sec. 170—*  
*Civil Procedure Code (Act XIV of 1882), sec. 278—*  
*Claim adverse to the tenure whether maintainable when attached in execution of a decree for arrears of rent due thereon.*

This was a rule obtained by the decree-holder against the order of Babu Sarat Chandra Pal, Munsif of Baruipur, dated the 21st of April 1900.

The Petitioner obtained a decree for arrears of rent against one Pitambar Chakravarti and in execution of the same attached the defaulting tenure whereupon the opposite party preferred a claim under sec. 278, C. P. C., to the tenure attached. In the first Court a preliminary objection was raised as to whether a claim could be preferred under sec. 278 to a tenure attached in execution of a decree for arrears of rent. The Court held that the claimants claimed under an adverse title to the tenure and decided the question in favour of the claimants and relied upon the case of *Jagabundhu Chattopadhyaya v. Deenu Pal* (Civil Rule No. 1370 of 1886).

The decree-holder made an application under sec. 622, C. P. C., and obtained the present rule.

It was contended on behalf of the decree-holder that under sec. 170 of the Bengal Tenancy Act the provisions of sec. 278, C. P. C., are excluded and declared not to be applicable to proceedings in execution of rent-decrees, and that the recent case of *Makbul Ahmed v. Rakhal Das Hazra* (Civil Rule No. 201 of 1900, decided by Rampini and Pratt, JJ., reported in 4 C. W. N. 732) was in favour of this contention; and that this case being in conflict with the case of *Jagabundhu Chattopadhyaya v. Deenu Pal* (Petheram, C. J., Cunningham, J., reported in 4 C. W. N. 734), the question should be referred to a Full Bench.

Rule I of Ch. V of the High Court Rules on its Appellate Side was also referred to.

Maclean, C. J., and Banerjee, J., who heard the rule referred it to the Full Bench. The following is the order of reference:—

In this rule the first question that arises for decision is—

• Whether sec. 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the Code of Civil Procedure to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property

claimed does not form part of the tenure or holding attached.

Upon that question there is a clear conflict between the decisions of this Court in the case of *Jagabundhu Chottopadhyaya v. Deemu Pal* (4 C. W. N. 734), and *Makbul Ahmed and others v. Rakhal Das Hazra* (4 C. W. N. 732).

The question must, therefore, be referred to a Full Bench for determination and as the question arises in a rule, the whole case must be so referred.

*Held* by Maclean, C. J., Prinsep, Ameer Ali and Rampini, JJ. (Banerjee, J., dissenting)—That having regard to the provisions of sec. 170 of the Bengal Tenancy Act a claim under sec. 278, C. P. C., was not maintainable.

*Babu Bunkim Chunder Sen* for the Petitioner.

*Babu Sarat Chunder Roy Chowdhry* for the Opposite Party.

S. C. S.

*Rule made absolute.*

H. P. C.

#### [CIVIL APPELLATE JURISDICTION.]

[Full Bench]

APPEAL FROM ORIGINAL DECREE

No. 14 of 1898.

MACLEAN, C. J.

PRINSEP, J.

BANERJEE, J.

AMEER ALI, J.

RAMPINI, J.

1901.

14, February.

RAM TARUCK HAZRA,

Defendant, Appellant,

v.

DILWAR ALI and another,

Plaintiffs, Respondents.

*Public Demands Recovery Act (VII of 1868), sec. 2—Public Demands Recovery Act (VII of 1880, B. C.), sale under—Civil suit to set aside sale on the ground of irregularity if barred by sec. 2, Act VII of 1868.*

This was an appeal against the decree of the Subordinate Judge of Burdwan, dated the 13th November 1897.

This case was referred to a Full Bench with the following opinion by Banerjee and Brett, JJ., to whom the case was referred under sec. 575, C. C. P., in consequence of a difference of opinion between Rampini and Pratt, JJ., who had originally tried the case. The following was the order of reference:—

"In this appeal, which has been referred to us under sec. 575 of the Code of Civil Procedure, one of the questions that arise for determination is whether a civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act (VII of 1880, B. C.) on the ground that the sale was vitiated by a material irregularity leading to substantial injury, the irregularity complained of being that one property was advertised for sale and a different property sold; or whether the only remedy of the party whose property was sold lies in the appeal to the Commissioner under sec. 2 of Act VII of 1868, B. C.

The cases of *Sudhusaran Singh v. Panchdeo Lal* (I. L. R. 14 Cal. 1) and *Troylukho Nath Moumdar v. Gohar Khan* (I. L. R. 23 Cal. 641) are authority in favour of the view that the first branch of the question should be answered in the negative and the second in the affirmative; while, on the other hand, the case of *Ram Logan Ojha v. Bhowani Ojha* (I. L. R. 14 Cal. 9) is in favour of the opposite view; and the judgment of the learned Chief Justice in the case of *Chunder Kumar Mukerji v. The Secretary of State for India* (4 C. W. N. 586) also supports the same view. In my judgment in this last-mentioned case there is a passage which has been referred to by one of the learned Judges who heard this case in the first instance as being in favour of the opposite view; but that passage, taken with the context, would show that there was no definite expression of opinion on my part on the question stated above, nor was it necessary to express any such opinion in that case, all that was said being to this effect, that even if the Respondent's contention was accepted that would not affect the jurisdiction of the civil Court to entertain the suit then under consideration.

But quite apart from the last-mentioned case, there is, as will appear from what we have said above, a clear conflict of authority in this Court upon the question stated at the outset. That being so, the question must be referred to a Full Bench. We may add that the inclination of our opinion is in favour of the view taken by Mr. Justice Wilson in the case of *Ram Logan Ojha v. Bhowani Ojha* (I. L. R. 14 Cal. 9).

There is nothing in Act VII of 1868, B. C., to take away the jurisdiction of the civil Court to entertain a suit like this; and the only legal provision which takes away the jurisdiction of the civil Court to entertain a suit for setting aside a sale on the ground of material irregularity leading to substantial injury, namely, sec. 312 of the Code of Civil Procedure, is not applicable to a sale in enforcement of a certificate issued under the Public Demands Recovery Act.

*Held* by Maclean, C. J., Prinsep, Banerjee and Ameer Ali, JJ. (Rampini, J., dissenting)—That sec. 2 of Act VII of 1868, B. C., does not bar a civil suit to set aside a sale in enforcement of a certificate held under the Public Demands Recovery Act on the ground of material irregularity in publishing and conducting the sale leading to substantial injury. *Troylukho Nath Moumdar v. Gohar Khan* (I. L. R. 23 Cal. 641) overruled.

*Dr. Asutosh Mukherji, Babus Gobind Chunder Dey Roy and Tarit Mohun Das* for the Appellant.

*Babus Ram Chunder Mitter, Lal Mohun Das, Karuna Sindhu Mukherje and Jnanendra Nath Bosa* for the Respondents.

S. C. S.

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, FEBRUARY 24, 1901.

[No. 14]

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### REPORTS (See Index.)

WE ARE INFORMED THAT GREAT DISSATISFACTION prevails at the manner in which the Criminal Appellate and Reversional business of the Court is being disposed of. People complain of the uncertainty of the procedure and the rulings are also said to be fast becoming chaotic. Even experienced lawyers are finding it difficult to foretell results and are getting tired of having to await them without assurance.

WE ARE GLAD TO FIND THAT THE GOVERNMENT HAS lost no time in appointing a *locum tenens* to Mr. Justice Banerjee. It is also a matter for congratulation that a vakeel has been appointed in the place of a judge who also belonged to the same Bar. Babu Sarada Charan Mitter is a lawyer of mature experience and of acknowledged ability with even temper and evident judicial temperament. He was on our editorial board and we have special reason to be proud of his appointment. Still, we must point out that he is going to fill a very difficult position where the qualities which go to create public confidence are not precisely those that go to assure success at the Bar. The eyes of the public will now be on him and critically view every action of his by the reflected light of the glorious traditions of the vakeel judges. They will ever be on the watch to contrast him with the two judges now on the

Bench, who have, all through their long career, by their great ability and, above all, character, added to the fame and good name of Indian judges. This is a severe ordeal to pass and when the new judge has successfully passed through it unscathed, that will be the time for us to convey to him our sincere congratulations.

WE ARE ALSO GLAD THAT MR. HENDERSON OF THE local Bar has been appointed to officiate for Mr. Justice Sale, who is proceeding home on furlough and will not sit from to-day until November next, when the Courts re-open after the Poojah Vacation. Mr. Henderson has officiated before as a judge both in the Calcutta and the Allahabad High Courts and in both places he made himself deservedly popular. Mr. Henderson's appointment has, naturally, given universal satisfaction. There was a talk of the appointment of an additional judge and it is said that the appointment has not been made owing to the sanction of the Secretary of State not having been received. It is, however, expected that by the time Mr. Justice Sale returns, the sanction of the Secretary of State will be received and Mr. Henderson will be made permanent. It is a matter of satisfaction to notice that the Elgin-Chalmers theory that no member of the local Bar should officiate as a judge has after all been knocked on the head. We predicted at the time of its promulgation under the seal of the Secretary of State that there was no substance in it, and are glad that after putting it to practical test it has come to be discredited.

HIS EXCELLENCY THE CHANCELLOR'S ADDRESS AT the last Convocation of the Calcutta University was intended as an address to the young men who having completed their academic career were in search of one in the outside world. The Viceroy, as the Indian saying goes, young in age but old in wisdom, took upon himself the task of offering advice all round and in doing so did not forget to apporportion to the lawyer his quota. His words may appear somewhat common-place to the busy lawyer, but those who have yet a great deal of time to spare will, perhaps, find in it matter for meditation and precepts for practice, if only any early chance

should present itself to them. But youngsters will be none the worse if they have to wait a long while yet, and forget all about the last Convocation speech. In the profession of law, as in any other business, an ounce of practice is often worth tons of theory. Theories with which we are all familiar, are always entitled to respect and specially so when they are repeated by a Governor-General of India and we need no further apology for quoting his Excellency's words.

In a Law-court the facts are the first thing; the law is the second; and the eloquence of the barrister or pleader upon the facts and the law is the third. Do not let your attention to the third subject obscure the importance of the first and second, and most of all the first. Words are required to express the facts, and to elucidate or to apply the law, but when they become the mere vehicle of prolix dissertation, they are both a weakness and a nuisance. The second danger of the Law-courts is the familiar forensic foible of over-subtlety, or as it is commonly called, hair-splitting. We know what people mean when they say, "That is a lawyer's argument": and although the trunt may often be undeserved, there must be something in it to explain its popular acceptance. Try, therefore, to avoid that refining, and refining, which concentrates its entire attention upon a point—often only a pin-point—and which forgets that what convinces a judge on the bench or a jury in the box is not the adroitness that juggles with minutiae, but the broad handling of a case in its larger aspects.

Mr. Haldane says this was true of lawyers a hundred years ago. As for the undeserved odium referred to in his Lordship's speech we had it recently on the authority of an M. P. that a learned judge once observed that "the House of Commons is a place where, if a man talks common-sense, they call him a lawyer." We wonder if his Excellency had the House in his mind when he delivered his convocation address.

MR. HALDANE, M. P., K. C., SPEAKING BEFORE THE Leeds Law Society delivered, as usual, a very sound and vigorous discourse touching matters which are of common interest to the public and the profession. Referring to the position of a lawyer in our modern polity, he said:—

A learned Judge had once observed: 'The House of Commons is a place where, if a man talks common-sense, they call him a lawyer.' The tendency, however, towards narrow views in the legal profession was one against which they ought all to guard, and it was well that they should try in their contemplation to look beyond the traditions of the past, beyond those even of the moment, and look a little to the future. The watchword of reformers at this time was efficiency—a desire to put the machinery of our Empire upon a better footing; and perhaps the lawyers did well not to leave out of account what was too often forgotten, viz., that in the law they had a potent part not only of the machinery, but of the Empire itself. The lawyer of a hundred years ago was, generally speaking, divorced from human society and human development, as well as from the commercial and business life of the age. They had altered that now. The lawyer had changed (as far as Parliament would let him change), and had become a man of affairs and a man of wider understanding.

Regarding the importance of law, he said:—

He knew nothing so potent, nothing so subtle in its binding effects, as the legal machinery of the Empire. The King ruled over 400 millions of people, and nearly twelve millions of square miles, and in these vast territories there were included people of different races, with different traditions, different ethical standards, different systems of law in which their morals, standards, and principles were embodied.

From this he argued that there should be one Final Court of Appeal for the Empire and observed:—

There was, of course, the Judicial Committee of the Privy Council, a remarkable body, and of high repute throughout the country. But the London policeman would not be able to tell the stray traveller where it was or where it sat. Why were the House of Lords and the Judicial Committee of the Privy Council separate bodies? The House of Lords formed the supreme Court of Appeal for England, Scotland, and Ireland, and the Privy Council for everywhere else. Originally it was not so. With the Empire where it was we must reconsider these things. A supreme Court of Appeal should be one for the Empire. It should sit in two divisions if necessary, and it should be housed with at least the splendour which pertained to the House of Lords at the present time. Unity of appeal in a supreme tribunal would form a new link which would go towards Imperial Federation, in a sense.

WE HAVE REASONS, HOWEVER, TO BELIEVE THAT IT IS not at all likely that any fresh measures will be taken just at present to reconstitute the Judicial Committee and the House of Lords. However slow and unsatisfactory the latter may be, British public opinion will not easily be a consenting party to any drastic changes in this tribunal. Lord Selborne attempted to abolish the Lord's appellate jurisdiction but was obliged to abandon his attempt. Mr. Chamberlain's recent attempt on the opposite direction, to enlarge it into one great Imperial Court of Appeal failed because the Australian Commonwealth saw no particular advantage in modifying their constitution materially, for the bare honour of having a few representatives in a titular tribunal. The Government would have been better advised if they had accepted Mr. Haldane's suggestions and proceeded to carry them out without binging the whole question of a Final Court of Appeal on a single clause of the Australian Commonwealth Bill.

IT MAY BE STATED ON THE AUTHORITY OF A correspondent of the *Times* that Russia, with all her net work of foreign policy spread far and wide, not only finds time but, evidently, devotes a great deal of it, in endeavouring to be up to date in matters of legislation as well. It is also remarkable that even the Russian Legislature proposes to do away with the death penalty. As for the Russian process of revision of the Criminal Code the correspondent says.

The Council of State is now engaged in the consideration of the new Criminal Code, which has been drawn up by an expert committee of jurists. The Criminal law at present in force is the old code of 1845 supplemented by various later enactments, and is no longer suited to the requirements of



modern Russian life. The committee which is responsible for the new code has devoted some fifteen years to its task. The main feature of the revised code is that it does not seek, as is the case with the one at present in force, to define every separate crime which may be punished, but relies upon broad general definitions. Instead of the 1711 paragraphs of which the old code consisted, the revised one contains about a third of that number, in spite of the fact that it deals with a number of crimes which were, unknown, or practically unknown, in 1894, such as blackmailing, strikes, and many others. It is interesting to note that strikes become criminal under the new code when they are directed against the Government or when they lead to injuries to persons or damage to property. The old "staircase of punishments," to employ a Russian phrase, finds no place in the new code. According to the old law the lowest punishment was a "reprimand," and all other punishments were reckoned as equivalent to so many reprimands. The penal system was very complex, and included punishments of many kinds and grades, ranging from the reprimand to transportation and capital punishment. In the new code all this is done away with, and imprisonment of various degrees of severity becomes practically the only punishment. The committee even recommends the entire abolition of the death penalty. The new code endeavours to deal in a comprehensive manner with the difficult question of the estimation of the extent to which it is possible to hold a person responsible for acts committed in particular circumstances or in particular states of mind. This part of the code, which includes the definition of the principles of the responsibility of minors, is the work of the well-known jurist, Professor Tagantzeff, the president of the department of Criminal Cassation.

Russia is not so un-civilized after all.

It is interesting to notice the following predilection of Boer youths for the profession of law.

Among the new members of the Middle Temple is a native of the Orange River Colony, who happens also to be a nephew of ex-President Steyn. Educated Boers have always been noted for an ambition to qualify as English barristers. Mr. Steyn himself is a member of the Bar, and so, for the present, is Dr. Krause. Several other young Boers are enrolled as students at the different Inns of Court. During the earlier stages of the war some of them went abroad, but they have since returned, and now are quietly pursuing their studies.—*Law Times*.

#### AWARD BY ARBITRATORS CIVIL PROCEDURE CODE, CH. XXXVII.

The judgment of their Lordships of the Privy Council in the recently decided case of *Ghulam Jilani v. Muhammad Ahmed* (6 C. W. N. 226) will have a most important effect on the decisions which have from time to time been passed by our Courts on questions relating to arbitration.

After entering into a general exposition of the provisions of Ch. XXXVII of the Civil Procedure Code—their Lordships proceed to distinguish the three classes of references to arbitration provided for by that Code, namely, under secs. 506, 523 and 525. It is pointed out that in the case of a reference under sec. 506, the agreement to refer and the application of the Court must have the concurrence of all parties and the actual reference is an order of the Court. So that no question can arise as to the regularity of the proceedings up to that point, whereas in cases of reference under secs. 523 and 525, proceedings described as a suit and re-

gistered as such must be taken in order to bring the matter under the cognisance of the Court.

"This distinction," their Lordships remark, "does not seem to have been always kept in view in India." Their Lordships seem to be of opinion that the conflict of decisions in India on questions relating to the finality of award is mainly due to our Courts not having kept in view this distinction. We shall attempt, therefore, to illustrate their Lordships' meaning by reference to some Indian decisions.

The cases we refer to, all turn on the question, "Does an appeal lie from a decree passed in accordance with an award?"

The decisions of the Indian Courts with all their conflict seem to agree in asserting the following propositions.

That a decree passed in accordance with a *valid* award is final. But that if the award itself be *illegal* or *invalid*, a decree passed even in accordance with it is not and an appeal would lie therefrom.

It is in determining what forms of illegality would be sufficient to lay an award open to appeal that the conflict arises and that because our Courts have not kept in view the distinction between an award given under sec. 506, and those made under secs. 523 and 525.

The forms of illegality which have been uniformly regarded by our Courts as sufficient to warrant an appeal are chiefly two:

(1) That the Court which passed the decree disregarded the objections raised against the award under secs. 520, 521.

(2) That there was no valid reference and that there was no genuine award or that the reference to arbitration and the genuineness of the award were disputed.

The conflict that has arisen in reference to the first point, will appear from the following:—

(a) In *Shashih Ch. Chatterji v. Tarak Ch. Chatterji* (Full Bench decision, 8 B. L. R. 315), we find the judges divided. Some were of opinion that though it is certainly incumbent on the Court passing the decree on the award to carefully weigh such objections still, should it fail to do so, there would be no remedy against its decision. Others held that such errors would render the decree illegal and void and an appeal would lie.

(b) In *Surjan Raot v. Bhikari Raot* (I. L. R. 21 Cal. 213, F. B.) the judges were unanimous that no appeal would lie.

(c) In *Kali Prosonno Ghose v. Rajoni Kant Chatterji* (I. L. R. 25 Cal. 141), again, it was held that the award would be illegal and an appeal would lie.

The decision of their Lordships of the Privy Council may now be taken to have finally settled the question, namely, that a decree passed in accordance with an award made on a reference under sec. 506 is final and is not impugnable either on appeal or revision. It should be remarked that on

this as on the other points, their Lordships evidently fully endorse the decision of Justice Subramania Iyer in the Full Bench case of *Husananna v. Lingana* (I. L. R. 18 Mad. 423) concurred in by the other judges.

On the second point, namely, when the fact of reference to arbitration itself, and the genuineness of the award are disputed, we notice.

(a) In *Micharaya v. Sudashiva* (I. L. R. 4 Mad. 319) it was held that no appeal would lie. It should be noted that this case arose out of reference made under secs. 525, 526.

(b) In *Shashiti Ch. Chatterji v. Tarak Ch. Chatterji* (8 B. L. R. 315) it was held unanimously that appeal would lie. This case too arose out of a reference under sec. 327 of the old Code, which corresponds with sec. 525 of the present Code.

(c) In *Surjan Raot v. Bhikari Raot* (I. L. R. 21 Cal. 213, F. B.) the judges were divided. This case also arose out of secs. 525, 526.

(d) In *Husananna v. Lingana* (I. L. R. 18 Mad. 423) it was held that an appeal would lie. This case too arose out of secs. 525, 526.

Now all these cases are cases of reference to arbitration without the intervention of Court—(secs. 525-526). It is in perfect accordance with the views of their Lordships, that questions as to the truth of the fact of reference or the genuineness of the award may arise only in cases falling under these sections. For in such cases, to quote their Lordships, "proceedings described as a suit must be taken in order to bring the matter under the cognisance of the Court. That is or may be a litigious proceeding—cause may be shewn against the application—and it would seem that the order made thereon is a decree within the meaning of the expression as defined in the Civil Procedure Code."

The conclusion we draw from this is (and we have the authority of Justice Subramania Iyer, 18 Mad. 423 in our support) that a decree passed on an award made on reference under sec. 523 or secs 525, 526 need not necessarily be final and an appeal may lie from it.

The confusion which has resulted from not keeping always in view the distinction between the two class of cases was well illustrated in the important Madras decision, *Husananna v. Lingana* (I. L. R. 18 Mad. 423). In that judgment the cause of the confusion and the way out of it were well pointed out by Justice Subramania Iyer, namely, by thus distinguishing the two classes of awards.

1st. Those arising from a reference made in the course of a suit under sec. 506. The decrees passed on such awards under sec. 523, are unimpeachable except on the ground that they are not in accordance with or are in excess of the award.

2nd. Those arising from references made under secs. 523, 525. The decree, passed on these are decrees in the ordinary sense (sec. 2, C. P. C.) and are open to appeal (sec. 540, C. P. C.).

## English Notes.

COURT OF APPEAL.—*ADAMS v. CAIRNS*. Before the MASTER OF ROLLS, LORDS JUSTICES WILLIAMS and STERLING. 11th July 1901.

*Agreement reserving weekly rent—Weekly tenancy.*

The Defendant was the free-holder of a house at Kilburn in London. He gave a lease of that premises to one Twine for a term which was to expire on 24th June 1901, the lease bearing date, the 9th of November 1897. Twine let a part of that premises to the Plaintiff for his hair-dressing business on 5th January 1900 and under such agreement the Plaintiff took possession. Twine accepted the Plaintiff as tenant at 7/ a week "the rent not to be raised during my present tenancy." Under those words followed the signature of Twine. After this on 27th September 1900 Twine surrendered to the free-holder, the Defendant Cairns, all his interest in the lease of 9th November 1897. In the October following the Defendant after notice to the Plaintiff to quit at once, entered into possession. This action was for such trespass and wrongful entry.

At the trial before Mr. Justice Readly it was held that merely a weekly tenancy was created in favour of the Plaintiff.

The APPEAL COURT being of opinion that the reservation of a weekly rent did not necessarily create a weekly tenancy, that effect must be given to the concluding words, that rent was not to be raised until the 24th June 1901. Held that the meaning of the agreement was that it was to continue until that date and decided in Plaintiff's favour and ordered a new trial.

*Mr. Forder Lamparel* for the Plaintiff.

*Mr. Abel Thomas, K. C., and Mr. Turner* for the Defendant.

*Decision in favour of Plaintiff: New trial ordered.*

C. W. A.

COURT OF APPEAL.—*HOPE v. I'ANSON AND WEATHERBY*. Before the MASTER OF THE ROLLS, LORDS JUSTICES STERLING and MATHEW. 17th December 1901.

*Libel—Publication in Racing Calendar—Decision of Jockey Club—Committees of Club, duty of—Privilege.*

This action was the result of a dispute between the Plaintiff A. J. Hope and one Armstrong. Hope had entered a horse for one of the Edinburgh races, a dispute arose between the two about a certain jockey riding Plaintiff's horse. The libel complained of by the Plaintiff was the communication by I'Anson to the other Defendants, that the Plaintiff had at the Naddock hit Armstrong in the face, and the publication in the Racing Calendar by the other Defendants, that Armstrong had reported the Plaintiff to the stewards for assaulting him, that the stewards having heard the evidence of these witnesses, censured the Plaintiff and had reported the matter

to the Jockey Club. There was a further publication that the Jockey Club had referred the matter back to the local stewards and that the Plaintiff was severely censured.

Mr. Justice Darling had found that privilege had not been made out, and the jury had returned £50 damages against P'Anson and £100 against the other Defendants.

For the Defendants in support of their contention for a new trial it was urged that the occasion on which the above libels were published was privileged and that there was no evidence of malice. It was pointed out that the Plaintiff had himself lodged the complaint to the stewards against Armstrong, and had himself against the local stewards' decision appealed to the Jockey Club. The rules of the Jockey Club were referred to, and it was said that it was under those rules that the Plaintiff had lodged his complaint. That the action of the Defendant, P'Anson, who was the clerk of the course at the meeting, was in accordance with those rules. That the Weatherby Defendants were acting as the servants of the Jockey Club, in publishing the decisions arrived at by the local stewards. Plaintiff had invoked the jurisdiction of the Jockey Club and knew the result would appear in the Racing Calendar.

The COURT OF APPEAL dismissed the appeal, holding that even assuming that the decision of the Jockey Club was *quasi-judicial*, they were not of such general public interest as to make the occasion privileged; with regard to the Plaintiff having consented to the action of the Jockey Club and knowledge that the result would appear in their journal, there was nothing to show that the last point was made out, nor was it proved that all such decisions were printed in the Racing Calendar. There was no inference of law that a person submitting to the decision of certain individuals, thereby submitted to its being published as if it were a decision of a Court of law. On the facts it was not made out that the Plaintiff had consented to the publication. The racing rules did not contain any express provision regarding the publication of a decision like the present.

The Defendant had to establish an admission on the part of the Plaintiff that he had consented to the publication. Then there was the further question whether even if the Plaintiff had submitted to the publication was it not to be understood that the proceedings were to be regularly conducted? Committees of Clubs, although they had not to follow the rules of law, were bound to follow the requirements of natural justice (*Dawkins v. Antrobus*, 17 Ch. D. 615) one important rule being the accused should be heard. Mr. Justice Darling was quite right on a consideration of all the circumstances in ruling that it was for the jury and not the Judge to decide regarding the Plaintiff's alleged consent and the appeal failed.

*Sir Edward Clarke, K. C.*, and *Mr. C. W. Mathews* for the Appellants.

*Mr. Lawrence, K. C.*, and *Mr. Cantley* for the Plaintiff.

*Appeal dismissed: Stay of execution allowed on usual terms pending the appeal to the House of Lords.*

C. W. A.

COURT OF APPEAL—*HUNT v. LUCK*. Before LORDS JUSTICES VAUGHAN WILLIAMS, STERLING and COZENS HARDY. 23rd January 1902.

*Conveyancing Act, 1882—Mortgagee's duty of inquiry.*

The facts of this case are stated in the report of the litigation in its original state before Mr. Justice Farwell (see 5 C. W. N., p. cli).

This was the appeal of the Plaintiff Hunt from that decision.

The COURT OF APPEAL dismissed the appeal being of opinion that Mr. Justice Farwell's statement of the law was quite accurate. Referring to sec. 3 of the Conveyancing Act of 1882, the Court said the only inquiry which the mortgagees were bound to make was an inquiry to protect themselves against any right which the tenant might have in the property, but that did not extend to any right which the lessor might have. Any reasonable inquiry would not have led to the information regarding the title of Dr. Hunt, the deceased husband of the Plaintiff; in such inquiry what they would have discovered was that the tenant had paid his rent to Woodrow and even if it were assumed that they would have heard that the rent was paid on behalf of Gilbert that would not have given notice of Dr. Hunt's title. The Conveyancing Act did not enlarge the duty of inquiry from the law as it previously stood.

*Mr. Webster* for the Appellant.

*Mr. Hughes, K. C.*, and *Mr. Church* for the Respondents.

C. W. A.

*Appeal dismissed with costs.*

CHANCERY DIVISION.—*STEDALL v. HOUGHTON*. Before MR. JUSTICE SWINFEN EADY. 28th November 1901.

*Negatives of photographs—Implied contract not to use for other purposes—Breach of confidence—Injunction—Costs.*

*POLLARD v. PHOTOGRAPHIC COMPANY* (40 Ch. Div. 345) followed.

The Defendant, a Marriage photographer, had photographed the Plaintiff Stedall's wife (since divorced by him) and their children. The payment for the same was made by her, but she had no separate means. At the time she was photographed she was living in the house with her husband but on bad terms with him, receiving from him money weekly for the usual

domestic expenses. The Plaintiff Stedall, having obtained a decree *nisi* and after it was made absolute, married another lady. He objected to Defendant exhibiting the photograph in his window and an enlargement in his reception room. On his objecting, the Defendant partly acceded to his request, but on the ground that at a further interview the Plaintiff had used strong language towards him, refused to altogether comply with the Plaintiff's request. It was an ascertained fact that the further exhibition of the picture (that which formed the basis of this action) was unknown to the Defendant. The question was whether he had a right to exhibit the picture against the wish of the Plaintiff; whether the action would lie.

The learned Judge held, on the facts, that a contract not to use the photographs for the purpose of exhibiting same was an implied one, the wife was acting as her husband's agent at the time she sat for the photos, and it was a breach of confidence to exhibit same. It was no excuse to say that he was not aware of the subsequent exhibition thereof, he should have taken care to prevent such use being made of the photos after Plaintiff's objection.

The above-mentioned case was followed and an injunction with costs was allowed.

*Mr. Eve, K. C., and Mr. Manning for the Plaintiff.*

*Mr. Mecklem, K. C., and Mr. Solomons for the Photographer.*

*Judgment with costs for the Plaintiff.*

C. W. A.

KING'S BENCH DIVISION.—*TERRELL v. MURRAY.* Before JUSTICES BRUCE and PHILLIMORE. 11th June 1901.

*Lease—Covenant—Dilapidations—“Reasonable wear and tear excepted.”*

The Defendant Lady Murray was the tenant. The lease to her contained no covenant to repair during the term of her lease, but there was a tenant's covenant to deliver up the premises “in as good repair as it now is in, reasonable wear and tear and damage by fire excepted.”

The lessor at the expiration of the term demanded £112 under the above stipulation, and his action to recover same was referred to Mr. Hamming, K. C., the Official Referee.

The learned Official Referee found for Plaintiff for £39. That amount included £14 for painting and painting outside of house and £5 for damage by dry rot to kitchen.

Defendant objected to these items, and this was a motion on her part to set aside that judgment on the ground that she was only liable to commissive waste and not permissive waste. The dilapidations were merely “reasonable wear and tear.”

The Court held that what the tenant was liable for was to deliver up the messuage in as good a

condition as it was in when she rented same, but subject to this that she was not liable for dilapidations caused by friction of the air, by exposure and for such as was caused by ordinary use; and outside painting the tenant was not bound to do under her covenant; and as the amount due to the Plaintiff under such decision would be reduced to the amount paid into Court, judgment would be for the Plaintiff.

*Mr. Boussey for the Plaintiff.*

*Mr. Sherman for the Defendant.*

*Judgment for amount paid into Court.*

C. W. A.

KING'S BENCH.—*THE KING v. DIX.* Before JUSTICES DARLING and PHILLIMORE. 14th January 1902.

*Extradition—Larceny Act, 1861, sec. 81—Extradition Act, 1870—“Larceny by embezzlement”—Crim within the laws of Washington and England—Crim not called by the same name in the two countries.*

*In re ARTON (L. R., 1896, 1 Q. B. 509) followed.*

The second information on which the prisoner Mr. St. John Dix, was committed to prison with a view to his extradition to Washington U. S. A. by one of the London Magistrates was on a charge described as “Larceny by embezzlement.” The matter now came on on a *habeas corpus* writ issued on behalf of the prisoner contending that although the evidence had disclosed a *prima facie* case of that character within the meaning of the American statutes no such case was disclosed according to the law of England. The offence not being a crime within the law of both countries, the prisoner could not be lawfully extradited. Also that conceding that there was an offence *prima facie* within the purview of the English Larceny Act, it was not the same as that mentioned in the information before the Magistrate, *viz.*, “Larceny by embezzlement.”

The Court decided against the prisoner and refused the writ. The judgment states that the essential thing to find out was whether what the evidence disclosed *prima facie* was that what the prisoner had done was a crime in both countries; and after a consideration of the statutes named at the head note, the Court arrived at the conclusion that the same thing had been made a criminal offence in both countries, the same facts established that a crime had been committed within the law both of the United States and of England. It was no essential that the offence should be called by the same name. See the decision of the late Lord Chief Justice *In re Arton*, where it was held that extradition should not be refused on the ground that the falsification of accounts was not forgery according to English law, but fell under that head according to French law.

**Mr. Beron for the Prisoner.**

The application was opposed by the Attorney-General and Mr. Sutton.

*Decision against the issue of the writ.*

C. W. A.

**KING'S BENCH DIVISION.**—*LONGMAN v HESS.*  
Before the LORD CHIEF JUSTICE and a SPECIAL JURY.  
28th January 1902

*Libel*—"Outside broker"—*Nominal damages*—*Costs.*

The Plaintiff in this action was one William Longman, an "outside broker." He brought this action against the Defendant Hess, the editor of the financial newspaper called the *Critic*, and against the British and Colonial Publications Company, the owners of that paper. In that paper in several issues of it there were references to Plaintiff's business, "as the bucket shop dealing under the cover system" warning people not to have any dealings with such people and in particular referring to the Plaintiff's as one of the larger of such establishment. It stated that Mr. Longman "has the misfortune to continually ensnare clients." There was no dispute that all the articles Plaintiff complained of and his counsel noticed in his opening address were *prima facie* libellous. The question on the defence for determination was whether under all the circumstances the comments made on the Plaintiff's business and the manner of his dealings were substantially true.

Upon such defence the Plaintiff was not examined after Plaintiff's counsel's opening statement. The Defendant's counsel then addressed the jury and called the Defendant and their witnesses.

At the conclusion of the examination of witnesses for the defence, the Plaintiff was called to be examined, and the Lord Chief Justice, overruling an objection from the Defendant's counsel to such procedure, decided that it was quite proper to do so. When the affirmative was on the Defendant to prove, Plaintiff was not bound to call evidence by anticipation he was at liberty to do so by way of reply.

At the conclusion of the examination of the Plaintiff and his witnesses the Lord Chief Justice intimated that the Plaintiff was entitled to his reply.

Counsel for each party having accordingly addressed the jury, the Lord Chief Justice left the matter to the jury, intimating that the business of an outside broker was a lawful business, and no one had a right to speak injuriously of it and that it appeared from the Plaintiff's own statement in his examination that when he gave advice to his clients, it would be unfortunate for him; whenever his advice turned out to be good, that was a feature which must be noticed. The jury must look into all the facts and say whether they were satisfied that the statements made against the Plaintiff were substantially true.

The jury found a verdict for Plaintiff one farthing damages.

On such verdict counsel for Defendants asked that the Plaintiff be deprived of costs.

The LORD CHIEF JUSTICE after consideration refused the application, the verdict was against the Defendant, it meant that the jury did not believe in the charges and there were special circumstances sufficient for depriving the Plaintiff of his costs.

*Mr. Duke, K. C., and Mr. Drake for the Plaintiff.*

*Mr. Hume Williams, K. C., and Mr. Shaw for the Defendants.*

*Judgment for the Plaintiff with costs.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2614 OF 1899.

RAMPINI, J.	}	CHUNI LAL DUTT, Defendant No. 2,
PRATT, J.		Appellant,
1902		v.
4, February.	}	HIRA LAL DUTT, Plaintiff, Respondent.

*Specific performance, suit for—Civil Procedure Code (Act XIV of 1882), sec. 244—Right of suit—Limitation Act (XV of 1877), Sch. II, Art. 113—Estoppel.*

This was an appeal preferred on the 19th December 1899, against the decree of Babu Mohim Chunder Ghose, Subordinate Judge of Hooghly, dated the 27th November 1899, confirming the decree of Babu Bidhu Bhushan Banerji, Munsif, 3rd Court, Howrah, dated the 29th March 1899.

The facts of the case material to this report are as follows:—The Plaintiff sued Defendant No. 1 for *khas* possession of 3 cottahs of land. The suit was compromised and dismissed, Defendant agreeing to execute a *kabuliyat* in favour of Plaintiff for a term of ten years at a certain rate of rent. Defendant did not execute the *kabuliyat* and assigned the land to Defendant No. 2. Plaintiff sued Defendants Nos 1 and 2 for ejectment on the ground that Defendant No. 1 by assigning his interest in the land had forfeited his tenancy; the suit was dismissed. Plaintiff then brought this suit for specific performance of the contract to execute a *kabuliyat*.

The first Court decreed the suit; upon appeal by Defendants Nos. 1 & 2 the lower Appellate Court upheld the judgment of the first Court; the following two points were urged before the lower Appellate Court: *First*.—That the Defendant No. 2 being

a *bond fide* purchaser for value and without notice is not bound by the contract. *Second*.—That the *solanamah* having been admittedly filed by a pleader who had no authority to file it is not enforceable under the law.

The Subordinate Judge was of opinion that the first point had not been taken before the first Court and could not therefore be allowed to be taken before him. The second point was decided against the Defendants. Defendant No. 2 preferred this second appeal.

In the High Court it was argued on behalf of the Plaintiff. (1) That the suit was barred by sec. 244, C. P. C., and that when a decree was passed in the first ejectment suit, Plaintiff could have executed his decree, but was not entitled to bring a separate suit for specific performance. (2) That in suing to eject the Defendant the Plaintiff had acted in contravention of the terms of the compromise which allowed Defendant a ten years' lease and so could not now sue to enforce it. (3) And that the suit was barred by limitation.

*Held* as to the first objection.—That as the previous suit, which was for *khas* possession was dismissed and in the decree there was no direction for the execution of any *kabuliyat*, and the Plaintiff could not obtain the relief he now sought for the present suit was not barred by sec. 244.

*Held* as to the second objection.—That as in the former suit, Plaintiff had treated the Defendant as a tenant who had forfeited his rights under the compromise, Plaintiff had not acted in contravention of the terms of the *solanamah* and was not precluded from now suing for a *kabuliyat*.

*Held* on the third point.—That the suit was not barred as the refusal by the Defendant to execute the *kabuliyat* had been made within 3 years of the institution of the present suit.

*Mr. Hill, Babus Nilmadhab Bose and Syama Prosonno Mojumdar* for the Appellant.

*Babu Mohendra Nath Ray* for the Respondent.

*Appeal dismissed.*

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER  
No. 22 of 1901.

GHOSE, J. BRETT, J. 1902. 11, February	}	SURJU PERSHAD NARAIN SINGH and others, Plaintiffs, Decree-holders, Appellants, v. L. D. REID and ors., Defendants, Judgment-debtors, Respondents.
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*Civil Procedure Code (Act XIV of 1882), sec. 244—  
Mesne profits—Principle of assessment—Preliminary  
order—Appeal.*

This was an appeal against an order made in the course of proceedings for assessment of mesne profits, in execution of a decree. The Plaintiffs had obtained a decree for possession of certain lands against the Defendants and the decree directed that the mesne profits payable by the Defendants to the Plaintiffs should be assessed in the execution department. The Plaintiffs thereupon applied for assessment of mesne profits and prayed that such profits might be assessed upon the basis of the actual produce of the lands. The Defendants objected that the mesne profits ought to be assessed in the basis of the fair rent at which the lands might have been let out to tenants. The Subordinate Judge held that the principle upon which mesne profits should be assessed ought to be decided before entering into the merits of the case, and without taking any evidence, held upon the authority of the case of *Raghu Nandan Jha v. Jalpa Pattap* (3 C. W. N. 748), that the proper principle was to ascertain what would have been a fair and reasonable rent from the land if the same had been let out to a tenant during the unlawful occupation of the wrongdoer. The Subordinate Judge then directed the parties to produce evidence as to the rate of rent. The decree-holder appealed to the High Court. At the hearing of the appeal a preliminary objection was taken that no appeal lay inasmuch as the order in question was merely an interlocutory order.

*Held*—That when an order has been made deciding the principle upon which mesne profits should be assessed, the order was one under sec. 244 C. P. C., and is appealable although the amount of the mesne profits recoverable on the basis of such principle has not been actually ascertained.

*Held further*—That there is no rule of law that mesne profits must in every case be ascertained on the basis of the rent payable in respect of the lands; but the true principle is that the loss of the party wrongfully kept out of possession must be measured by the actual profits arising from the usufruct of the land, in an occupation of the same character as that of the party wrongfully kept out of possession, at the date of his ouster.

*Asmed Koer v. Indurjeet Koer* (9 W. R. 455)  
*Sreenath Bose v. Nobin Chander Bose* (9 W. R. 473)  
*Soudanini Dubee v. Anund Chunder Haldar* (1 W. R. 37), *Nursing Roy v. Anderson* (16 W. R. 21) and *Rookmee Koer v. Ramtuhul Roy* (17 W. R. 156) referred to and followed.

*Raghu Kandan Jha v. Jalpa Pattap* (3 C. W. N. 748) referred to and explained.

*The Advocate-General (Mr. J. T. Woodroffe), Dr Asutosh Mookerjee and Babu Biraj Mohan Mojumda* for the Appellants.

*Babu Umakali Mukerjee* for the Respondents.

*Case remanded.*

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

WE ARE GLAD TO FIND IT ANNOUNCED THAT MR. Justice Sale is going to take up the Suits for Liquidated Claims on and from the 6th instant.

HIS EXCELLENCY THE VICEROY IN EXPLAINING THE scheme of the Victoria Memorial Hall, and in suggesting that gifts or loans from private individuals or public bodies may be largely availed of for the collection of its contents, said—

We may appeal for some friendly assistance to the Bar Library. There, I believe, are to be found, unless they have already perished, 14 volumes of the manuscript notes of cases in the handwriting of Mr. Justice Hyde. There is his transcript of the evidence of Warren Hastings and Barwell at the trial of Nuncomar, and his entry of the order for the execution of that ill-fated person. I believe that there is also in the High Court the original bond given by Bolagi Das to Nuncomar, which was pronounced a forgery at the trial.

We do not think there will be any opposition on the part of the members of the Bar to lend the valuable manuscripts in their possession to the Trustees of the Victoria Hall. We believe that there are not merely the fourteen volumes of Mr. Justice Hyde's notes, including the famous Indian State Trials, but that there are also fifty-nine volumes more of manuscript notes of the proceedings of the Supreme Court, which although by repulse are known to be fair copies, to all appearance, seem to be in the handwriting of Mr. Justice Hyde and of the other judges of that Court. The designation "rough" and "fair" as applied to the respective sets of these manuscript notes, is said to have originated from their exterior rather than from the contents which cannot lay any claim to be called "fair."

The proceedings are mostly recorded in long hand but occasionally a form of short hand is used which appears to be very different from what is in common use now and is difficult to read except by experts in that art. We are not aware that these interesting manuscripts serve any more useful purpose in the Bar Library than the satisfaction of the curiosity of some occasional visitor. All such treasures ought surely to find place in institutions where they are likely to meet with greater appreciation.

IT IS BOTH INSTRUCTIVE AND USEFUL TO US TO FIND in the State Trials, above referred to, that the Judges of the Supreme Court, even in its early days, put it down as an unconstitutional practice for the Government or its representatives to communicate with the judges by letter on any subject which was engaging their attention judicially and laid it down as a rule that the only legitimate way in which Government can address them on such matters is by instructing its law officers to make applications in open Court. The following rule laid down by them in the case of *King*, on the prosecution of Warren Hastings, against *Roy Radha Charan* (1775) and the proceedings bearing upon it may, to this day, be usefully referred to in this connection:—

That it is contrary to the principles of the English constitution, for any person or persons to address a Court of Judicature by Letter missive, concerning any matter pending before such Court; and that the higher the station is, the act is the more unconstitutional.

Although old, this must not be regarded as an obsolete rule or as unenforceable. For, it was only two years ago that Lord Macnaghten, sitting in Her Majesty's Judicial Committee of the Privy Council, in answer to a suggested disobedience by a Government officer to a judicial order, said that the remedy for any such defiance was simple enough. "On a proper application and on proper notice being given it would be found that the arm of the Court would be long enough to reach the offender whatever his position might be" (*Fischer v. Secretary of State for India*, 3 C. W. N. 173).

• NOTWITHSTANDING OUR GREAT MASTERY OVER THE material world, we are at times apt to doubt whether we are any better off to-day than were our ancestors, ages before, when moral ideals had a more complete hold over human actions than they have, perhaps, at the present day. Recent discoveries in Egypt disclose an idea of justice and an ideal of a judge

which we wish we could more frequently meet with outside the antiquities of Egypt. The importance of the discovery, noted in the columns of the Journal of the Society of Comparative Legislation, does not comprise in the question whether Rekhmara, the Chief Justice, possessed all the virtues which are inscribed on his tomb, but consists in the fact that people even in that distant age believed to be the ideal virtues of a judge. Nearly four thousand years have elapsed and we may very well pause to-day and enquire whether there is amongst us any higher ideals of justice and judicial duties than what Mr. Newberry's discovery discloses.

Mr. Percy Newberry, the well-known Egyptologist, has lately restored from the hieroglyphics of his tomb an interesting figure—that of Rekhmara, Chief Justice, or in Oriental hypallage, the "Gate of Justice," of Upper Egypt and Governor of Thebes under Thothmes III, circa 1471-1445 B.C. If we may believe the statements concerning the virtues of Rekhmara, he possessed all the good qualities of an upright and honest judge. He "did not lean to one side more than another, nor weigh the truth for exchange," and never accepted a bribe. He was patient with witnesses, "keen in deliberating," and "not passionate." He was learned in the law, "carried the law of the king in his hand," and always discerned clearly what was to be done. With those who offended against the law through ignorance he merely remonstrated, but wilful wrongdoers he imprisoned. He tells us that he kept a careful eye upon the dictates of his conscience, and set up truth as his guiding star. In order that the poor and oppressed might have free access to him, it was his custom to walk abroad in the early morning, accompanied only by a few servants and scribes, so that he might listen to their grievances. "No one who so approached him was repulsed, and there were no fearful eyes among his Petitioners: "I judged the weak," he says, "with the strong. I protected those who were weak, and I punished the evil-doers and violent persons. I encouraged the tearful and helpless. I supported the widow without a husband, and established the son in the inheritance of his father." It was not a fancy justice either that Rekhmara administered. The king, for instance, in installing the Chief Justice instructs him to act strictly according to law, and in one of the scenes depicted on the tomb there are spread in front of the Chief Justice, upon four mats with fringed edges, the forty parchment rolls containing the Books of the Law.

WE RECENTLY QUOTED FROM THE *Law Quarterly Review* to point out what Mr. Trevelyan regarded as the weak points in our present system of judicial administration. The remedy he suggests for this is no new-fangled scheme, but is one which Sir James Fitz James Stephen intended carrying out and what the Public Service Commission adopted as sound, with but a few minor modifications. This eminent Law Member to the Viceregal Council said—

"I would, on the one hand, encourage civilians to be lawyers, and, on the other, enable lawyers not being civilians to receive judicial appointments. I think that all District and Sessions judgeships, as well as the High Court judgeships, should be thrown open, and that the ablest natives should be appointed to them largely, especially in the quieter parts of the country. I believe that, in this way, it would be possible in the course of a few years to have a thoroughly good judicial service and a regularly organized legal profession, and in particular to make the service a bond of union between the natives and ourselves. The native appointments to the

High Court of Calcutta have answered admirably, and I hear on every side excellent accounts of the younger munsiffs and subordinate judges who have been educated in our Universities."

Such were the recommendations by a person in authority in his own legitimate sphere of business, made many years ago, but so slowly does the Government move in the East that we are not much further from where we were then. It is a sad commentary on our judicial system that Mr. Trevelyan after his long career at the Bar and on the Bench should, so soon after his retirement from this country, have considered it his duty to draw public attention to the evil of the present system and suggest a reform which has been pressed upon the Government for many years. Mr. Trevelyan considers that the need for such reform is not a mere matter of judicial necessity but one of political exigency. He says—

In India, where the action and character of a European official is subject to the keenest and most microscopic criticism, and where it is of the utmost political importance that the inhabitants of the country should entertain the highest respect for the decisions of our Courts, the dangers of this comparison cannot be overestimated.

The native judiciary is highly educated and well trained. Moreover, except in very isolated cases, they are now free from the charges which used to be made against them, namely of being wanting in impartiality and judicial purity. The greater number of important civil cases are now tried by native subordinate judges, and the reports of the decisions of the Judicial Committee of the Privy Council show that frequently the opinion of a single subordinate judge is preferred to that of the judges of the High Courts sitting in appeal from him. What higher testimony could there be to the capacity of the subordinate judiciary?

Mr. Trevelyan does not, however, recommend the subordinate judiciary as the sole recruiting ground for the District Judgeships but considers that, perhaps, still better materials may be available if a judicious selection be made from the Bar and from amongst the vakils practising in the High Courts and the District Courts.

Moreover the selection need not be made entirely from the subordinate judiciary. There is now in India a large and well-educated bar consisting not only of barristers, both English and native, called to the bar in England, but also of pleaders who practice in the High Courts and in the Courts in the districts, and who are required to pass severe examinations, and in some cases to undergo an apprenticeship, before being enrolled.

#### CRIMINAL CASES OF 1900.

The past year has been somewhat fruitful of criminal cases. The bulk of the rulings relate to Procedure; and in this branch of the law the class of cases under sec. 145, regarding disputes concerning land, forms the largest body of decisions, notwithstanding the curtailment of the High Court's jurisdiction in respect of such matters. The cases under the Penal Code and Evidence Act are not numerous, but some of them are important. I propose to deal first with the decisions under the Penal Code.



## I. PENAL CODE.

**PUBLIC SERVANT:**—A peon in the service and pay of Government, and attached to a Government officer, is an officer of Government, and a public servant, within sec. 21, cl. 9:—*Re Nazamuddin*, 4 C. W. N. 798. In *Empress v. Arayi*, 7 Mad. 17, a peon employed by the manager of an estate under the Court of Wards was held not to be a public servant; but *Empress v. Mathura*, 21, All. 127, while not expressly dissenting from the Madras case, lays down that such manager is a public servant.

**CUMULATIVE SENTENCES:**—As the offence of rioting is constituted by the acts of being an unlawful assembly and the use of force or violence in prosecution of the common object, both constituent elements amounting in themselves to different offences, it is clear that when the force or violence of which an accused has been separately convicted is the force or violence which converts an unlawful assembly into rioting, the case falls within cl. 3 of sec. 71: *See Hriday v. Jagannada*, 4 C. W. N. 245. The question has been discussed in *Nilmony Poddar v. Queen-Empress*, 16 Cal 442, by a Full Bench. *See also Empress v. Ram Periah*, 6 All. 121.

**IMMATURETY:**—In a case where a boy under 12 was convicted, the High Court observed that the age of the accused being under 12, the Magistrate should, having regard to I. P. C., sec. 83, have found whether the accused had attained sufficient maturity of understanding to judge of the nature and consequences of his act:—*Queen Empress v. Maki-muddin*, 27 Cal 133.

**ABETMENT:**—In *Etim Ali v. Empress*, 4 C. W. N. 500, certain persons of influence who, being aware of the object of an unlawful assembly, had deliberately absented themselves from the locality where the assembly had collected, were held not to have “instigated” the offence under I. P. C., sec. 143, within the meaning of sec. 107. Where a child was kidnapped by persons, some of whom were servants of the purveyor of the accused, and was missed shortly after a visit to the latter, and was found by his servants, the Court held the evidence insufficient to show instigation or conspiracy on the part of the prisoner:—*Nogendrabala v. Empress*, 4 C. W. N. 528. The act of a person receiving an unstamped document might amount to abetment of an offence, having regard to sec. 61 of the Stamp Act, 1879, read with I. P. C., sec. 40:—*Queen-Empress v. Somanulderam*, 23 Mad. 155. Sec. 108 A was enacted in consequence of *Empress v. Gunpatrao*, 19 Bom. 105. The section contemplates that the abetment shall be completed in British India. The *Illustration* to it is not very clear. If A is in British India and B in Goa, A can only abet an offence by him either by letter or some other mode of communication; and though the letter may be written in British India, yet until it reaches B in Goa, it can hardly be said that the latter has been instigated. If the instigation, as a matter of fact, takes

place when the letter reaches B, then the instigation has taken place in Goa and not in British India, and this seems outside the scope of the section. The case of *Queen-Empress v. Bapu*, 24 Bom. 287, does not state whether any acts constituting abetment took place in British India. A minor was taken by the first accused under *directions* from second accused from Sholapur to Nizam's territory and there dedicated to a goddess. The nature of the “directions” is not stated. If the second accused, while at Sholapur, instructed the first accused to take the girl to foreign territory and to dedicate her to the goddess, the abetment would be completed in British India, and the case would seem to be within sec. 108 A: provided of course the dedication abroad would, if performed in British India, be an offence. Under sec. 114 it is necessary to prove acts which would constitute abetment if the accused was absent, and then to show that the accused was present. This principle, laid down in *Queen v. Musst. Niruni*, 7 W. R. Cr. 49, was followed in *Abhi Misser v. Luchmi*, 4 C. W. N. 546; 27 Cal. 566. The case of *Empress v. Chattradhari*, 2 C. W. N. 49, was explained on the ground of abetment before the actual presence of the accused at the time of the commission of the offence abetted. To support a conviction for abetment of an offence under I. P. C., sec. 408, it must be proved that the accused knew that the act which he abetted was dishonest:—*Bal Gobind v. Empress*, 4 C. W. N. 309. Instigation implies knowledge of the criminality of an act.

**UNLAWFUL ASSEMBLY:**—Where the common object of the assembly is alleged to be theft, and the facts found do not constitute that offence, the assembly is not unlawful:—*Parmeshwar Singh v. Empress*, 4 C. W. N. 345. Where the accused are acquitted of rioting, they cannot be convicted under secs. 325, 149, where it is not found that accused or any one of them were members of an unlawful assembly in prosecution of the common object of which grievous hurt was caused by any other member of the assembly, or that the offence was such that each member of the assembly knew to be likely to be committed in pursuance of that object:—*Abhi Misser v. Luchmi*, 4 C. W. N. 546; 27 Cal. 566. To establish the offence under sec. 154, it is necessary to prove that a riot took place on land owned by accused, that his agent or manager knew that it was about to take place, and did not use all lawful means to suppress the riot:—*Tarakant Das v. Empress*, 4 C. W. N. 691, referring to *Brae v. Queen-Empress*, 10 Cal. 338.

**• CONTEMPTS:**—The case of *Durga Das Rukhit v. Umesh Chandra Sen*, 5 C. W. N. 131; 27 Cal. 985, decides that an appearance by a muktair in a summons case is sufficient obedience to the summons, and default of personal attendance should not have been regarded as an offence under sec. 174. But having regard to Sch. V of the Cr. P. C., if a summons requires appear-

ance in person, the accused is legally bound to attend personally, and cannot appear by agent, (unless he has been exempted under sec. 205, in which case the summons would require appearance by agent) and his failure to appear in person seems to fall within sec. 174. In *Queen-Empress v. Sankaralinga*, 23 Mad. 514, it was held that a refusal to answer questions put by a police-officer under sec. 161, Cr. P. Code, is not punishable under I. P. C., secs. 176, 179, 187, as under the present sec. 161 the person examined is not legally bound to state the truth. This was the view of the law under the Code of 1872: See *Empress v. Kassim Khan*, 7 Cal. 121. To constitute the offence under sec. 188, it is necessary to show not only a lawful order promulgated by a public servant and knowledge of, and disobedience to, such order, but also that such disobedience causes or tends to cause certain results. In *Brojo Nath v. Empress*, 4 C. W. N. 226, it was held that the mere holding of a rival hant on the same day near an old hant was not sufficient to bring the case within sec. 188, in the absence of evidence that the act would cause the results mentioned therein: but *quære* whether such act does not come within the words "tends to cause."

**PERJURY**:—It is a false statement made under a verification that constitutes the offence punishable under sec. 193, not a verification on oath or solemn affirmation:—*Durga Das Rukht v. Queen-Empress*, 27 Cal. 820. It was held in *Queen-Empress v. Khem*, 22 All. 115, that where a witness made a statement on oath or solemn affirmation before a third class Magistrate under sec. 164, Cr. P. C., and an inconsistent statement at the trial before a first class Magistrate, he might properly be convicted under the second, if not the first, para. of I. P. C., sec. 193. In *Queen-Empress v. Bharna*, 11 Bom. 702, a Full Bench of the Bombay High Court held that a statement made to a third class Magistrate, who could not hold the preliminary inquiry, was not one made in a judicial proceeding within sec. 193, I. P. C. The Allahabad case is in conformity with *Queen-Empress v. Alagon*, 18 Mad. 421. A preliminary inquiry held by a Subordinate Magistrate, under the direction of the District Magistrate, into the circumstances of a "complaint" against the Police is not a judicial proceeding within sec. 193, I. P. C.:—*Queen-Empress v. Venkatarammanna*, 23 Mad. 223. The head-note to *Hari Churn v. Queen-Empress*, 4 C. W. N. 249; 27 Cal. 455, is not quite correct. Where a person apparently after acquittal was examined on oath to enable the Court to take cognizance of an offence under sec. 190(c), Cr. P. C., it was held that though the Magistrate might examine the person for that purpose, yet he could not examine him on oath under the Oaths Act, as he was not a witness in any case at the time, and that such person was not legally bound to state the truth.

**FALSE CHARGE**:—A false report by a police-officer that a certain case was found true, which the Magis-

trate found to be false, is not within sec. 211, as the officer did not institute or cause to be instituted any criminal proceeding against any person:—*Thakur Tewary v. Queen-Empress*, 4 C. W. N. 347.

**TAKING A GIFT**:—Where a police-officer demanded money from a person, not in consideration of not proceeding against him, but to obtain his release from illegal custody, it was held that the offence was extortion, and did not come within sec. 213, I. P. C.:—*Akhay Kumar v. Jagat Chandra*, 4 C. W. N. 755; 27 Cal. 295.

**FRAMING FALSE RECORD**:—The word "charged" in sec. 218 is not restricted to the meaning of, "enjoined by a special provision of law." So where the D. S. P. usually required a first information and special diary in gambling cases, just as in ordinary cognizable cases, it was held that the accused was charged with the preparation of such record within the meaning of sec. 218:—*Queen-Empress v. Deodhar Singh*, 27 Cal. 144.

**PUBLIC NUISANCE**:—Soliciting for the purpose of prostitution by a woman on a public road is not a public nuisance within secs. 268, 290, as it does not necessarily cause annoyance:—*Queen-Empress v. Nanni*, 22 All. 113. A prostitute visiting a dak bungalow at the request of a visitor does not commit an offence under sec. 290:—*Queen v. Mt. Begum*, 2 N. W. P. 349.

**WRONGFUL CONFINEMENT**:—It was held in *Re Randai*, 4 C. W. N. cv, that if a guest persisted in remaining in a house and refused to leave it, the locking of the doors against him and confinement of him in a part of the house did not amount to wrongful confinement, and that no one can be said to be wrongfully confined during the time that an escape is open to him if he will avail himself of it.

**KIDNAPPING**:—The Full Bench ruling of *Nemai Chatternoj v. Queen-Empress*, 4 C. W. N. 645; 27 Cal. 1041, lays down that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from such guardianship, and that it is not an offence continuing so long as she is kept out of guardianship. The principle forms the basis of the decision in *Rakhtul Nikari v. Queen-Empress*, 2 C. W. N. 81, and the Allahabad cases, *Queen-Empress v. Ram Deo*, 18 All. 350, and *Queen-Empress v. Ram Sundar*, 19 All. 109, seem to support the same view. When the guardianship has determined, the offence is complete, and no subsequent removal of the girl can constitute the offence of abetting the kidnapping. If there has been a voluntary abandonment of her home by the minor, and the guardianship has thereby ceased, and some person then obtains possession of her, his act is neither kidnapping or abetment:—*Queen v. Gondhur Singh*, 5 R. J. and P. J. 151. The offence of kidnapping from British India stands differently. In such offence the taking continues as long as the person kidnapped is in transit in British India, and the case of *Reg v. Samia*

*Kaundan*, 1 Mad. 173, falls under sec. 360. Under sec. 368 the offence of detention of a kidnapped person is no doubt continuous with the period of detention—see *Queen-Empress v. Ram Deo*, *supra*, but the section refers not to kidnappers but to others who conceal the kidnapped person:—*Queen v. Sheik Ozer*, 6 W. R. 17.

**DISPOSAL OF MINORS\*:**—Secs. 372, 373 are complementary and refer to the two parties to the transaction of which the minor is the object. It would, therefore, seem that there are three parties to the transaction prohibited by these two sections. In other words, the sale, letting, hiring or other disposal imply three persons to the act. This was the view of Holloway, J., in *Dowlath Bee v. Shaik Ali*, 5 Mad. H. C. R. 473, and was adopted in *Queen v. Nowajan*, 6 B. L. R. Ap. 34 (but see per C. J. in *Dowlath Bee v. Shaik Ali*, and *Hardeo v. Emp.*, Punj. Rec. 5 of 1880). These cases, as well as *Queen v. Musst. Bhutia*, 7 N. W. P. 295, and *Khushala v. Emp.*, Punj. Rec. 27 of 1880, also lay down that the terms of the sections import a contract or arrangement, and a present giving up of possession of the minor whether by sale, letting, or other mode of disposal. But the class of cases known as “dedication” cases requires neither three parties, nor any delivery of immediate possession of a minor. According to this view a change in the status or position of the minor is a sufficient “disposal” under sec. 372, though the minor may continue in the disposer’s possession, and there is no third person to whom the minor is disposed. This theory is settled in Bombay by *R. v. Jaiti*, 6 Bom. H. C. R. 60, followed in *Queen-Empress v. Tippa*, 16 Bom. 737, and now by *Queen-Empress v. Bekur*, 21 Bom. 287, *supra*, and in Madras by *R. v. Aruma Chillum*, 1 Mad. 161, H. C. Pro., 11th April 1881, Weir, 3rd Ed. 215, *Queen v. Mara Ratham*, lb. 221, and recently by *Srinivasa v. Annasami*, 15 Mad. 41, *Queen-Empress v. Basava*, 15 Mad. 75, *Srinivasa v. Annasami* 15 Mad. 323; but see per Parker, J. The case of *Queen-Empress v. Papu Sani*, 23 Mad. 159, lays down that the necessary intent may be shown from the circumstances of the sale and from the fact that dancing girls in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls who were given to prostitution. See also *Dy. Leg. Rem. v. Karuna Baistobi*, 22 Cal. 174.

**THEFT:**—In *Abdol v. Khater*, 3 C. W. N. 332, the accused claimed to be entitled to the paddy as grown by his uncle, and his cutting it was held not to amount to theft, though the Court found it was not so grown. In *Jagat Chandra v. Rakkal Chandra*, 4 C. W. N. 190, the land on which the paddy grew was claimed by the accused and not the paddy itself, and the conviction was upheld. So also in *Pandita v. Rahimulla*, 4 C. W. N. 480;

27 Cal. 501, it was held that if the crops were found by the Court to have been grown by the complainant, the accused could not cut the same though they claimed the right to the land. The accused appear to have alleged that they grew the crop, in which case the principle of *Abdul v. Khater* would seem to apply. Stanley, J., held that a dispute as to title supported by evidence showed *bona fides* of claim to the crop itself. Of course, if the crop, though sown by A, is under an agreement the property of B, the latter does not commit theft by cutting and removing it:—*Parneshwar v. Empress*, 4 C. W. N. 345.

**EXTORTION:**—Where a Sub-Inspector wrongfully arrested a person and demanded money for his release from illegal custody, it was held that he had committed extortion, and a money-lender, who had advanced the money, was not an accomplice in the offence of extortion:—*Akhoy Kumar v. Jagat*, 4 C. W. N. 755; 27 Cal. 295.

**UNLAWFUL ASSOCIATION:**—Proof of merely being together at some distance from home, and intimate connection with each other, and habit of visiting *melas* together, of the arrest of one in the act of picking a pocket, and of giving false names when arrested, held insufficient to show that they belonged to a gang associated for the purpose of habitually committing theft: *Mgukura Pasi v. Queen-Empress*, 27 Cal. 139. In *re Shrivam*, 6 Mad. H. C. R. 120, it was held that there must be proof (1) of association, (2) for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts: See on the analogous sec. 400, the cases of *Queen v. Kanul*, 17 W. R. 50, *Queen v. Mookteram*, 23 W. R. 18, and *Empress v. Naba*, 1 C. W. N. 146.

**CRIMINAL TRESPASS:**—An entry by a person into premises purchased by him at a sheriff’s sale for the purpose of acquiring possession is not unlawful entry within sec. 441:—*Charoo Chunder v. Queen-Empress*, 4 C. W. N. 47.

**FORGERY:**—Where there is evidence that a forged document was used on behalf of the accused with his knowledge or under his instructions or with his approval, which might be proved by the conduct of the party, a commitment may be made:—*Empress v. Ananda*, 4 C. W. N. cxvi.

**INFRINGEMENT OF TRADE MARK:**—A mark, to be a trade mark, must be one used to denote that the goods are the manufacture or the merchandise of a particular person. So where a Bank imported gold bars stamped with the name of another Bank which had closed, and there was no proof of transfer or assignment of the mark, or that the new Bank was a continuation of the old Bank, or succeeded to its business, or that such mark denoted in the market importation by the new Bank, it was held that there was no proof that the mark belonged to the new Bank:—*Anookul Chunder v. Queen-Empress*, 4 C. W. N. 423; 27 Cal. 776.

**DEFAMATION:**—It is not necessary, in order to

\* See Article “Unlawful Disposal of Minors” by the writer in 5 Mad. Law Journal, pp. 393, 394.

establish the offence, to show that the complainant was injuriously affected:—*Gobinda v. Empress*, 4 C. W. N. cxxix. The question of privilege is one that must be decided by Indian Law. The criminal law of defamation in India is the Penal Code, and not English law:—*Green v. Delannev*, 14 W. R. 27, *Queen v. Parsaram*, 3 W. R. 45, *Re Nagarkhi*, 19 Bom. 340. The principles of the Penal Code have been adopted by the Civil Courts in *Abdul Hakim v. Tej Chand*, 3 All. 815, *Angoda v. Nemai*, 23 Cal. 867. The Allahabad case, *Isuri Prasad v. Unwar Singh*, 22 All. 234, adopts this view. It was held that the case of defamation in pleadings fell within the 9th Exception, and was not governed by the English law. The case of witnesses has been held in several cases to come within the rule of absolute privilege. In *Gunnesh Dutt v. Mugheeram*, 11 B. L. R. 321, the Privy Council inclined to the view that a witness should be prosecuted for perjury, and not sued civilly for defamation. This case was not, however, under the Code; but it has been held that no civil suit will lie for defamation by a witness in *Bhikumber Singh v. Bechravam*, 15 Cal. 264.

The same rule has been applied in criminal cases, and *Woolfun Bibi v. Jessarat*, 27 Cal. 262, follows the Madras and Bombay rulings in *Manjappa v. Shesha*, 11 Mad. 477, *Empress v. Babaji* 17 Bom. 127, *Empress v. Balkrishna*, 17 Bom. 573. But Telang, J., in the last case doubted the correctness of these rulings, and his view was approved of in *Re Nagarkhi supra*, and in *Isuri Prasad v. Unwar Singh, supra*. There is thus a conflict of authorities on this point.

E. H. MONNIER.

## English Notes.

COURT OF APPEAL.—*GORDON v. FOWLER*. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and ROMER. 5th February 1901.

*Promissory Notes—Renewals—Fraudulent misrepresentations—Extravagant findings of the jury.*

This was the Plaintiff Gordon's appeal from the finding of the jury at the trial of the cause at Birmingham, Mr. Justice Wills presiding. The action was based on two Promissory Notes executed by the Defendant, a farmer in poor circumstances, in favour of the late notorious money-lender Isaac Gordon. The defence was that at the time of the original loans the lender had fraudulently represented that if renewal thereof took place that should be done "on easier terms;" the first of these loans was made in June 1896, £125 was advanced, the Promissory Notes being given for £175. Both the notes (on which action was brought) were from time to time renewed. The jury found that the fraudulent misrepresentation was made when the loans were originally given, that that was the reason for Defendant accepting the terms, that when the time

came for payment of the loans the Defendant was not a free agent being pecuniarily heavily pressed, owing to the very high rate of interest charged which was an extortionate rate and that Isaac Gordon had contemplated that such extortionate rate would bring about failure on Defendant's part to satisfy the amounts which would become due. Mr. Justice Wills on such verdict gave judgment for Defendant. The Plaintiff now based his application for a new trial on the ground that there was no evidence to support the finding of the jury that as a matter of fact Isaac Gordon had made the alleged fraudulent misrepresentation.

The COURT OF APPEAL unanimously accepted that view. The undoubtedly hard terms imposed by the notorious money-lender was not a material fact in this case. This was not a case respecting bargains with expectant heirs. The Defendant was of full age and entered into the transactions and the renewals with full knowledge of the facts. There were no grounds for finding that the Defendant was not a free agent, excepting his poverty and indebtedness. There was no evidence whatever that the representations were made by the two clerks of Isaac Gordon, nor was there any evidence of fraud in Isaac Gordon, and even assuming that there was such representation, when the notes first came into existence, renewals on several occasions had taken place without any complaint on Defendant's part, nor was it suggested that there was any evidence produced at the trial that on any of the later transactions there had been any fraud. The Plaintiff must therefore succeed.

*Mr. Hugo Young, K. C.*, and *Mr. Disturnal* in support of the application for the Administrator of Isaac Gordon's estate.

*Mr. Ashton Cross* for the Defendant.

C. W. A.

*Application successful.*

PROBATE COURT.—*HOFER v. MACKENZIE*. Before Mr. JUSTICE BARNES. 22nd January 1901.

*Testamentary disposition—"Undue influence"—Costs.*

The Plaintiffs propounded the Will and codicils of one William Mackenzie of Dublin and London (as executors) who died on May 1899. The Will was dated in 1897 and the codicils in the two following years. The principal Defendant was the testator's widow from whom he had separated in 1885, fifteen years after his marriage with her, and to whom he made an allowance, but there was considerable litigation between the husband and wife since. Some of the children were also Defendants, but not the testator's eldest son who did not contest the Will. One of the questions raised was that the Will was executed by "undue influence." The testator in failing health had engaged a house-keeper called Mrs. Clarkson. Mrs. Clarkson was the wife of a Mr. Foote, but on his deserting her, she had

lived with a Mr. Clarkson as his mistress. This was known to the testator. By his testamentary dispositions he had left a legacy for Mrs. Clarkson or Mrs. Foote, a legacy to his daughter Maude, and the rest and residue to his son.

The learned Judge on his summing up to the jury explained what was "undue" influence; to be "undue" the influence must amount to coercion so that a man's Will is not the true expression of his wishes, but that of the person exercising the influence, superimposing his own mind on that of the testator. Every influence was not undue, some were quite legitimate because the object of making Wills was to benefit others as a return for benefits received or because of the influence of kinship or affection. The evidence disclosed that Mrs. Clarkson had acted with perfect propriety of conduct. The jury having found for the Plaintiffs, supporting the testamentary dispositions, Mr. Justice Barnes pronounced for the Wills and codicils and ordered costs to follow the result, refusing to order costs personally against the guardian *ad litem* of one of the minor Defendants. (See *Morgan v. Morgan*, 12 L. T. R. 199, and *Reynolds v. Mead*, the Times, 6th December 1895).

The application that Defendants should not be condemned in costs on the ground that there were reasonable grounds for enquiry was also refused.

*Mr. Deane, Q. C.*, and *Mr. Wilcock* for the Trustees of the Will.

*Mr. Duke, Q. C.*, and *Mr. Leese* for the Defendants.

*Judgment in favour of the Will.*

C. W. A.

**BANKRUPTCY COURT.**—*In re SIRAJUDDIN AHMED.* Before REGISTRAR GIFFARD. 6th February 1901.

*Bankruptcy.*

On this date fixed for the public examination of Munshi Serajuddin Ahmed, a student at Grays Inn, it was intimated by the Assistant Official Receiver that the debtor had left for Bombay, and had not attended under the proceedings.

The receiving order was made on the petition of a claimant for rent of certain apartments in the Regents Park district. The order was dated 18th December 1900. It was alleged that the debtor was now resident in Bombay.

The Registrar directed that the examination be adjourned *sine die*.

C. W. A.

**COMMERCIAL COURT.**—*STEAMSHIP BALMORAL COMPANY v. MARTEN AND OTHERS.* Before MR. JUSTICE BINGHAM. 11th August 1900.

*Shipowners and underwriters—Practice—Ship insured for a sum less than the amount at which it*

*was valued for salvage action—Admission of evidence of average adjuster.*

The Defendants, Marten and others, underwriters at Lloyds, underwrote a policy of marine insurance on the Plaintiffs' ship "Balmoral" for £33,000 at which figure the ship was valued. During the continuance of that policy a general average loss was sustained, and a salvage award was made by the Admiralty Court, against that ship, freight, and cargo. An average statement followed thereon, when the real value of the vessel was taken at £40,000, on the footing whereof the rights of the parties interested in the salvage claim was adjusted *inter se*. In the present action an average adjuster gave evidence for the Defendants, while the Plaintiffs did not examine any witness. The Plaintiffs now sought to recover from the underwriters on the ship the whole of the ship's proportion of the salvage, and of the general average contribution. The question which the Court had to determine was whether the Plaintiffs' claim was sound or whether as the Defendants urged they should indemnify Plaintiffs only against  $\frac{3}{40}$ ths of the average loss payable by them.

Following a long established practice the Court decided in favour of the Defendants' contention and gave judgment in their favour with costs.

*Mr. Leck* for the Plaintiffs.

*Mr. Pickford, Q. C.*, and *Mr. Scrutton* and *Mr. McKinnon* for the Defendants.

*Judgment for Defendants with costs.*

C. W. A.

**QUEEN'S BENCH DIVISION.**—*WARREN v. BROWN.* Before MR. JUSTICE WRIGHT. 4th August 1900.

*Ancient Lights—Quantity of light.*

This case raised the question whether the right which is acquired by statutory prescription is a right to the continuance of substantially the whole quantity of light which has come to the windows during the 20 years or is ordinarily limited to a sufficient quantity of light for all ordinary purposes.

The learned Judge had found as a fact that the Defendant had by the acts to which Plaintiffs took exception so far diminished the light as to be materially insufficient during a part of the day for the special requirements of the Plaintiffs' industry; and that the inconvenience to which the Plaintiffs was subjected could be and to a great extent had been obviated by the removal of machines to the upper floor and that in any case it could be remedied by some increased expenditure of gas. Mr. Justice Wright on the facts so found by him held that no sufficient case for a mandatory injunction had been made out. In a lengthy judgment the learned Judge after a review of several authorities concluded his judgment as follows:—"I think I must take it that the law is laid down in the *City of London Brewery Co. v.*

*Tennant* (9 Ch. 212) agreeing as that case does with the criterion expressed by Lord Cranworth in *Clark v. Clark* (1 Ch. 10) and that the Plaintiffs, having an abundance of light left for all ordinary purposes of inhabitation or business, are not entitled to relief on the ground that their extraordinary use has been interfered with. Unless indeed there is some such limitation of the right to light for ancient windows, it is difficult, as Lord Hardwicke observed in effect in the *Fishmonger Co. v. East India Company* (1 Dickens 163), to see how the ordinary extensions and improvements of towns could be carried on. If every house which has existed for 20 years is entitled to have all, or substantially all, the same light come into its windows as during the 20 years, no new houses could be built opposite to old ones unless at a distance which would impose on servient tenements an unreasonable burden and might involve great public inconveniences." Upon such finding the Court considered it unnecessary to consider the case of *Lafranchi v. Mackenzie* (4 Eq. 421) in which Vice-Chancellor Malins had said that if Plaintiffs (silk examiners) had been in the enjoyment of an extraordinary user for 20 years that would establish the right against all persons who had reasonable knowledge of it.

*Mr. Young, Q. C., and Mr. Stevenson* for the Plaintiffs.

*Mr. Stanger, Q. C., and Mr. Neilson* for the Defendant.

*Judgment for Defendant with costs.*

C. W. A.

KING'S BENCH DIVISION.--*COLLINS v. CORY.*  
Before MR. JUSTICE PHILLIMORE. 4th February 1901.

*Wife's authority to pledge her husband's credit -- Education of children.*

The Plaintiff, a schoolmaster, sued the Defendant Cory for charges and expenses incurred in boarding and teaching two of his sons from September 1899 to April of last year. Mrs. Cory had obtained a divorce from her husband, the Defendant. During the time for which the suit was brought, Mrs. Cory had the custody of the children and had placed the children under Plaintiff's charge. The Defendant's contention was that Mrs. Cory had no authority to pledge his credit, education of children not being a "necessary."

The learned Judge decided in Plaintiff's favour, being of opinion that in the present day education was a "necessary" for children.

*Mr. Hugo Young, K. C., and Mr. Garland* for the Plaintiff.

*Mr. Rufus Isaacs, K. C., and Mr. Grazebrook* for the Defendant.

C. W. A.

*Judgment for Plaintiff.*

## List of Business, Privy Council.

FEBRUARY AND MARCH, 1901.

(The Sittings will commence on Friday, the 8th February 1901, at half-past 10 a. m.)

## INDIAN APPEALS.

CAUSE.	Record received — Set down for hearing	SUBJECT.	SOLICITORS.
<b>Bengal.</b>			
Edwant Singh and ors. v. Tokhan Singh and ors.	31-7-90 — 13-9-00	Whether Appellants are entitled to execute a decree against certain properties; power of the High Court to vary its decree in the execution proceedings.	Watkins and Lempriere. (A.) T. L. Wilson and Co. (R.)
The East Indian Railway Co. v. Kallidus Mukerjee. (3 C. W. N. 781.)	3-7-00 — 28-12-00	Whether the death of Respondent's son was caused by negligence on the part of the Appellants.	Freshfields. (A.) T. L. Wilson and Co. (R.)
Harendra Lal Roy Chowdhury v. Mahasant Das and ors. (1 C. W. N. 155.)	2-6-00 — 21-1-01	Application by Appellant as mortgagee for execution of a consent-decree; whether Respondents are liable thereunder for the whole or only for part of the mortgage money.	Gush Phillips Walters and Williams. (A.) Watkins and Lempriere. (R.)
Ananda Mohun Roy Chowdhury v. Bhuban Mohini Dobi and anr.	23-10-99 — 24-1-01	Whether the first Respondent is bound by a mortgage.	T. L. Wilson and Co. (A.) <i>Ex parte.</i>
<b>Madras.</b>			
Vasudeva Padhi Khandanga v. Maganji Devan Bakshi Mahapatra.	21-9-00 — 30-10-00	Suit by Respondent for partition of certain villages and for mesne profits.	Lawford, Waterhouse and Lawford. (A.) R. T. Tasker. (R.)
<b>Oudh.</b>			
Jadresh Bahadur v. Shew Palab Singh.	3-12-98 — 11-12-00	Claims for possession of an estate; alleged tribal customs; inalienability; Rights as between half-brothers.	Barrow, Rogers and Nevill. (A.) T. L. Wilson and Co. (R.)
Jafri Begam & anr. v. Saiyed Ali Raza.	13-7-99 — 21-12-00	Claims for separate possession by partition of one-half share of an estate; limitation.	Barrow, Rogers and Nevill. (A.) T. L. Wilson and Co. (R.)
Aziz-un-nisa v. Tasaddug Husain Khan.	15-11-99 — 21-1-01	Whether the heirs of one Chedu Khan are entitled under an arbitration award to have a monthly allowance paid to him during his life continued to them.	T. L. Wilson and Co. (A.) Barrow, Rogers and Nevill. (R.)
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# THE Calcutta Weekly Notes.

Vol. V.]

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[No. 16]

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### REPORTS (See Index.)

WE INVITE ATTENTION TO THE DECISION OF THE Chief Justice, Banerjee and Brett, JJ., in the case of *Mahomed Ali Hossein v. Mir Nazar Ali*, reported at p. 326 of this issue to the effect that unreported decisions of the High Court are as much authoritative as those reported in the authorised reports. The reasons given by the learned Chief Justice will fully appear from pp. 328-329 of the reports. Our note in this connection at 4 C. W. N. clvii (257) also the note in our original prospectus, which was submitted to the late Chief Justice at his request, preliminary to our obtaining sanction to privileges similar to those enjoyed by the reporters of the authorised reports, may also be referred to.

WE ARE GLAD TO BE ABLE TO SAY THAT THE THREE Courts we have had since the 4th of March have already proved a great success. A large number of Liquidated claims was disposed of by Mr. Justice Sale, although he had only two clear days for hearing them last week, Monday and Thursday having been motion days and Tuesday a holiday. We have no doubt that he will be able to clear the whole list of such suits in the course of this month. There are also several Small Cause Court suits which

have been transferred to the Original Side under the provisions of the amended Act. These may be conveniently included in the Liquidated cause list, and placed below the Liquidated claims.

THE NON-COMMERCIAL LIST IS A VERY HEAVY ONE and some very heavy suits are ready for hearing. These cases are by no means simple. In fact the majority of them involve difficult questions of law, custom and usage, and require considerable knowledge and experience of the country. The work is very onerous and should if possible be divided.

THE PRESENT STAFF OF OFFICERS ON THE ORIGINAL Side is quite unable to cope with the work. There is already a block and with three Courts the block must become still greater. As it is, urgent orders can hardly be drawn up as speedily as they should and we are informed that orders granting Probate have sometimes not been drawn up for months. It is with satisfaction therefore that we have heard that the Chief Justice has been considering how best the difficulty can be met and the grievance removed.

• IT IS A MISTAKE TO SUPPOSE THAT THE ORIGINAL Side cause list shows a larger number of arrears than the District Courts. On the other hand the comparison is altogether favourable to the Original Side. There are undoubtedly some old cases on the list but lay critics are apt to forget that delay frequently arises from the necessity of revising suits upon the death of some parties thereto, of appointing *guardians-ad-litem* if there be infant defendants, of issuing commissions to distant parts of the country to examine witnesses at the instance of the parties, for duly serving defendants in Europe and elsewhere and from similar causes. That old causes do not come up for hearing is frequently due to the action of the parties themselves. Applications for filing affidavits of documents and for inspection of accounts are made as a matter of course and much time is wasted by the parties in taking or allowing such inspection. It is not probably generally known that during the year, lists are from time to time made up of old causes and the parties and their attorneys are called upon to show cause why they should not be struck off for default of due prosecution and if no satisfactory cause is shown the cases are struck off.

Sometimes a block is created by an unusually heavy case coming up for hearing, like the one we had last year, *Sm. Nistarinee Dusee v. Nando Lal Bose*, before Mr. Justice Stanley. It is not possible to shorten the hearing of such cases and unless special Judges are appointed to take them, the rest of the work must occasionally suffer. The High Court can hardly be called upon to furnish such special Judges, without an addition to the number now constituting the Court. In spite of the formidable appearance of the Remanet list, it must be conceded that the Original Side of the Calcutta High Court shows that it is far ahead of other original Courts in the country.

## CRIMINAL CASES OF 1900.

### II.—CRIMINAL PROCEDURE CODE.

DEFINITIONS:—A petition asking the Magistrate to be allowed to prove the case is a "complaint";—*Sarat Chandra v. Aghore Nath*, 4 C. W. N. cxxxi: see also 14 Cal. 707. The words "police-officer" in sec. 4 (f) do not mean any and every officer, but include any particular class of police-officers empowered exclusively to arrest under a local law. An offence under the Gambling Act is, therefore, a cognizable one:—*Queen v. Deodhar Singh*, 27 Cal. 144.

UNLAWFUL ARREST:—The provisions of sec. 80 are not applicable to an arrest made under sec. 56. It may be desirable, and even obligatory, that if called upon the police-officer should show his authority, but he is not legally bound to do so before the arrest:—*Queen-Empress v. Basanta Lal*, 4 C. W. N. 311; 27 Cal. 320. Under sec. 80 an arrest without previous notification of the substance of the warrant is illegal:—*Satis Chandra Rai v. Jodu*, 3 C. W. N. 741; 26 Cal. 748; *Abdul Gafur v. Queen-Empress*, 23 Cal. 896. A private person cannot arrest for theft not committed in his view, and a chowkidar who takes over custody from such person is not a police-officer within sec. 59, and his custody is illegal:—*Kalai v. Kalu*, 4 C. W. N. 252; 27 Cal. 366, approving of *Empress v. Kallu*, 3 All. 60. Under sec. 13 of I of 1892 (B. C.), a chowkidar is not empowered to receive persons arrested and is not, therefore, within sec. 59, Cr. P. C.; but he is, nevertheless, a "police-officer" within secs. 24 to 27 of the Evidence Act, (*Queen v. Keta*, 2 C. W. N. clxxx; *Empress v. Indira*, 2 C. W. N. 637; *Queen-Empress v. Saleemuddin*, 3 C. W. N. 393; 26 Cal. 569; see contra, *Queen-Empress v. Bepin Behary Dey*, 2 C. W. N. 71). Under sec. 68 (2), process servers may serve summonses, under rules made by the Local Government, but they are not police-officers, and cannot arrest under sec. 79, and the endorsement under the latter section must be by the person to whom it has been directed:—*Durga Charan v. Queen-Empress*, 27 Cal. 457. Endorsement on a warrant under sec. 79 should be regularly made by name

to a certain person in order to authorize him to arrest:—*Durga Tewari v. Rahman*, 4 C. W. N. 85.

PROCLAMATION:—Though a proclamation is irregular, yet the property having vested in third parties, strangers, the sale cannot be set aside:—*Abdullah v. Titu*, 22 All. 216. There is no provision of law requiring a Magistrate who has attached property under sec. 88 to investigate claims of third persons: 7 W. R. 35, followed in 6 All. 487; but see 20 Mad. 88.

SECURITIES FOR THE PEACE:—Sec. 106 is not very clearly worded. The offence under sec. 143, I. P. C., is not necessarily within sec. 106:—*Sheo Bhunjan v. Mosawi*, 4 C. W. N. 795; 27 Cal. 983; *Jib Lal v. Jugmohan*, 26 Cal. 576. There may be, however, findings in the case which would justify such order, but there should be an express finding by the lower Court:—*Sheo Bhunjan v. Mosawi*. In *Jib Lal v. Jugmohan*, the Court observed that it would, in the absence of an express finding, uphold an order under the section if there was clear evidence of facts bringing the case within it. Instances of this will be found in *Queen v. Gondoo Khan*, 7 W. R. 14, and *Queen v. Shapoo* 20 W. R. 37. Sec. 110 applies only to persons residing within the limits of the Magistrate's jurisdiction, and "reputation" means the reputation of that man in the neighbourhood:—*Kutaldi v. Queen-Empress*, 5 C. W. N. 29; 27 Cal. 993. The section is applicable only to persons as individual members of the community and not when acting under duty:—*Hari Telang v. Queen-Empress*, 4 C. W. N. 531; 27 Cal. 781. Where certain barkan dazes were bound down on grounds of habitual extortion and disturbance of the peace, and of being dangerous characters, it was held that, even if there was association as regards the first two grounds, there would be no such connection between them in their character so as to make them dangerous persons within the section:—*Hari Telang v. Queen-Empress*, 4 C. W. N. 531; 27 Cal. 781. The Judge in confirming an order under sec. 123 is bound to find the special grounds for the order required by sec. 110:—*Nakhi Lal v. Queen-Empress*, 27 Cal. 656. It was held in *Mahomed Abdul v. Empress*, 4 C. W. N. 121, that a security bond once given extends during its continuance to every act of the person bound over in breach of any condition. Residence at a distance is not the ground for refusal to accept security:—*Abirash v. Empress*, 4 C. W. N. 797.

PUBLIC NUISANCES:—If the Defendant in proceedings under sec. 133 raises a question of title, the Magistrate must first find whether the objection is *bona fide*, and cannot refer the question to the jury. This is well settled law, see 5 Cal. 875; 9 Ib. 103; 11 Ib. 8; 12 Ib. 137, 696; 15 Ib. 564; 17 Ib. 562; 23 Ib. 409; 25 Ib. 278; 22 Bom. 988; 3 C. W. N. 345, and *Budh Nath v. Nil Mahato*, 4 C. W. N. 596. But if the Defendant applies for a jury under sec. 135, he cannot, after verdict, raise the plea of title:—*In re Lachman*, 22 All. 267.



**URGENT ORDERS** :—Where there is no emergency and the order is not limited to two months, it is bad and without jurisdiction :—*Diamulla v. Maharulla* 27 Cal. 918.

**DISPUTES RELATING TO LAND** :—Where there is a complaint of offences none of which necessarily involves a breach of the peace, but includes a dispute as to land, the Magistrate ought not to act under sec. 145, but should try the offences; and if an offence attended by criminal force is established, he should proceed under sec. 522 :—*Kesu v. Moti Mohan*, 4 C. W. N. 57. As to when the Court ought to proceed under sec. 107 instead of sec. 145 or sec. 147, see the cases in 23 W. R. 58 : 24 W. R. 67 : 25 Cal. 559 : 23 Ib. 557 : 27 Ib. 918 : 3 C. W. N. 297, 463 : 9 B. L. R. 229. The High Court will set aside orders passed without jurisdiction. Apparently all questions of procedure in sec. 145 are regarded as relating to jurisdiction. Thus it has been held in *Re Pandurang*, 24 Bom. 527, that a Magistrate acting under sec. 145 is bound to follow the proper procedure. (i) The Magistrate must be satisfied that a dispute likely to cause a breach of the peace exists. This principle has been well settled in a large number of cases. A family dispute regarding the respective rights of the members thereof, where it is not shown to be likely to cause a breach of the peace, does not give jurisdiction under sec. 145 :—*Diamullah v. Mahawullah*, 27 Cal. 918. (ii) There must be a dispute relating to "land or water," which terms include a right of performing religious service in a temple (*Re Panduranga*, 24 Bom. 527, following *Muhamad v. Kunji*, 11 Mad. 323), collection of rents disputed by joint owners under Mitakshara law (*Sri Mohan v. Narsing*, 4 C. W. N. 420 ; 27 Cal. 259). See also as to rents—11 Cal. 413 : 15 Ib. 527 : 16 Ib. 513 : 19 Ib. 127 : 3 Ib. 320 : 23 Ib. 80 : 25 W. R. 2. Sec. 145 contemplates a dispute between parties each asserting actual possession against the other, and not one between parties one of whom claims joint possession and the other denies it :—*Tarujan v. Asamuddi*, 4 C. W. N. 426. (iii) The written order must contain the grounds of action under the section :—*Mohesh Sower v. Narain Bag*, 27 Cal. 981 ; *Kesu v. Moti Mollah*, 4 C. W. N. 57 ; *Re Pandurang*, 24 Bom. 527. (iv) Notices must be issued—see *Re Pandurang* (v) to all the parties "concerned in the dispute," which expression has been construed to include all persons interested in, or claiming a right to the property in dispute :—*Ram Chandra v. Monohur Roy*, 21 Cal. 29 ; *Protab Narain v. Rajendra*, 1 C. W. N. 3 ; 24 Cal. 55, followed in *Laldhari v. Sukdeo*, 4 C. W. N. 613 ; 27 Cal. 892 ; *Re Pandurang* ; *Gonesh Jalra v. Ayub*, 4 C. W. N. 753, referring to *Harak v. Luchmi*, 5 C. L. R. 287. Accordingly, where the real question was not only which of rival zemindars were entitled to collect rent, but which of rival tenants were entitled to actual possession, the omission to join the tenants was held to be without

jurisdiction :—*Laldhari v. Sukdeo*, supra. The Magistrate cannot add parties except as provided for by cl. 5 of sec. 145 :—*Khetter Mohan v. Nanki*, 4 C. W. N. lxxxiii, referring to 18 Mad. 53 and 21 Cal. 29 ; *Raj Kumar v. Mahadeo* 4 C. W. N. 748. If the Magistrate cannot deal with the case as originally instituted, because the parties on the record are not in dispute, or no breach of the peace is likely to result from this action, he should put an end to the case :—*Raj Kumar v. Mahadeo*, supra. (vi) In *Joyanti v. Middleton*, 4 C. W. N. 562 ; 27 Cal. 785, where an order under sec. 144 had first been made, it was held that the Magistrate was right in looking to the possession on the date of the order. (vii) The order of the Magistrate cannot interfere with rights of parties as previously determined by a Civil Court :—*Re Pandurang*. His jurisdiction is ousted by previous orders of Civil Courts : See 16 W. R. 24 : 6 Cal. 835 : 26 Cal. 625 ; but the subsequent appointment of a Receiver does not affect his jurisdiction at the time of the order :—*Sri Mohan v. Narsing*, 4 C. W. N. 420 ; 27 Cal. 259. The existence of an order under sec. 145 does not bar the power of a Civil Court to appoint a Receiver under sec. 505, Civ. P. C. :—*Barkatunnissa v. Abdul*, 22 All. 214. In a matter under sec. 147, as under sec. 145, the Magistrate is bound to hear evidence tendered by the parties :—*Empress v. Gunpat*, 4 C. W. N. 779. The right of use of land in sec. 147 is one of an entirely different description resembling a right of easement, and a dispute between landlord and tenant as to the right of the latter to re-erect gola is not within the section.—*Ibid.*

**POLICE INVESTIGATION** :—Under the new sec. 161 a person examined is not legally bound to state the truth :—*Queen-Empress v. Sankaralinga*, 23 Mad. 544. This was the law under the Code of 1872 :—*Empress v. Kassim Khan*, 7 Cal. 121. As to the Code of 1882, see *Queen-Empress v. Parshram*, 8 Bom. 216. Where there is evidence in the hands of the Police on which he is bound to arrest, it is improper to examine a person under sec. 161 : and the Judge who brings such evidence on the record disregards sec. 162 :—*Queen-Empress v. Jadub Das*, 4 C. W. N. 129 ; 27 Cal. 295, p. 302. It is improper for the Police to send a witness practically under custody (sec. 171) to have his statement recorded under sec. 164 so as to bind him down to that statement. Such a statement is open to suspicion, and should not be brought on the record under sec. 288 without proper enquiry.—*Ibid.* Police diaries cannot, under sec. 172, be placed before the jury. They are useful not as evidence but to aid the Court on a trial.—*Ibid.*, p. 305.

**CERTIFICATE OF POLITICAL AGENT** :—Where an offence took place out of, though preparatory acts occurred in British India, it was held that the certificate of the Political Agent or sanction of Local Government was necessary :—*Queen-Empress*

v. *Buku*, 24 Bom. 287; *Bapu v. Queen*, 5 Mad. 23; *Queen-Empress v. Ram Sundar*, 19 All. 109. In *Queen-Empress v. Kathaperumal*, 13 Mad. 423, a trial without a certificate by the District Magistrate was held illegal, even where he was the Agent and the defect treated as not cured by sec. 532. Where there is no such Agent, the sanction of the Local Government is required:—*Queen Empress v. Bhina*, 13 Bom. 147; *Queen-Empress v. Shrik*, 14 Bom. 227; *Dadphale v. Gurav*, 6 Bom. 122. The case of *Empress v. Sarmukh*, 2 All. 218, was peculiar: see 24 Bom. 287 at p. 291.

**COGNIZANCE**:—Where proceedings were commenced by the D. C. against an informer and made over to a Subordinate Magistrate for trial, and on his acquittal, the D. C. directed action against the consignor, it was held that the D. C. had acted under sec. 190 (c) and that the order was not an Executive order:—*Shahiram v. Queen-Empress*, 4 C. W. N. 825. In *Charu Chandra v. Navendra*, 4 C. W. N. 367, and *Bishen Doyal v. Chedi Khan*, *Ibid*, 560, it has been decided that if a Magistrate, having lawful cognizance of a case, finds from the evidence that others not before the Court are also concerned in the offence he can issue process and try them. The rule as to giving the complainant an opportunity of proving his case before instituting proceedings under I. P. C., sec. 211, as laid down by the Full Bench in *Queen-Empress v. Sham Lal*, 14 Cal. 707, is exemplified in *Surat Chandra v. Aghore*, 4 C. W. N. ccxxi. Where a Magistrate, after examining the complainant and without hearing witnesses or dismissing the complaint, ordered his prosecution under sec. 211, I. P. C., it was held that the order was without jurisdiction:—*Mahadeo Singh v. Queen-Empress*, 27 Cal. 921, see also *Budh Nath v. Empress* 4 C. W. N. 305. The principle laid down in *Golapdy v. Queen-Empress*, 4 C. W. N. 827; 27 Cal. 979, that if the District Magistrate has referred a case to a Subordinate Magistrate, and the latter discharges the accused, the latter alone can issue process against others not before the Court, is questionable. Under sec. 191 the District Magistrate transfers the "case" to the other Magistrate. But it is only the case as it is before him at the time that he can transfer. Thus if he takes cognizance of a case in which A is the only accused apprehended, and transfers the "case" to another Magistrate, what he does transfer is only the case against A, and what the other Magistrate tries is the case against A. If others are to be accused, and arrested the referring Magistrate seems the proper officer to issue process. The other Magistrate on the acquittal, discharge or conviction of A is *functus officio*, as regards the case; and it does not appear correct to say that the case is still before him, because the proceedings have terminated and there is in fact no case before him.

It has been held that the first Clause of sec. 191 is not limited to cases of offences:—22 Cal. 898. The second Clause relates to offences, and a first class

Magistrate has no power to transfer a proceeding under sec. 145, Cr. P. C., but his act is not invalidated under sec. 529 (f):—*Akbar Ali v. Domi*, 4 C. W. N. 821.

**SANCTION**:—The difference between a sanction granted under sec. 195, and an order made under sec. 476, is that the former should be given only on application by some person who desires to complain and the latter is made by the Court on its own motion:—*Durga Das Rakhit v. Queen-Empress*, 5 C. W. N. 131; 27 Cal. 820; *Thakur Tewary v. Empress*, 4 C. W. N. 347; *Banarsi Das*, 18 All. 213; *Baperam v. Gouri Nath*, 20 Cal. 474: See also 7 Cal. 208, Prinsep, J.: 13 Bom. 384; *Jardine, J*: 16 Bom. 729: 20 Cal. 349, Pigot, J.: 7 Mad. 189: 23 Bom. 50, p. 55. A sanction proceeding ought to be so framed as to enable the High Court in revision to determine whether it is properly granted or not:—*Kedanath v. Mohesh*, 16 Cal. 661, followed in *Pampapati v. Subba*, 23 Mad. 210. No notice is strictly necessary before sanction can be granted: 12 Cal. 58: 18 All. 358: 10 Mad. 232, but the granting of sanction is a judicial act, and there may be circumstances where sanction without notice will be set aside on the ground of want of proper discretion, e.g., where difference of opinion exists between two Courts as to the propriety of granting it (*Pampapati v. Subba*) or where the Court granting it had not proper materials before it (10 Mad. 232: 10 Cal. 1100: 16 Cal. 661: 6 All. 98, 101, 114). Sanction without anything to show that the Judge had directed his attention to the real question in such cases, viz., whether there was *prima facie* case which would succeed was set aside:—*Pampapati v. Subba*; *Thakur Tewary v. Empress*, 4 C. W. N. 347. Sec. 195 gives power of revocation only in respect of a sanction but not as regards complaints made thereunder or orders passed under sec. 476:—*Queen-Empress v. Ankanna*, 23 Mad. 205. The High Court can set aside orders under sec. 476 in virtue of sec. 439: see 23 Cal. 610, p. 616, citing *B. L. R. F. B.* 716, 16 Cal. 730 and 20 Cal. 349, see also 23 Cal. 971: 16 All. 80: 21 Mad. 124. The cases in 18 Mad. 144 and 13 Bom. 109 were explained in these rulings and distinguished. Proceedings under sec. 182, without sanction were set aside in *Amatulla v. Empress*, 4 C. W. N. 366. Though the District Magistrate is the head of the Police, the sanction contemplated in sec. 195 (a) is that of some superior officer of Police:—*Ramasroy v. Queen-Empress*, 4 C. W. N. 594; 27 Cal. 452. Sec. 197 does not require a judicial enquiry prior to the grant of sanction, and no oath can be administered:—*Queen-Empress v. Venkatrammanna*, 23 Mad. 223. No sanction is necessary for the prosecution of a village Magistrate when he is not acting in the capacity of Judge or public servant:—*Kendasami v. Soli*, 23 Mad. 540.

E. H. MONKIE.

(To be continued.)

## English Notes.

**COURT OF APPEAL.**—*BRENCHLEY v. HIGGINS.* Before LORDS JUSTICES RIGBY, VAUGHAN WILLIAMS and ROMER. 8th November 1900.

*Unconscionable bargain—Expectant heir—Sales of Reversions Act, 1867, sec. 2.*

The Defendant Higgins called himself a mortgage broker. The Plaintiff, a man 30 years of age, was entitled to a reversion of £4,000 under the marriage settlement of his parents, to devolve upon him on the death of his mother who had survived his father and was 72 years of age. He applied to the Defendant for a loan of £300, and in the result a deed, dated the 15th May 1899, was executed, which Plaintiff sought successfully to have set aside before Mr. Justice Farwell. This was the Defendant's appeal from the judgment of that learned Judge.

By the indenture sought to be set aside Plaintiff purported to assign to Defendant his whole reversionary interest, upon trust to pay a previous charge of £1,000, to retain for the Defendant's absolute use, £1,000 with 10 per cent. interest thereon per annum commencing from the date of Plaintiff's mother's death, to the date on which Defendant should receive the £1,000. The balance was to be paid to Plaintiff who for the whole of such transaction received £300 from Defendant as part of the same arrangement. Defendant gave to Plaintiff a letter agreeing to resell the £1,000 on receiving £600 from Plaintiff; time in that respect was to be of the essence of the contract. Mr. Justice Farwell had ordered the deed to be cancelled, on Plaintiff repaying to Defendant the £300 with 5 per cent. interest and as Plaintiff had offered to do that before action commenced he ordered Defendant to pay the costs of the action.

The COURT OF APPEAL supported that decision finding that besides the gross undervalue of the price given by the Defendant there had been "unfair dealing" and so the case did not fall within sec. 2 of the above Act.

*Mr. Hughes, Q. C., and Mr. Jessel* in support of the Appeal.

*Mr. Marshall Hall, Q. C., and Mr. Lawrence* for the Plaintiff.

C. W. A.

*Appeal dismissed with costs.*

**CHANCERY DIVISION.**—*WARD v. TAYLOR (In re DE FALBE).* Before MR. JUSTICE BYRNE. 27th November 1900.

*Fixtures to freehold—Tapestries.*

*D'EYNCOURT v. GREGORY (L. R. 3 Eq. 382) noticed. NORTON v. DASHOOD (1896, 2 Ch. 497) followed.*

This was a dispute about certain tapestries which at the death of the late Madame De Falbe were at the residence whereof that lady had been tenant for life. There were 10 pieces of tapestry in dispute, seven in the drawing-room and the rest in the hall.

The claimants were those interested in the said residence as part of the settled estates as representing the freehold interest, while ownership of the tapestries was also claimed by Madame De Falbe's executors and residuary legatees.

The learned Judge quoted the following passage from the late Lord Justice Chitty's judgment in the first-named case: "In considering any question of fixtures the important circumstances to be regarded are, (1) 'The mode of annexation of the article and the extent to which it is united to the freehold; (2) 'Its nature and, construction, i.e., whether it has been put up for a temporary purpose, or by way of permanent improvement; (3) 'The effect its removal will have upon the freehold.' After an examination of the evidence, the Court held, that those in the drawing-room had in effect been annexed to the residence while those in the hall were not attached to the fabric of the house in such a way as to constitute permanent additions to the house.

*Mr. Levett, Q. C., and Mr. Methold* for the freeholders.

*Mr. Rowden, Q. C., and Mr. Howard* for Madame De Falbe's executor.

*Mr. Norton, Q. C., and Mr. Wilkinson* for her residuary legatees.

C. W. A.

On the 7th February 1901 in

THE COURT OF APPEAL—Lord Justices Rigby, Williams, and Sterling reversed Mr. Justice Byrne's decision in the above case on the appeal of the representatives of Madame De Falbe which appeal was limited to the drawing-room tapestries. In the course of the judgment Lord Justice Rigby said he had great difficulty in following the decision of Lord Romilly in the above case of *D'Eyncourt v. Gregory*. The other case *Norton v. Dashood* was materially different from the present one. The Courts had of late relaxed invariably the rule *quid quid plantatur solo solo cedit*. These tapestries had been affixed to the freehold for the purpose of being enjoyed as chattels, and not for the improvement of the freehold. In the case of *Norton v. Dashood* the tapestries had belonged to the house for generations, they were so attached to the freehold as to be not removable. Here what was done was all that was really necessary for the enjoyment of the tapestries as chattels; that was a complete answer and the appeal would therefore succeed.

C. W. A.

*Appeal allowed.*

**QUEEN'S BENCH DIVISION.**—*QUEEN ANNE MANSIONS, LIMITED v. BUTLER.* Before MR. JUSTICE WILLS. 3rd November 1900.

*Hotel-keeper—Negligence—Substantial consideration—Bailor.*

The substantial question in this action arose on the counter claim made by the Defendant Butler,

for the loss of a trunk containing wearing apparel, &c. Mr. Butler was an accountant and had to travel backwards and forwards between London and Clifton for some months. He resided while in London at the Plaintiff Company's premises. By arrangement with the manager he used to leave a box containing clothes, &c., at the Mansions while he was away. The manager agreed that he should do so on his giving notice to the hall-porter. On the last occasion he returned to the Mansions the box was missing. The value claimed was £38. Evidence was given by the hall porter, who swore that on the last occasion the Defendant Butler had not informed him of having left the box, that the Defendant had told him that he had told a page boy to take the box down to the box room and had given him a shilling. The page boy denied this. The learned Judge gave credence to the Defendant's statement, found that there had been negligence on the part of the Plaintiff Company, that they had taken charge of the box for a valuable consideration and were liable.

Mr. Atkin for the Plaintiffs.

Mr. Powell for the Defendant.

*Judgment on counter claim for Defendant.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

## CALCUTTA HIGH COURT.

### [TESTAMENTARY AND INTESTATE JURISDICTION.]

SUIT NO. 5 OF 1900.

STANLEY, J. 1901. 21, February.	} In the goods of MATHURA MOHAN BISWAS, deceased.

*Application to extend the time for filing Paper-book—Sec. 553 of the Civil Procedure Code—Rule 176 of the Rules and Orders of the High Court.*

In this case an appeal being No. 35 of 1900 was filed on the 15th of December last, and the usual notice was issued by the Registrar but not served on the Defendant. On the 14th instant an application was made before the Hon'ble Mr. Justice Harington to extend the time for filing Paper-book which was to expire on the next day, but the matter was adjourned till to-day. The Appellant served the notice on the Respondent on the 20th instant.

An application was made by Mr. Avetoom in Chambers on behalf of the Appellant for extending the time for a further period of two months for filing his client's Paper-book, he having got an affidavit to the effect that owing to adverse circumstances his client could not find money for payment of office copies of the voluminous evidence and papers to be printed herein.

Mr. Hyde on behalf of the Respondent argued that under sec. 553 of the Civil Procedure Code the process governing the issue and service of notice of appeal on the Respondent is the same that governs those of summons and accordingly the Appellant not having complied with Rule 176 (Belchambers' Rules and Orders, 2nd edition) by taking out the notice from the Registrar's office and delivering the same to the Sheriff for service within the 14 days mentioned in that Rule, the appeal should have been struck off. He also relied on Rule 11 of the Appellate Side Rules (*ibid*).

Mr. Avetoom in reply said that the practice of the Court had not been such as had been made out by his learned friend and that whether Rule 176 should be read along with sec. 553 of the Code in the manner his friend has done is a debateable question.

*Held*—That under the special circumstances of the case and the application having been once entertained and adjourned a reasonable time (one month) should be granted.

Babu Opoorba Coomar Ganguly for the Appellant.

Messrs. Watkins & Co. for the Respondent.

K. K. D.

### [TESTAMENTARY AND INTESTATE JURISDICTION.]

HARRINGTON, J. 1901. 13, February.	} In the goods of PEARYMONEY DASSEE, deceased.

*Construction of Will—Authority to sell not necessarily an authority to mortgage—Leave under sec. 90 of the Probate and Administration Act, as amended by Act VI of 1889.*

The deceased who was a Hindu inhabitant of Calcutta, governed by the Bengal School of Hindu Law, died some time in January 1890 having published his last Will and testament whereby he appointed the applicant, Beni Madhub Dass, his sole executor and first *shebait* of the Thakurs with all the powers therein mentioned. The material clauses of the Will were:—

"(c) Out of the rents and profits of my immoveable estate in the first place to pay the ground rent and other rates and taxes for and on account of my houses and premises No. 23, Wooma Churn Das' Lane, &c., &c., and in the second place to meet the expenses of the *deb sheba* of my family Thakur Sree Sree Radhaballuvjee, &c., to whose service I hereby entirely dedicate all my moveable and immoveable estates," and (d) "if in the opinion of my said executor by reason of Government acquiring my lands and premises or by reason of saving my lands and premises from being deteriorated in value or by reason of improving the estate for the said *deb sheba* it seems advisable to him or to his successor or successors as executor to carry or dispose of the whole or any portion of my estate and properties he or they are hereby authorised to do so. The sale-

proceeds will be invested in any way he or they would think proper and the income or profits from such investment will be devoted towards the said *deb sheba*."

*Babu Peari Lall Halidar* applied in Chambers on behalf of the executor for grant of probate of the said Will and for leave under sec. 90 of the Probate and Administration Act, as amended under Act VI of 1887, to mortgage one of the properties belonging to the estate of the testator. It was submitted on behalf of the applicant that the testator by giving express power of sale and direction for disposal of the sale-proceeds has impliedly restricted the power to mortgage and that therefore it is necessary to come before the Court to obtain leave as aforesaid and that the general terms of the Will leads to the same conclusion. He cited *Kanti Chandra Chatterpadhya v. Kristo Churn Acharjee* (3 C. W. N. 515) and an unreported case "In the goods of *Doorga Mohun Das*, deceased (Sale, J.)."

Probate of the Will granted and the executor was given leave to mortgage as prayed for.

Messrs: *Bannerjee & Halidar* for the Applicant.

K. K. D.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 312 of 1898.

STANLEY, J.	}	ANNO DASSEE
1901.		?
21, February.		PITAMBUR DUTT.

*Attorney's lien for costs—Costs due to an attorney by a pauper—Change of attorney—Belchambers' Rules and Orders, Rule 792.*

This suit was instituted by the Plaintiff *in forma pauperis* through *Babu Bepin Behary Bonnerjee* for recovery of certain *stridhan* articles wrongfully taken from her by the Defendant and for other reliefs. That suit was dismissed on the 17th day of December 1900. The Plaintiff was now desirous of filing an appeal through *Babu Jyoti Prosad Ghosh*.

*Babu Jyoti Prosad Ghosh* applied in Chambers on summons for an order for change of attorney from *Babu Bepin Behary Bonnerjee* and for delivery of the cause papers without payment of costs upon the strength of Rule 792 of Mr. Belchambers' Rules and Orders (2nd edition). It was submitted that the said rule was very clear and the practice of this High Court founded thereon has been not to allow the costs of a pauper to his attorney on a change from him.

*Babu Bepin Behary Bonnerjee (contra)* submitted that this being an action on trover and the hearing having lasted for several days, large amount of work had to be done and accordingly costs became heavy and if an order for change be made without payment of costs he would not be able to reconp himself in case the appeal is decided in the Plaintiff's favour with costs. He further submitted that the rule under consideration does not affect in any way the attorney's lien for

costs under which he holds the cause papers and consequently a pauper's case should not be distinguished from that of an ordinary suitor and accordingly a change in this case ought to be made upon the usual terms. He referred to an order made by *Jenkins, J.*, on the 3rd day of June 1898 (in the unreported case No. 813 of 1896, *Harry Dass Dass v. Nitganando Dass*) by which His Lordship held that the order for change of attorney of a pauper could only be made on the usual terms, *viz.*, upon payment of costs.

*Held*—That the application was not free from difficulty inasmuch as by Rule 791 no costs are to be allowed to the pauper against the opposite party except by special order, and by Rule 792 no fees shall be payable by a pauper to his counsel or attorney; considering, however, that the Appellate Court might order costs to be paid to the pauper it would be unreasonable to allow a change in this case except on the usual terms, that is, upon payment of all costs which might have been incurred by the attorney.

Upon *Babu J. P. Ghosh* personally undertaking to pay such costs as might be awarded by the Appellate Court in respect of the work and services rendered by the attorney on the record, if recovered from the other side and on *Babu B. B. Bonnerjee* agreeing to accept such an undertaking an immediate order for change was made.

*Babu Bepin Behary Bonnerjee*, Attorney on record.

*Babu Jyoti Prosad Ghosh*, Attorney in the application.

K. K. D.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 823 of 1899.

HARINGTON, J.	}	HENRY BIRKMYRE and others
1901.		v.
28, February.		DEEP NARAIN SINGH.

*Commercial cases—General list for administration, prayer for—Contract, suit on.*

This was a suit for recovery of certain sums of money against the firm of *Tejnarain Singh & Son* on account of breaches of several contracts entered into by the firm of *Tejnarain Singh & Son* for the purchase of gunny bags of certain qualities manufactured by the Plaintiff. The contracts upon which the suit was brought were entered into by *Tejnarain Singh* deceased prior to his death (which took place on the 11th May 1898) in the name of the said *Tejnarain Singh & Son* which business was carried on by him for himself and his son the Defendant *Deep Narain Singh* constituting a joint Hindu *mitakshara* family.

The plaint was filed against *Deep Narain Singh* after *Tejnarain's* death, praying (a) judgment for sums of money therein mentioned, (b) that if necessary an account may be taken of the estate of

the said Tejnarain Singh deceased and the said estate administered under the decree of this Hon'ble Court, (c) that if necessary the Defendant may be ordered to account for the assets of the said deceased which came into his hands and to pay and make good to the Plaintiffs out of his own moneys the value of any such assets as came into his hands and was disposed of by him. The suit when filed was entered in the General List of Causes.

• *Mr. Sowton for Messrs. Sanderson & Co.* applied in Chambers for an order that the suit may be transferred from the General List of Causes to the General List of Commercial Causes and that the costs of and incidental to this application be costs in the cause, on the ground that the claims in this suit arise out of ordinary mercantile transactions.

*Mr. Pugh (contra)* submitted that as the Plaintiffs asked for an administration of the deceased's estate the suit could not be placed in the General List of Commercial Causes.

*Held*—That this is not a proper suit to be placed in the General List of Commercial Causes and the application should be dismissed with costs.

*Messrs. Sanderson & Co.* for the Plaintiffs.

*Messrs. Pugh & Co.* for the Defendant.

K. K. D.

# [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDERS NOS. 284 AND 301 OF 1900.

RAMPINI, J.	} MUSST. JIGRI BEGUM and anr., Objectors, Appellants, "SYED ALI NAWAB, Respondent.
SALE, J.	
1901.	
27, February.]	

*Succession Certificate Act (VII of 1889), sec. 7—Enquiry, nature of—Act IX of 1841, decision under—Legitimacy, Civil Procedure Code (Act XIV of 1882), sec. 141—Practice.*

This was an appeal preferred on the 1st of August 1900, against an order of A. Goodeve, Esq., District Judge of Zillah Tuhbat, dated the 28th of July 1900, granting to one Syed Ali Nawab on behalf of Musst. Majimunnessa Begum a certificate under cl. (4) of sec. 7 of Act VII of 1889, for the collection of a debt due to the estate of the deceased Syed Mahomed Ali Khan. There were three applicants (1) Syed Ali Nawab the brother of the deceased and the guardian of the alleged minor daughter, (2) Musst. Jigri Begum another daughter of the deceased (3), Musst. Umatul Mehdi the widow.

The lower Court was of opinion that the third applicant was not a fit person to whom a certificate should be granted and that her interest was small; that Musst. Jigri Begum (who was the present Appellant) was a *puṣṭanashin* lady and as such was unable to manage her own affairs and that she was not a fit person to whom a certificate could be granted. The lower Court granted certificate to

Syed Ali Nawab the Respondent in the present appeal whom it found to be a respectable and trustworthy man who was also the guardian of Majimunnessa the alleged minor daughter of the deceased.

The present Appellant contended in the Court below that Musst. Majimunnessa was not the legitimate daughter of the deceased.

It was contended in appeal that the order of the learned Judge of the lower Court was bad because it had been passed without enquiry whatever and the following cases were cited, in support of the contention that certain enquiries must be made under the provisions of sec. 7 of the Succession Certificate Act before a certificate could be granted: *Hurri Krishna Panda v. Balabhadra Panda* (I. L. R. 23 Cal. 431), *Radha Rani Dassi v. Brindaban Chundra Bosak* (I. L. R. 25 Cal. 320), *Sivamma v. Subbamma* (I. L. R. 17 Mad. 477), *Dharmaya Sangappa v. Sayana Malapa* (I. L. R. 21 Bom. 53). It was also contended that the lower Court entirely neglected the provisions of the Code of Civil Procedure and decided the case without enquiry and after perusal of documents not filed in the case or admitted in accordance with the provisions of sec. 141, C. P. C.

One of the documents upon what the lower Court relied was a decision in a case between the parties under Act XIX of 1841. In that case the District Judge said as follows:—Since Syed Mahomed Ali, gave, and Syed Ali Nawab took Majimunnessa Begum in marriage to the latter's son as daughter of Syed Mahomed Ali Khan, I must assume that they knew what they were doing and that she is legitimate."

*Held*—That although the District Judge had not dealt with the documents in accordance with the provisions of sec. 141, yet although the decision under Act XIX of 1841 would not have the effect of *res judicata* still, it having been passed in the presence of the parties to the case, it was admissible in evidence before the Judge and on the strength of which he was justified in saying that Musst. Majimunnessa appeared to have been recognised as the daughter of the deceased during his lifetime and was married as such to the son of Syed Ali Nawab.

That the decision is a public document and could be proved by means of a certified copy.

That the enquiry is to be a summary one and as the Judge had legal evidence before him on which he came to the conclusion at which he arrived, the proceedings cannot be set aside because they seem not to have been of a very protracted or detailed nature.

*Sur Griffith Evans and Moulvie Mahomed Yussuff and Babu Saroda Churn Mitter* for the Appellants.

*Babu Umakali Mookerjee and Moulvie Mahomed Mustafa Khan* for the Respondent.

*Appeal dismissed.*

S. C. S.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, MARCH 19, 1901.

[No. 17]

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WE REGRET TO ANNOUNCE THAT MR. JUSTICE HILL is obliged to proceed home owing to ill health. It was a matter of wonder with us how he could go on with his work after the calamity which befel his family about the time the Court re-opened. He was always at his work, which was very heavy, being one of the Judges who heard the Original Side appeals, always paying the closest attention to the matters before him, never for a moment showing any sign of weariness or irritation. This heavy work has told upon his health. We wish him speedy recovery.

THE CALCUTTA BAR GAVE A FAREWELL DINNER TO Sir William Macpherson, last Thursday, 15th March. No other guest was invited. The dinner was largely attended and was in every way a great success. The Advocate-General proposed the health of the guest of the evening in appropriate terms and the reply by the retiring Judge was much appreciated. When Sir Comer Petheram sent Mr. Justice Macpherson to the Original Side, the Bar did not quite approve of the innovation, but after a few days' experience of the Judge, opinion became unanimous in his favour. Always patient and courteous, thoroughly conscientious in the discharge of his duties, a perfect master of facts, and ever ready to do justice to the parties, he soon became a favourite and everyone considered it a pleasure to appear before him. During his long service in this country, for nearly 45 years, during sixteen of which he has been a Judge of the High Court, he made many friends and the Government has also shown its appreciation of his character and ability by conferring upon him a Knighthood. We wish him all happiness and can assure him that we are giving expression to the feeling of the profession in doing so.

WITH THE INCREASE OF PLAGUE IN CALCUTTA WORK is beginning to suffer. Applications to put off cases on account of illness of the parties or their witnesses are being almost daily made. In one case a commission to examine a Hindu lady had to be put off as the neighbourhood of her residence was stated to be largely infected. We hear that there has been a considerable falling off in the number of new suits in the High Court, but more so in the Court of Small Causes. One redeeming feature however this year is that there is no panic.

## Government of Bengal Notification.

PRESIDENCY MAGISTRATE'S COURT.

NOTIFICATION—No. 1256J.

The 5th March 1900.

The following revised rules, which have been framed by the Chief Presidency Magistrate for the guidance of Benches of Magistrates in the town of Calcutta, under sec. 21 of Act V of 1898, and sanctioned by the Lieutenant-Governor, in supersession of all previous rules are published for general information:—

1. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall sit in the rotation arranged by the Chief Presidency Magistrate.

2. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall undertake only such business as is made over to them by the general or special order of the Chief Presidency Magistrate.

3. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall ordinarily sit from noon to 5 P.M. on the days on which they have been invited to attend by the Chief Presidency Magistrate.

4. A Bench of Presidency Magistrates shall ordinarily be composed of three Presidency Magistrates, other than the Chief Presidency Magistrate or salaried Presidency Magistrate, sitting together; or of two so sitting when, in the opinion of the Chief Presidency Magistrate, this is necessary.

5. A Bench of Presidency Magistrates may, however, be composed of the Chief Presidency Magistrate or the salaried Presidency Magistrate and two Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate, or of the Chief Presidency Magistrate or the salaried Presidency Magistrate and one Presidency Magistrate

other than the Chief Presidency Magistrate or salaried Presidency Magistrate.

6. Should any Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate appointed to sit in Bench be unable or fail to be present on the appointed day, the Chief Presidency Magistrate may in his discretion, at any time before the actual sitting of the Court, reform or reconstitute such Bench in such manner as to him seems most convenient for the disposal of business.

7. The Chief Presidency Magistrate and the salaried Presidency Magistrate shall be *ex-officio* members of Benches; the Chief Presidency Magistrate shall, if present, officiate as Chairman of the Bench; the salaried Presidency Magistrate, if sitting, shall, in the absence of the Chief Presidency Magistrate, officiate as Chairman; and in the absence of the Chief Presidency Magistrate and the salaried Presidency Magistrate, the Chief Presidency Magistrate shall nominate the Chairman.

8. Every member of a Bench shall have a voice in the determination of all points arising in cases before them and in the finding and sentence. In a Bench composed of three members, the decision of the majority shall prevail; and in a Bench composed of two members, the decision of the Chairman shall prevail.

9. The Chairman shall ordinarily record the evidence and judgment in cases where a record of evidence and judgment is necessary; but such duty may, with his consent, be performed by any of his colleagues, or the evidence and judgment may be taken down by the Registrar, or the Clerk of the Court, at the dictation of the Chairman.

10. A Bench or a Presidency Magistrate sitting singly may hold one or more adjourned sittings, should it be necessary to do so for the disposal of business or part-heard cases, but such adjournments shall be, as far as possible, *de die in diem*.

11. Any part-heard case may be sent back to the Chief Presidency Magistrate for disposal, should it, in the opinion of the Court, be thought to be a case which should be committed to the Sessions Court for trial.

12. Any case transferred to a Bench or to a Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate sitting singly remaining unheard at the close of the day may be either adjourned or, on necessity arising, may be sent back for disposal to the Chief Presidency Magistrate.

13. No private business shall be carried on in the chambers set apart for the Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate, and no outsider shall be admitted therein. It will be the duty of the Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate to report to the Chief Presidency Magistrate any infraction of this rule which may come to their knowledge.

14. It shall be the duty of the Registrar to inform the Chief Presidency Magistrate of any stress of business in the Courts.

15. The Chief Presidency Magistrate may at any time delegate any or all powers conferred on him under these rules to the salaried Presidency Magistrate.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 300 of 1898.

BAKERJEE, J.  
STEVENS, J.

1900.  
2, March.

SREKUTTY JOGEMAYA DASSI  
and others, Appellants,

GIRINDRA NATH MUKERJEE and  
others, Respondents.

*Landlord and tenant—Suit for recovery of rent—Liability or otherwise of a purchaser of property for rent falling due before the date of confirmation of sale—Priority of contract and of estate—Personal liability—Joint-liability with other ijaridars—Release of some of several promisors, whether a release of all—Code of Civil Procedure (Act XIV of 1882), secs. 28 and 316—Bengal Tenancy Act (VIII of 1885, B.C.), secs. 17 and 88—Indian Contract Act (IX of 1887), sec. 44.*

This was an appeal, preferred on the 5th of September 1898, against the decree of Babu Prasanna Kumar Ghose, Rai Bahadur, Subordinate Judge of Nuddia, dated the 30th of June 1898.

This appeal arose out of a suit brought by Girindra Nath Mukerjee and others, Plaintiffs-Respondents, for arrears of rent due from 1296 to Poush 1299 on account of eight annas share of an *ijara* lease of certain estates and shares of estates held by the Defendants, representatives of one of the original lessees, late Saroda Prasad Mukerjee, under the *pro forma* Defendant No. 7, Tarini, *alias* Shoyamoni Debi. The Plaintiffs claimed to recover the rent in virtue of an *Arpannamukh*, or deed of assignment, executed in his favour by the said Shoyamoni on the 3rd Kartik 1297. It was alleged that under the terms of the *ijara* lease, the ijaridars were bound to pay the Government revenue payable on account of the estates held in *ijara*, but by reason of the Defendants' default, the Plaintiffs had to make two payments of revenue and they now sought to recover the amount of those payments also. The total amount claimed was Rs. 9,443-2-8 after deducting certain payments made by some of the Defendants and the amount was sought to be recovered by sale of certain properties mortgaged by the *ijara karniat*; and Defendants Nos. 9 and 10 were made parties as purchasers of certain property which had been hypothecated by some of the lessees as security for the rent.



The Defendant No. 7, Shoyamoni, died pending the suit.

The Defendants Nos. 1, 2, 3, 5, contended, *inter alia*, that the *Arpannamith* which was the basis of the Plaintiffs' claim was invalid and ineffectual, and no claim could be founded upon it and that the suit was bad for misjoinder of causes of action. Defendant No. 6, Nistarini Dassi, contended that her deceased husband being the auction-purchaser of only a portion of the *ijara* tenure from Poush 1298 she was not liable for the previous rents, that the suit as against her was not maintainable jointly with the remaining Defendants.

The suit was dismissed by the Subordinate Judge on the ground that the *Arpannamith* was a mere power-of-attorney which did not authorise the Plaintiff to maintain the suit. That decision was reversed by the High Court on appeal, the *Arpannamith* being held to be a deed of assignment and the case was remanded to the Court below for trial on the merits.

After the remand the only Defendants who contested the suit were the representatives of Defendant No. 6, who had died in the meantime, and whose defence was to the effect that her husband having purchased at an execution sale confirmed on the 15th December 1891, only two out of the several properties covered by the lease, she was not liable for the rent for any period before that date nor for the rent for any of the properties other than those two. The Defendants Nos. 9 and 10, having pleaded non-liability on the ground of being *bona fide* purchasers for value and on other grounds, the Plaintiffs abandoned their claim against them. The Subordinate Judge overruled the objections urged in the defence of Defendant No. 6, and decreed the suit against the principal Defendants.

Against that decree the representatives of Defendant No. 6 Jogennaya Dassi, Padmabati Dassi, and Bhabhabhagini Dassi preferred this appeal, and it was contended on their behalf, *first*, that the Court below was wrong in holding that the Appellants were liable for rent for any period before the 15th December 1891, whereas it ought to have held that they were not so liable, and that the suit was, not maintainable for misjoinder of parties and of causes of action; *secondly*, that the Court was wrong in holding that the Appellants were liable for the whole rent jointly with the other Defendants, whereas it ought to have held that they were liable only for a share of the rent proportionate to their interest in the properties leased; and *thirdly*, that the Court below ought to have held that the Plaintiffs having released Defendants 9 and 10, the holders of the property hypothecated as security for the rent, the Appellants were discharged from liability for rent except so far as rent was due for the portion of the *ijara* mehal held by them.

On behalf of the Plaintiffs-Respondents, it was contended that the Appellants' predecessor in interest having purchased the property that was liable to pay

rent, the purchase must be held to have been made subject to liability for the rent that was due, and that the other contentions of the Plaintiffs-Appellants, were not sound.

*Held*—That neither by privity of contract nor by privity of estate could any liability attach to the Appellants for rent falling due before their interest in the *ijara* mehal accrued, that is, regard being had to sec. 316 of the Code of Civil Procedure, before the sale at which their predecessor made his purchase was confirmed.

*Rash Behary Buntopadhyaya v. Peary Mohun Mookerjee* (I. L. R. 4 Cal 346) followed.

*Chhatrapat Singh v. Girindra Chandra Roy* (I. L. R. 6 Cal. 389) and *Mahurane Dussya v. Harendra Lal Roy* (1 C. W. N. 458) explained and distinguished.

That though the Appellants are not personally liable for the rent that fell due before Poush 1298, the portion of the *ijara* mehal held by them being liable for that rent, they are rightly joined as Defendants in respect of the whole claim, regard being had to the provisions of sec. 28 of the Code of Civil Procedure.

That though the privity between the parties may be one of estate only, it is in respect of the whole of the tenure though the transfer was of a part, by reason of the indivisibility of the tenure without the landlords' consent.

*Shib Das Banerjee v. Baman Das Mookerjee* (15 W. R. 360), *Hare v. Cator*, (Cowper 766), *Holford v. Hatch* (1 Douglas 182-188), and *Curtis v. Spilley* (Bingham, N. C. 756) distinguished.

That the release of Defendants 9 and 10, some of several joint promisors, does not release the Appellants, other promisors from their liability.

*Heera Lal Samant v. Sydul Ozeer Ali* (21 W. R. 347) distinguished.

*Dr. Rash Behari Ghose and Babu Shiba Prasanna Bhattacharjee* for the Appellants.

*Babus Basanta Kumar Bose, Harendra Nath Mukerjee, Hara Prasad Chatterjee and Hari Churn Sarkhel* for the Respondents.

*Appeal allowed in part; decree modified.*

H. P. C.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE  
NO. 115 OF 1898.

BANERJEE, J.	RAJ JATINDRA NATH CHAUDHURI and
STEVENS, J.	another, Defendants, Appellants,
1900.	v.
8, March.	AMRITA LAL BAGCHI and others
	Plaintiffs, Respondents.

*Hindu Law—Adoption—Hindu widow, adoption, by, of a second son upon the death of a son, begotten or adopted, whose estate she inherited as mother, whether divests her of her estate—Review of the law on the subject—Principle underlying such an act—Declaratory decree given on a case not made in the plaint and inconsistent with it, whether proper.*

This was an appeal, preferred on the 6th of April 1898, against the decree of the Second Subordinate Judge of Zillah 24-Pergunnahs, dated the 11th January 1898.

This appeal arose out of a suit brought by Amrita Lal Bagchi and others, Plaintiffs-Respondents, to recover possession of certain immoveable property known as Nune Bheri, which consisted of 915 bighas and odd land comprised in taluk Dhapa Manpur, on the allegation that it belonged to one Pran Kissen Bagchi, who died in 1852, leaving his widow, Lobongomoni Debi, as his sole heiress; that upon the death of Lobongomoni on the 21st Magh 1302 (corresponding to February 1896) the Plaintiffs, as the nearest agnates and heirs of Pran Kissen Bagchi, became entitled to the property as reversionary heirs; that Jatindra Nath Chaudhuri and Harendra Nath Chaudhuri, Defendants Nos. 1 and 2, have been holding possession of the same by setting up a lease purporting to have been granted by Lobongomoni Debi on the 30th Srahan 1264; and that the said lease was inoperative after the death of Lobongomoni Debi, there having been no legal necessity for the granting of the same, and the Plaintiffs were consequently entitled to possession. A lady, named Sukhodamoni Debi, was made one of the Defendants in the suit on the ground that she had been setting up a right to the property as the widow of one Kali Nath Roy upon the false allegation that Kali Nath had been adopted by Lobongomoni under an authority from her husband.

The defence of the Defendants Nos. 1 and 2 was that the Plaintiffs were not entitled to recover possession as the reversionary heirs of Pran Kissen Bagchi, as Lobongomoni Debi, with the authority of her husband, adopted Kali Nath Bagchi as her son and the estate of Pran Kissen Bagchi vested in Kali Nath, and upon Kali Nath's death, was inherited by his heir Sukhodamoni, that the *mourasi* lease under which the Defendants held was a valid lease and binding on the reversionary heirs of Pran Kissen Bagchi and of Kali Nath as having been granted under legal necessity; and that the claim of the Plaintiffs was barred by limitation.

The Defendant No. 3, Sukhodamoni Debi, filed two contradictory statements, in the earlier of which she supported the Defendants Nos. 1 and 2, but in the later one she supported the Plaintiffs. The Subordinate Judge found that Pran Kissen Bagchi gave permission to his widow to adopt two sons in succession; that the widow Lobongomoni first adopted a boy, named Baikanto, and on Baikanto's dying unmarried, she adopted Kali Nath and had him married to Sukhoda and that Kali Nath died at the age of sixteen leaving his adoptive mother and his widow him surviving. The Subordinate Judge further found that the lease of the Defendants Nos. 1 and 2 was not shewn to have been granted under legal necessity

and upon these findings the Subordinate Judge dismissed the Plaintiffs' suit for possession but gave them a declaratory decree, declaring that the lease to the Defendants Nos. 1 and 2 was granted without legal necessity and was not binding upon the reversionary heirs of Pran Kissen Bagchi and Kali Nath Bagchi.

Against that decree the Defendants Nos. 1 and 2 preferred this appeal and it was contended on their behalf that the Court below was wrong in granting the Plaintiffs a declaratory decree upon a case not made in the plaint and in fact inconsistent with the case made in it and that the Plaintiffs' claim for a declaratory decree was barred by limitation under Art. 125 of the 2nd schedule of the Limitation Act.

The Plaintiffs preferred a cross-appeal which was abandoned at the hearing. It was contended, however, on their behalf that upon the facts found by the Court below, the estate left by Pran Kissen Bagchi having passed to the first adopted son and on his death to his adoptive mother Lobongomoni Debi by inheritance, the second adoption could not divest Lobongomoni of her rights, and as Kali Nath, the second adopted son, died in the lifetime of Lobongomoni, the estate remained in Lobongomoni and the Plaintiffs as reversionary heirs after the death of Lobongomoni were rightly entitled to the declaration that was granted in their favour.

*Held*—That a Hindu widow adopting a son under the authority of her deceased husband, upon the death of a son begotten or adopted, whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her, and that the second adopted son takes the estate immediately upon his adoption. *Bhubannoyi v. Ram Kishore Achary Chowdhury* (10 Moo. I. A. 279), *Vellam Venkata Krishna Rao v. Venkata Rama Lakshmi* (I. L. R. 1 Mad. 174) followed.

*Janabai v. Roy Chand Nihalchand* (I. L. R. 7 Bom. 225), *Rajji Vinyakran Jagannath Shankarsett v. Lakshmi Bai* (I. L. R. 11 Bom. 381) cited and referred to.

That the case upon which the declaration has been granted not only not being the case made in the plaint, but being one that was wholly inconsistent with it, the declaration ought not to have been granted. *Ishan Chunder Singh v. Shama Charan Bhutto and others* (11 Moo. I. A. 7) referred to.

*Sir Griffith Evans, Dr. Rash Behari Ghose, Babus Jaggut Chunder Banerjee, Sharat Chunder Roy Chaudhuri, Charu Chander Ghose and Indubhusan Majumdar* for the Appellants.

*Dr. Asutosh Mookerjee, Babus Mahendra Nath Roy and Jogendra Nath Chatterjee* for the Respondents.

*Appeal allowed: suit dismissed.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, MARCH 26, 1900

[No. 18]

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#### REPORTS (See Index.)

THE LAST NUMBER OF THE *Harvard Law Review* contains many interesting notes of cases. In one case it was held that although testimony as to previous wrongful acts of an accused person is generally inadmissible in evidence, yet it becomes admissible where the question is the intent with which the later acts are committed, and where all the acts form part of a general scheme.

ALTHOUGH WE DO NOT REGARD IT ALWAYS SAFE that a Judge should freely interfere with the discretion of counsel while cross-examining witnesses, still when the privilege is abused it seems but right that the Judge should also exercise some control over cross-examinations assuming inordinate length. In the *Golden R. Mining Co. v. Buzton Mining Co.* (97 Fed. Report 414) it was held that examination of witnesses must not be protracted beyond reasonable limits even if the questions put be logically relevant. The admissibility of such evidence depends upon the opinion of the trying Judge; and if he is of opinion that a clear inference can be drawn without going into such details as would confuse the jury and unnecessarily protract the case, he may not allow questions on collateral issues to be put.

THE CASE, *Fakir Lal Goswami v. W. C. Bonnerji* and another, reported in this issue, is worthy of notice. If it had been held, as is suggested at the conclusion of the judgment, that sec. 54(2) of the Bengal Tenancy Act had no application to the circumstances of the case, we would have had no diffi-

culty in accepting the law as laid down. It does not appear from the report that the tenants had asked the landlord to appoint a convenient place. On the contrary it appears that they had for years paid rent at Burdwan and only latterly they offered to pay at Calcutta and on being sued for arrears with interest contended that Burdwan was not a convenient place. Under such circumstances it was quite competent for the Court to say that sec. 54(2) had no application to the present case. And in that view the tenant's offer to pay at Calcutta was not a sufficient tender and he was therefore liable to pay interest on the arrears in suit. But our difficulty in accepting the law as laid down arises in two ways: First, that the finding that Burdwan is not a convenient place is not disturbed and still interest is allowed on rent in arrear. Next, it is said broadly that even if sec. 54 were applicable to the case, the tenants would be under a liability to pay rent at the residence of the landlord even if the latter had no village office or did not appoint a convenient place. But surely, sec. 54 does not contemplate that tenants from the remote corners of these provinces are under any liability of taking or paying rent at Calcutta where many of their landlords reside. A tenant's liability to pay in time seems to be strictly qualified by cl. (2) of sec. 54 and his liability to pay interest under sec. 67 must also be regarded as subject to the same qualification.

THE MILITARY SPIRIT OF THE PRESENT AGE SEEMS to have disturbed also the proverbial equanimity of the English judges. It must, however, be said to the credit of the professional journals that they have not allowed their enthusiasm to get the better of their sense of propriety and have uniformly deprecated the recent exhibitions on the Bench which have gone far to tarnish its fair fame. The *Law Journal* says:—

'It is regrettable that certain Judges should allow their patriotic feelings to eclipse their judicial dignity. Mr. Justice Grantham interrupted a trial for attempted murder, at the Liverpool Assizes, to announce the relief of Kimberley, and treated the gratifying nature of the intelligence as a sufficient reason for passing a nominal sentence upon a prisoner in another case; while Sir Francis Jeune, in the course of an important trial in the Probate Court on Wednesday, informed the jury that he had received news of the relief of Ladysmith.

These announcements were greeted by the jurymen in both Courts with loud applause, and it is recorded in the Press that 'it was some minutes before the judicial business was proceeded with.' Members of the Bench can easily rejoice in the triumphs of our troops without creating these unseemly exhibitions in Courts of justice. It is certainly no part of their duty to spread the rumours that reach them concerning the progress of the war, while it is of the utmost importance that the attention of juries should not be diverted from the questions which they have to decide. There has lately been a marked increase in the tendency of certain Judges to comment upon matters that lie outside the scope of their judicial duties. It is a tendency which threatens not only the dignity but also the authority of the Bench, for a Judge who concerns himself with questions far removed from his official sphere is apt to impair the confidence of the public in his judgments on those matters with which he has been appointed to deal.

THE *Law Times* SIMILARLY DENOUNCES THE INCIDENT in which Mr. Justice Grantham surpassed, perhaps, all past record of judicial eccentricity. An account of it is quoted by our contemporary from the *Westminster Gazette* :—

That Mr. Justice Grantham should publicly announce in court the relief of Kimberley was in the nature of the inevitable, but he did far more than that at the Liverpool Assizes yesterday, when A. was charged with having caused the death of B., his brother-in-law. They quarrelled over Spion Kop, and A. in a fit of anger struck B. with a poker. As a result B. died a week later. A. "expressed great contrition" (as well he might) and pleaded guilty. Whereupon Mr. Justice Grantham said: "The war was an all-absorbing topic, and as very satisfactory news had been received that day as to the relief of Kimberley, he thought justice would be met by giving the prisoner the benefit of the good tidings." The prisoner was thereupon discharged unpunished. It is well indeed that Mr. Justice Grantham is a judge *au generis*. We cannot help wondering whether the Lord Chancellor would again be prepared to throw his *regis* over this remarkable verdict?

## English Notes.

COURT OF APPEAL.—*PURDAN v. SECRETARY OF STATE FOR INDIA*. Before LORDS JUSTICES SMITH, COLLINS and ROMER. 21st February 1900.

### Pension.

For the facts of this case, see 3 C. W. N., p. cxi. The decision of Mr. Justice Bigham was supported by the Court of Appeal. It was held that Plaintiff had failed to show any contract by virtue of which he was entitled to a larger pension than he was in receipt of, or any document by which his action could receive any support.

### Plaintiff in person.

*Mr. Arthur Cohen, Q. C., and Sir John Payet* for the Secretary of State.

C. W. A.

COURT OF APPEAL.—THE ATTORNEY-GENERAL *v. THE BRIGHTON AND HOVE CO-OPERATIVE ASSOCIATION, LD.* Before the MASTER OF THE ROLLS, LORDS JUSTICES WILLIAMS and ROMER. 22nd January 1900.

*Highway User, causing obstruction—Alleged nuisance—Injunction.*

*KING v. RUSSELL*, (6 East, p. 430) followed.

In this action the Attorney-General acting on the relation of a lodging-house proprietor of Lansdowne Street, West Brighton, had succeeded in securing an injunction from Mr. Justice Kekewich prohibiting the Defendant Association from obstructing that street and the pavement by an unreasonable use thereof. The complaint was that the Defendants so used their several vans daily from early morn to late in the evening as to obstruct that highway causing considerable annoyance and nuisance thereby.

On the Defendants' appeal the Court observed that the learned Judge had decided the case on the evidence before him. It was proved that the Defendants had blocked up a narrow street daily for some distance in loading and unloading their several vans in the carrying on of a large business. This continued throughout the day, in consequence of which persons had avoided the street; that showed an unreasonable obstruction, an appropriation of the highway. The obstruction being proved, *prima facie* this was a nuisance in law. As to what amounted to a reasonable user it was difficult to draw the line. The question was, what was the consequence of the reasonable exercise of their right conflicting with the right of the public and after referring to the judgment in the above-quoted case with approval and upon a consideration of the facts established by evidence, the Appeal Court held that Defendants' user of the street was unreasonable and dismissed the appeal with costs.

*Mr. Warnington, Q. C., and Mr. Beddall* for the Appellants.

*Mr. MacMoran, Q. C., and Mr. Parkyn* for the Respondent was not heard.

C. W. A.

*Appeal dismissed.*

QUEEN'S BENCH DIVISION.—*SHUCKBURGH v. LABOUCHERE*. Before JUSTICES GRANTHAM and CHANNELL. 15th January 1900.

*Pending cause—Newspaper comment—Alleged contempt of Court.*

*Truth*, in an article headed "Shylock in the Pillory" in its issue of 28th December 1899, referring to the Clerical and Medical Advance Bank of Bristol, said: "The latter concern is run by one Edward Shuckburgh who, as is indicated by the name he has chosen, devotes himself specially to fleecing the parsons and doctors; though he does not restrict himself to these classes I regard Shuckburgh as one of the most dangerous and unscrupulous members of his profession."

And referring to a cross-examination of Shuckburgh "in a case last week" it went on to say that the writer (Labouchere) had for the past 9 years used strong language against him, had referred to him as "a rapacious wolf" and "a ravening shark."

Shuckburgh was a money-lender, in fact he was himself the person who carried on the business named as the Bank above stated. The case referred

to in *Truth* was one for trial at the Bristol Assizes wherein Shuckburgh was proceeding against one Roe for obtaining money from him under false pretences. Upon the evidence of Shuckburgh it was said that Roe had been committed for his trial.

The matter now came before the Divisional Court on a motion on behalf of Shuckburgh for a writ of attachment against Mr. Labouchere, the editor of *Truth*, for a rule nisi, for a writ of attachment, for contempt of Court in commenting on the said cause standing then for trial.

The Court was of opinion that the article did not disclose anything which could prejudice the trial against the Defendant; and although comment on pending cases was to be deprecated and newspaper editors were warned against it, there was nothing in this case which rendered it desirable to grant the rule.

*Mr. Lewis Thomas* for the Applicant.

C. W. A.

*Application refused.*

16th January 1900.

*Mr. Lewis Thomas*, on this date made an *ex parte* application to the Court of Appeal by way of appeal from the above-mentioned decision of Justices Grantham and Channell on behalf of Mr. Shuckburgh and submitted that the article in question could have been published with no other object than prejudicing the trial.

LORD JUSTICE SMITH (LORD JUSTICES RIGBY and COLLINS concurring) said you may have your rule.

C. W. A.

*Application granted.*

QUEEN'S BENCH DIVISION.—PALMER *v.* SNOW. Before JUSTICES CHANNELL and BUCKNILL. 29th January 1900.

*Meaning of terms.*

The charge, laid by the Respondent before the Stipendiary Magistrate of South Staffordshire, was that the Appellant, a hair-dresser, a tradesman of Wolverhampton, had, on Sunday, the 24th September last, shaved and cut the hair of certain persons at his shop which was kept open for the purpose. The information was laid under the provisions of Statute 29, Car. II, c. 7. Sec. 1 prohibits any "tradesman, artificer, workman or labourer or other person whatsoever" from exercising any worldly labour business or his ordinary calling on the Lord's Day, the exceptions being works of necessity or charity.

The Magistrate convicted him as a "tradesman" exercising his "calling" or "business" for profit.

The Divisional Court thought that the word "tradesman" was intended to mean as used in the above Act a person who carried on the business of buying and selling. "Artificer" meant somebody who made something. "Workman or labourer" did not apply to the Appellant because they involved the idea of one who is employed by some one else. The English Act in contrast to the Scotch Act related to certain specified persons the words "or other

persons whatsoever" were to be read *ejusdem generis* with the preceding words and a barber was not a person to whom the Act was intended to apply.

The appeal would therefore be allowed.

*Mr. Shearman* for the Appellant.

*Mr. Dickens, Q. C., and Mr. Shakespeare* for the Respondent.

C. W. N.

*Appeal allowed.*

DIVORCE COURT.—COOPER KING *v.* COOPER KING. Before MR. JUSTICE BARNES. 11th January 1900.

*Restitution of conjugal rights—Evidence of validity of marriage at Hongkong.*

The Respondent was A. D. C. to the Governor of Hongkong. At Hongkong the Petitioner who had been residing there with her parents met him, and they were married at the Registrar-General's Office at Hongkong on the 7th November 1897. There was a mutual understanding that the marriage should not be disclosed. They were both of age when the ceremony took place, and they had never cohabited. He afterwards wrote to say that since the marriage he had made up his mind not to live with her and she was at liberty to make what arrangements she liked.

This was an application on her part for a decree for restitution of conjugal rights.

The Respondent was an Englishman, an officer in this country.

Evidence having been given in support of the facts, the learned Judge desired to have proof of the law of Hongkong regarding the validity of the marriage and the adjudication of the matter stood over for an affidavit from Sir William Robinson who was at the date of the marriage the Governor of the Colony deposing that marriage in question would there be considered a valid marriage. This step was taken on the suggestion of the Petitioner's counsel.

*Mr. Le Bas* for the Petitioner.

C. W. A.

*Matter adjourned.*

DIVORCE COURT.—ANDREW *v.* ANDREW AND WILLIAMS *alias* JOHNSON. Before MR. JUSTICE BARNES. 23rd and 29th January 1900.

*Husband and wife—Divorce—Matrimonial Causes Act (20 and 21 Vic., c. 85), sec. 31—Conduct conducing to adultery—Discretionary power to grant divorce.*

The Petitioner in this case, seeking a divorce from his wife, held a Commission in the Black Watch. He had married the Respondent professionally known as Maud Richardson. The co-Respondent was the man Williams who was convicted of having stolen the Duchess of Sutherland's jewels. The wife in her turn charged the husband with having deserted her and refused her marital rights and so conducing to her adultery.

The jury found that her adultery was proved, and that the husband's conduct had conduced to her adultery and he had wilfully and without just cause separated himself from her in 1897-98.

Mr. JUSTICE BARNES delivered a considered judgment as to whether on such findings the petition should be dismissed or whether the Court should exercise the discretion under sec. 31 of the Matrimonial Causes Act, 1857. The judgment states that it was intended thereby emphatically to assert that a husband ceased to be entitled to complain of his wife's infidelity if by his own misconduct or neglect he had conducted to it. *Baylis v. Baylis* (L. R. 1 P. and D. 395) was distinguished. Here, on the applicant the husband's return from South Africa in 1897 he went to Paris until March 1898, and the wife's request to return to her thereafter was not complied with. The adultery proved was committed later than that, therefore there was no reason for exercising his discretion in favour of the husband. The petition would consequently be dismissed with costs.

*Mr. Inderwick, Q. C., and Mr. Barnard* for the Petitioner.

*Mr. Wallace, Q. C., and Mr. Lynch* for the Respondent.

C. W. A. *Petition dismissed.*

### Notes of Cases.

(The important ones to be fully reported hereafter.)

#### PRIVY COUNCIL.

THEIR LORDSHIPS, on March 2nd, granted leave to appeal in the following cases:

From Oudh—*JEHANGIR BUKSH KHAN v. MUSSAMUT ZENAL BIBI.*

Costs of this application to be costs in the cause.

*Mr. C. W. Arathoon* for the Appellant, the Applicant.

*Mr. Mayne* for the Respondent.

From Bengal—*AGHORE NATH CHATTERJEE v. DAMODAR DAS BARMAN.*

*Mr. Branson* for the Applicant.

LORD ROBERTSON, on March 2nd, delivered their Lordships' judgment in the case of *SARDAR JAGJOT SINGH v. RANI BRIJ NATH KUNWAR* advising Her Majesty to dismiss the appeal with costs.

*Mr. C. W. Arathoon* for the Appellant.

*Mr. Branson* for Respondent was not called upon.

C. W. A.

### CALCUTTA HIGH COURT.

#### [CRIMINAL REVISIONAL JURISDICTION.]

PRINSEP, J.	} In the matter of the Petition
STANLEY, J.	
1900.	
21, March.	

of AKBAR ALI KHAN  
and HOSSEIN  
KHAN.

*Code of Criminal Procedure (Act V of 1898), secs. 145, 192 (1) and (2), 529 (f)—Order of transfer*

*made by a Magistrate not empowered by law in that behalf, whether void merely on that ground—Order made erroneously and in good faith.*

This was an application to set aside an order of the Deputy Magistrate of Hazaribagh, dated the 31st January 1900.

The facts of the case are shortly these:—

On the 24th of November 1899, Mr. Warde-Jones, Deputy Magistrate of Hazaribagh, drew up a proceeding under sec. 145 of the Code of Criminal Procedure calling upon Domi Lal, 1st party, and Akbar Ali Khan and Hossein Khan, 2nd party, to appear before him and to put in written statements of their respective claims regarding the fact of their actual possession to the lands in dispute. On the same day Mr. Warde-Jones passed the following order: "Draw up proceedings against both parties under sec. 145, Cr. P. Code. Referred to S. C. Dass." Written statements were filed by both the parties and Babu Suresh Chandra Dass, Deputy Magistrate, took evidence in the case and on the 31st January 1900 passed an order declaring the 1st party to be in possession of the subject-matter of dispute and forbidding all disturbance of such possession until evicted therefrom in due course of law.

The Petitioners Akbar Ali Khan and Hossein Khan made this application, and it was argued on their behalf that the order should be set aside on the ground that it was made by a Magistrate who had no authority to try the case. It was said that the order under sec. 145 (1) was made by a Magistrate of the first class, not being a District Magistrate, or a Sub-Divisional Magistrate, and he transferred the case to another Magistrate in the same locality, and it was contended that under the terms of sec. 192 (2) this Magistrate, although he may be empowered to transfer cases, was so empowered only to transfer an enquiry or trial relating to an accusation or charge of an offence. It was contended that the proceedings taken under the transfer were null and void.

*Queen-Empress v. Chedda and others* (1. L. R. 20 All. 40) was referred to.

The Court—

*Held*.—That under the provisions of sec. 192 (2) the transfer could only have been properly made by an officer, as described in clause (1) of sec. 192 of the Code of Criminal Procedure.

That although the order of transfer was made by a Magistrate, not empowered by law in that behalf, erroneously and in good faith, under the terms of sec. 529 (f) the proceedings taken under the transfer were not invalid, merely on the ground of the Magistrate not being so empowered.

*Queen-Empress v. Chedda and others* (1. L. R. 20 All. 40) distinguished.

*Mr. P. L. Roy, with Babu Atulya Charan Bose,* for the Petitioners.

H. P. C.

*Application rejected.*

# THE Calcutta Weekly Notes.

[Vol. V.]

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[No. 19]

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### REPORTS (See Index.)

THE HIGH COURT WILL REMAIN CLOSED ON ACCOUNT of Eid and Easter holidays from Monday the 1st of April to Tuesday the 9th of April, both days inclusive.

THE SOCIETY OF COMPARATIVE LEGISLATION is doing signal service in advancing our knowledge of crime and criminals both by publishing valuable notes in its journal and also getting such an eminent lawyer as Mr. Crackanthorpe, K. C., to read a paper on the subject of Comparative Crime and Punishment at its annual meeting. The resume of his lecture we publish in another column.

WE ARE GLAD TO FIND IT ANNOUNCED IN THE newspaper press that Mr. B. L. Gupta and not Mr. Staley is to officiate in the High Court Bench during the absence of Mr. Justice Prinsep on furlough. The office of the Legal Remembrancer to the Government of Bengal is a very responsible one, and we feel sure that Mr. Staley will fill it with great credit.

WE ARE NOT ALARMED AT THE SIGHT OF THE voluminous report of crimes committed in these provinces during 1899-1900, for in reality it shows a downward tendency, specially taking into consideration the last three years' figures. It is curious that this decline is represented by a steady decrease of nine to ten thousand cases in each of these years. As for previous years it is difficult to arrive at any conclusion as the mode of computation is made to vary from time to time. But taking the average annual return of crimes of all kinds at 300,000 and the population at 75,000,000 we get four offences in the year in a community of 1,000. Then, when we have regard to the fact that such offences are more collective than individual in their character, and relate mostly to possession of diluviated land or to the gathering of crops in such disputed lands, we feel no hesitation in saying that people of these provinces are as law-abiding as any in the world. The Government ought not to make much of the number of paddy-cutting cases arising out of disputed possession of land but would do better if it occupied itself to the repression of robbery and other violent offences against person and property which, it is alleged, are being committed by persons from beyond the North-Western frontier.

WE HAVE OFTEN POINTED OUT IN THESE COLUMNS that ideas as regard the objects of the criminal law have undergone a fundamental change in the course of the last century. Criminal law is no longer regarded as meant for hunting down criminals but merely as a means to keep them in check with a view to mend and not end them. We have not unfrequently congratulated ourselves on the low list of cases in the Calcutta Court of Sessions but we wish we could do the same as regards the sentences sometimes passed on the ground of previous convictions for petty thefts. Transportation for life, the sentence passed in one such case, and four years' hard labour relieved by thirty stripes and a further term of solitary confinement in another for the theft of Rs. 2-8 on the ground of previous convictions, were sentences which made a juryman come out of Court and enquire of the first robed gentleman he met, if there was no appeal against such sentences. Since both public opinion and the opinion of the judges vary greatly in the matter of sentences and personal equations play a great part either in the

direction of severity or leniency, we are sure that the report of an international commission on the lines proposed by Mr. Crackanthorpe will throw considerable light on the subject and may eventually go to eliminate personal factors.

#### CRIME AND PUNISHMENT FROM THE COMPARATIVE POINT OF VIEW.

The Lord Chief Justice presided over the annual meeting of the Society of Comparative Legislation held in the Old Hall, Lincoln's Inn, on Wednesday afternoon.

Mr. Crackanthorpe, K.C., read a paper on 'Crime and Punishment from the Comparative Point of View,' in which after referring to Dr. Anderson's recent article which describes our system of punishment as 'absurd and mischievous, neither science nor common-sense being allowed a hearing,' he observed that, though this statement might be exaggerated, it was well to have our comfortable optimism disturbed if our methods were to be improved. Modern penal law he defined as 'a weapon of social defence tempered by justice to the individual.' Sir James Stephen and Beccaria had shown that crime was in former times viewed objectively only, and without regard to the offender's character. On this principle the French code of 1810 treated the criminal as an abstraction, and the legal limits of punishment for specified crimes were laid down with mathematical precision. The rigour of the code was, however, modified by the admission of 'extenuating circumstances.' The Belgian code of 1867 discarded the theories of Beccaria and accepted those of Pellegrino Rossi, who laid great stress on the reclamation of the criminal. The new school of criminologists treated the criminal as the complex product of inherited propensities and the atmosphere in which he had been brought up. Its advocates were—in France, MM. Tarde and Lacaze; in Belgium, M. Prinz; in Russia, M. Fornitzki. In Italy the subjectivity of the criminal had been pushed to its extreme by Lombroso and Garofalo, the former laying principal stress on physiological peculiarities, the latter on the influence of the social factors of life. In Germany the connection between crime and its causes formed a separate department of study under the name of *die Kriminalpolitik*, of which Professor Franz von Litz, of the University of Berlin, was a powerful exponent. The first State reformatory for youthful offenders originated in the United States in 1825. Another attempt was made at the French agricultural colony of Mettray, founded in 1829 by M. De Metz and the Vicomte de Courteilles, of which a special feature was the *maison paternelle*, where sons of well-to-do parents who had proved unmanageable at home and were between the ages of sixteen and twenty-one could, by virtue of a provision of the French Civil Code, be sent to undergo for a period of six months a course of curative moral treatment and instruction at their parent's expense. Again the principle of our First Offenders Act, 1867, was first resorted to in Massachusetts, where the juvenile, after being convicted and admonished, was placed in charge of a probation officer, whose duty it was to watch over his conduct, and if it were unsatisfactory to report to the Court. In France the *loi Bérenger* of 1891 had been borrowed from our Act of 1887; but under the French law a defined sentence was pronounced, so that the first offender knew precisely what his punishment would be if he got into trouble again. Dealing next with the professional criminal, Mr. Crackanthorpe stated that every European code, except the Spanish, treated the *récidiviste* more severely than the first offender, the French law on this subject being more elaborate than the German, and the Italian more elaborate than the French. Among our own judges there were wide differences of opinion and practice. The question might well be threshed out by means of an international congress, with hope of a like fruitful result as had followed the International Penitentiary Congresses which had been held in most of the capitals of Europe. The first

of these was held in London in 1872, and as a consequence of these congresses improvements had been made in almost every country in Europe. It was for this reason he had proposed at the Congress of Comparative Legislation held in Paris last autumn that an international commission should be appointed for the purposes explained in a letter in the *Times* of August 17 last. This commission would possess one novel feature of supreme importance, in that it would bring an expert on prison discipline into close personal contact with experts on the theories of sentencing. These two subjects had been too long kept apart. Judges should not only ponder carefully over their sentences, but should also know precisely the nature of the punishment inflicted. He agreed with Dr. Anderson and with Mr. Justice Wills, in his letter recently published in the *Times*, that the uniform severity of penal servitude was a serious obstacle to the elimination of professional criminals, and that our existing methods of punishment were too monotonous and inelastic. The new commission might make some valuable suggestions on this head, and he (or his successor) might at no distant date be able to present to the society a body of carefully sifted opinion, capable of being translated into rules for practical guidance.—*The Law Journal*.

#### CRIMINAL CASES OF 1900.

##### III.—EVIDENCE AND OATHS ACTS.

A conspiracy within the terms of sec. 10 contemplates more than a joint action of two or more to commit an offence:—*Nogendrabala v. Empress*, 4 C. W. N. 528.

Statements to a police-officer recorded as under sec. 161 by a person against whom there was evidence in the hands of the Police on which he was bound to arrest are inadmissible under sec. 25:—*Queen-Empress v. Jadab Dass*, 4 C. W. N. 129; 27 Cal. 295. The words "take into consideration" in sec. 30 do not mean that the confession referred to is to have the force of sworn evidence:—*Queen-Empress v. Nirmal Das*, 22 All. 445. If a co-accused pleads guilty, he may be immediately convicted and sentenced, and his trial is then over. A confession by such person is not admissible under sec. 30, but he ought to be taken from the dock and examined as a witness:—*Queen-Empress v. Chinna*, 23 Mad. 151. If the plea is not accepted by the Court, and it nevertheless proceeds to try him, his confession is admissible:—*Queen-Empress v. Chinna*, following *Confirmation case* noted in *Empress v. Pakaji*, 19 Bom. 195. If after the plea, which the Court has accepted, he is still kept in the dock unconvicted, his confession is inadmissible:—*Empress v. Lakshmayya*, 22 Mad. 491:—*Empress v. Pakaji*.

Sec. 41 provides that the finding of a Civil Court is conclusive, and it is not open to a Criminal Court to find that the Will was a forgery. The finding of a Criminal Court is not binding on a Civil Court:—*Mangunali v. Empress*, 4 C. W. N. clxxvi.

The character of the accused not being a fact in issue in an offence under sec. 401, I. P. C., evidence of bad character or reputation is inadmissible:—*Mankuri Pussu v. Queen-Empress*, 27 Cal. 839.

The Judge misdirects the jury when he tells them that under sec. 103 the onus is on the accused



to show that the deed is genuine:—*Sadhu Sheik v. Empress*, 4 C. W. N. 576, following *Empress v. Dhunno Kazi*, 8 Cal. 121.

A bare finding of stolen property in the house of a joint Hindu family is not, under sec. 114, evidence of possession on the part of each of its members:—*Queen-Empress v. Nirmal Das*, 22 All. 445.

Mere presence of a person on the occasion of giving a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice; unless he has co-operated or was instrumental in the payment:—*Queen-Empress v. Deodhar Singh*, 27 Cal. 144. See on the point, 24 W. R. 55; 14 Bom. 115, 331; 17 Cal. 642; 21 Cal. 328; 2 C. W. N. 55, 672; 23 Cal. 361.

The rule as to the necessity of corroboration of an accomplice is also laid down in the case. In 21 Cal. 328 an informer was held not to be an accomplice, but his testimony nevertheless required corroboration. So also in 23 Cal. 86, certain persons were held to be no better than accomplices.

Sec. 167 applies to the High Court exercising powers under cl. 26 of the Letters Patent:—*Empress v. McGuire*, 4 C. W. N. 433; *R v. Nawaji*, 9 Bom. H. C. R. 358; *R v. Huribole*, 1 Cal. 207; *Empress v. Pitamber*, 2 Bom. 61; *Queen-Empress v. O'Hara*, 17 Cal. 642.

A person who is immediately after an acquittal examined to enable the Magistrate to act under sec. 190 (c), Cr. P. C., against other persons is not a witness under sec. 5 of the Oaths Act, and no oath can be administered to him:—*Hari Charan v. Queen-Empress*, 4 C. W. N. 249; 27 Cal. 455.

E. H. MONNIER.

(To be continued).

## English Notes.

COURT OF APPEAL.—SUN INSURANCE COMPANY, LIMITED AND OTHERS v. CARR. Before THE LORD CHANCELLOR, THE MASTER OF THE ROLLS, and LORD JUSTICE COLLINS. 1st November 1900.

Commercial Court—Transfer of cause—Right of appeal, sec. 19, Judicature Act, 1873—Question of International Law.

BARRY v. PERUVIAN CORPORATION, (1896, 1 Q. B. 208) approved of.

This was one of the actions arising out of the seizure of arms in the Persian Gulf in January 1898 by the Defendant Commander Carr of H. M. S. *Lapwing*. The Defendant had sought to justify the seizure under a proclamation of the Sultan of Muscat. The cause of Francis Times & Co. against him is still pending on appeal, on his part, to the House of Lords. The Plaintiffs in this action had failed in the action brought against them by Francis Times & Co. under a policy of Marine Assurance. In that action Francis Times & Co. had succeeded in recovering judgment for a total loss owing to the

confiscation of other portions of the arms by Commander Carr.

The action now brought was in consequence of the Plaintiffs, the Sun Insurance Company, failing in that action. They now sought to make the Defendant Carr liable to them for the amount so paid by them to Francis Times & Co. On their application Mr. Justice Mathew ordered the action to be transferred to the Commercial Court for adjudication.

On the arguments before the Court of Appeal, the appeal having been preferred on behalf of the Defendant, it was held, following the above quoted decision, that an appeal did lie and that the dispute between the parties raised serious questions of international law; therefore the transfer was not properly made.

The Attorney-General and Mr. Ackland for the Commander.

Mr. Joseph Walton, Q. C., and Mr. Hollams for the Plaintiff Company.

Appeal allowed.

C. W. A.

COURT OF APPEAL.—THE LONDON GENERAL OMNIBUS COMPANY v. LOVELL. Before the LORD CHIEF JUSTICE and JUSTICES RIGBY and WILLIAMS. 19th November 1900.

Judge viewing the thing in dispute and using impression derived in place of evidence.

This was an action by the Company to restrain the Defendant Lovell from running an omnibus so painted and lettered as to closely resemble the Plaintiff's omnibuses running ever the same course. No evidence was brought forward to prove that any one was deceived or misled by such resemblance into using the Defendant's vehicle as that of Plaintiff. Mr Justice Farwell had by consent of parties viewed the omnibus and had come to the conclusion that the Defendant's omnibus had been so got up as to deceive the public using the cars and therefore granted to Plaintiff the injunction they sought.

On Defendant's appeal, the Court of Appeal reversed that order. It was quite true that the Judge had power to inspect the thing concerning which the question was debated before him (Order 50, Rule 4) but a Judge had no right to place his impression derived from a view in the place of evidence. There may be cases of such common knowledge, so well known to the tribunal as no evidence would be necessary. The present case was not of that character, some evidence was necessary to justify the Court in coming to the conclusion beyond the mere view.

Mr. Davis, Q. C., and Mr. Boome for the Defendant.

Mr. Hughes, Q. C., and Mr. Wilkinson for the Company.

Appeal allowed.

C. W. A.

**COURT OF APPEAL.—MONTI v. BARNES.** Before THE MASTER OF THE ROLLS, LORDS JUSTICES COLLINS, and STIRLING. 27th November 1900.

*Furniture passing to mortgagee as fixtures.*

The claim was to recover certain fitments, fixtures, and effects of their value £287 and damages for their detention. The question arose between the mortgagor and mortgagee as to who was entitled to those articles in the mortgaged premises.

The Plaintiff purchased the mortgagor's equity of redemption in July 1893. The Defendant took a transfer of the original mortgagee's security in August 1890. In March 1898 the Defendant became owner in fee of the premises by foreclosure of mortgage.

Between the date of mortgage and its transfer to Defendant, the original mortgagor had caused considerable decorative improvements to be made to the house. The subject-matters of the present litigation were at that time added to the house. The most important item in dispute was called a "fitment" it was the necessary and usual dressing-room furniture and a mirror in the drawing-room. The dressing-room articles were specially made for the room, they were in several parts fastened together with nails and screws. The whole of them were fastened on to the walls of the rooms by battens, these again were nailed on to the walls and the fitment screwed on to them. The backs of the furniture were made up of the walls they were attached to; they had no backs of their own. The mirror was similarly fixed in, and covered up a large window. The Defendant counter-claimed for certain dog grates which were put in by the original mortgagor in the place of and as substitutes for the grates that were there fixed in when he became owner. Mr. Justice Bigham had by consent of parties sent in an expert to the premises to examine and report to him how these articles were fixed to the walls. Upon consideration of such report the learned Judge had held that the articles formed part of the premises and as such passed to the mortgagee, including the dog grates which stood in the place of the old fixed grates and so decided for Defendant.

On this appeal of the Plaintiff such decision was upheld. The Court came to the conclusion that there was evidence on which Mr. Justice Bigham could properly come to the conclusion he had arrived at. As regards the dog grates, in accepting the decision of the learned Judge, they refer to *Holland v. Hodgson* (1. L. R. 7 C. P., see p. 331).

Mr. H. Ried, Q. C., and Mr. Canutt in support of the Appeal.

Mr. Rufus Isaacs and Mr. McCarthy were not called on for the Respondent.

C. W. A.

*Appeal dismissed with costs.*

**COURT OF APPEAL.—RERCE v. HOWARD.** Before THE MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and ROMER. 6th March 1901.

*Contract—Inadequate award of damages by jury—Breach of warranty—New trial.*

In this case, Plaintiff who sought a new trial had bought a horse for £140 from the Defendant who had given a warranty that the horse was fit to go in single harness and a quiet animal.

The action was for recovery of the amount paid for the horse and expenses incurred, as the horse had turned out not fit for the purpose for which it was bought. The jury found that the warranty had been broken and gave £5 damages as a compromise verdict.

For the Defendant against the giving of a new trial, it was contended that the jury had every item before them and it was for them to decide on the amount of damages.

THE MASTER OF THE ROLLS.—"If I buy a horse for my wife to drive in, and the animal turns out no good for that very purpose that I bought him for, is not that the basis of the measure of damages I am entitled to, and not merely for the breach of warranty that the horse was quiet in single harness."

There was no reasonable ground on which the verdict of the jury could be supported, the jury had not been properly directed. The Plaintiff must be allowed a new trial.

Mr. Marshall Hall, K. C., and Mr. C. E. Jones for the Plaintiff.

Mr. Witt, K. C., and Sir John Paget for the Horse-dealer.

*Application granted.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

LORD HOBHOUSE.	} LAL JUGDISH BAHADUR, Plaintiff, Appellant, v. LAL SHEO PARTAB SINGH, Defendant, Respondent.
LORD DAVEY.	
LORD LINDLEY.	
SIR R. COUCH.	
1901.	
15, February.	

*Hindu Law—Inheritance—Impartible estate—Younger son by first wife—Elder son by later wife.*

Both Courts, that of the District Judge of Rai Bareilly and the Judicial Commissioners of Oudh, had dismissed Plaintiff's suit with costs. Hence this appeal to His Majesty in Council.

The suit was brought to recover possession of the entire Pawansi estate situated in the Partabghur,

District of Oudh. By the ruling of the Judicial Committee in Rani Janki Koer's case, it was decided (see L. R. 5 I. A., p. 1) that the estate created by *sanad* had vested in Thakurani Koblas Kunwar, the widow of Mahpal Singh, and on death of Koblas Kunwar to have descended to her daughter Rani Janki Kunwar under cl. xi, sec. 22, Act I of 1869. Koblas Koer's name was entered in lists I and II mentioned in sec. 8 of that Statute.

Rani Janki Kunwar died childless in December 1888, and the claimants to the estate were the present Appellant's great-grandfather Sitla Baksh who was the Plaintiff in the suit out of which this appeal has arisen and his elder brother the Respondent Shankar Baksh was the Defendant.

The Plaintiff and the Defendant were the sons of one Raghunath who was a distant cousin of Mahpal Singh, the father of Rani Janki Kunwar. Sitla Baksh was born of the first wife of Raghunath, while the Respondent, though born first, was born of the junior wife of Raghunath.

The Revenue authorities having recognized the claim of the Respondent, the first born son, the Appellant's great-grandfather Sitla Baksh had to establish his title which he sought to do by his present suit.

Upon the question which son should succeed according to Hindu law the Judicial Commissioner referred to the judgment of the Judicial Committee in *Padda Ramappa Nayaniwaru v. Bangari Seshamma Nayaniwaru* (L. R. 8 I. A., p. 1). In that case the same question which is now being considered was brought before the Lords of the Judicial Committee, who, referring to 122 Verse of Chap. 9 of Manu, gave their opinion, that if the text of Manu were read without the admittedly interpolated words "but of a lower class," Verses 122, 123 and 124 would undoubtedly give some support to the contention that the younger son of the first married wife was to be preferred to his elder brother, born of a later married wife. The interpolation having been then believed to be the work of so distinguished a commentator as Kalluka Bhatta, the Lords of the Judicial Committee were of opinion that it could not be disregarded, but that effect must be given to it; and they held that it limited the effect of Verses 122, 123 and 124 to the case of the later married wife being of a lower class, and that between sons of wives of the same class, no preference was to be given to the son of the earlier married wife by reason of such priority of marriage.

He held that the principle laid down in such case was binding upon him, though in the case before him it was admitted, and was accepted by him, that Sir William Jones was wrong in attributing the interpolation to Kalluka Bhatta, it being in fact the work of a commentator named Prakash. He then examined certain later commentators on this passage, and concluded this part of his judgment as follows:—

"As the correct translation of Verse 123 is doubt-

ful, and as Manu's own answer to the question propounded by him in Verse 123 cannot be clearly ascertained, it appears to me that the Appellant has failed to establish satisfactorily his contention by the texts quoted by him.

"I find, therefore, that by Hindu law, Sitla Baksh did not by virtue of being born of the first married wife, acquire seniority over his elder brother Shankar Baksh, the first-born son of his father, and that accordingly he was not under that law entitled to succeed to the impartible Pawansi estate in preference to his elder brother, the first born son."

As regards Plaintiff's claim to non-talukdari property the judgment states that these were not claimed as distinct from the talukdari property, or on any grounds other than those advanced in support of the claim to the taluka, and there was no evidence produced to show that such property followed a line of devolution distinct from the taluka, therefore he concurred with the lower Court that Plaintiff had made out no claim to such property.

Both Courts also found that the custom of succession alleged by Plaintiff had not been established.

*Mr. Branson* for Appellant contended that it being now admitted that the interpolated words in Sir William Jones's translation of Verse 122 of Chap. 9 of the Institutes of Manu are not supported by the authority of Kalluka Bhatta, the judgment in the case relied on by the Judicial Commissioners, which was based on the supposition that such gloss was the work of Kalluka Bhatta, was no longer to be considered as a binding authority.

*Mr. Branson* referred to Sarvadhikary Tagore Law Lectures, 1880, p. 221.

*Mr. Branson* also contended that it lay on the Defendant to prove that by custom the non-talukdari property was impartible and went with the taluka as such, as he did not do so such property was divisible.

LORD HOBHOUSE.—It is for you to show that the family custom does not apply to non-talukdari property.

*Mr. Branson* referred to 5 Mad. High Court Reports, p. 31, see p. 39; I. L. R. 17 Mad. 422, see p. 444.

Reference was also made to the case of *Dewan Ramhya Bahadur* (L. R. 17 I. A., p. 173).

*Mr. Mayne* and *Mr. Cowell* appeared for the Respondent and were heard only as regards the non-talukdari property.

*Mr. Mayne*.—That is a question of pleading, he should have raised that point in the first Court: see the case of *Sudaralingasawami* (L. R. 26 I. A., p. 55, end of p. 57).

*Judgment reserved.*

C. W. A.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

LORD HOBHOUSE.

LORD DAVEY.

LORD LINDLEY.

SIR RICHARD COUCH.

SIR FORD NORTH.

1901.

26, February.

ANNODA MOHUN RAI  
CHOWDHURY

BHUBAN MOHINI DEBI  
and another.

Purdanashin—*Mortgage deed.*

This was an appeal against a decision of the Calcutta High Court which in part reversed the decision of the Sub-Judge of Rungpore.

The suit was brought by the Appellant to enforce a mortgage executed by the executors of the late Mohesh Chunder Roy Chowdhury as regards his estate and by his widow Jagadishwari and his daughter Bhuban Mohini as regards separate properties granted to them by Mohesh Chunder. The original Court decreed in favour of Plaintiff as regards all the properties.

On appeal the High Court decided that Bhuban Mohini, a *purdanashin*, was not bound by the mortgage. They say in their judgment, "conceding that the deed was read over to her quickly, and we think that this was all that was done at the time of the execution, this falls far short of the explanation which is required in such cases, and we think it would be difficult for any one, much less an illiterate *purdanashin* lady to understand the full purport and effect of a deed of this description from hearing it rapidly read over, and from the mere fact of its being read over, it cannot be inferred that she understood it or knew that she was mortgaging her own property. It was not a simple mortgage by a person mortgaging her own property. It was a mortgage by persons purporting to act in different capacities and mortgaging different descriptions of properties. Possibly it may have been a very good and effective mortgage, so far as the executors were concerned; but Bhuban Mohini had nothing to do with the executorship or with the properties mortgaged by the executors. It would not have been difficult to persuade her that her signature was necessary or desirable to a deed which was being executed by her mother and husband, without any knowledge on her part that she was mortgaging her own property, or admitting a liability for debts for which they were alone liable. It is, we think, a case in which there should have been clear evidence of an explanation of the deed to Bhuban Mohini, in so far as it effected her interests as distinct from the interest of the other executants. There is really no evidence worth alluding to of any explanation to her, much less an explanation of that description, and we are very far from satisfied that she understood that she was mortgaging her property."

The deed on which the suit was brought was a consolidation of two previous deeds; the consideration for it is thus stated therein:—

Rs. a. p.

The amount due on the <i>ex parte</i> decree obtained by the Plaintiff on the strength of a mortgage bond for Rs. 8,000 executed by Jagadishwari and Sudarsan as executors under the Will of Mohesh Chunder Roy Chowdhury and also as guardian of the minor Kali Ranjan, and by Bhuban Mohini, Jagadishwari and Sudarsan themselves, on 3rd Assin 1294, vide Exs. V, XIII and XIII(a) ...	12,807	4	6
Money due on a bond executed in the same way by Jagadishwari, &c., in favour of Anund Mohun Chuckerbutty on 23rd Jeyt 1296 (Ex. 1) ...	13,000	0	0
Interest on ditto ...	3,877	13	6
Money advanced in cash ...	2,314	14	0

TOTAL ... 32,000 0 0

Mr. Asquith, K. C., Sir William Rattigan, K. C., and Mr. Mayne for the Appellant.

The Respondent was not represented.

LORD HOBHOUSE to Mr. Asquith.—You have to show that the deed was explained to this *purdanashin* lady. You admit that the onus lies on you.

Mr. Asquith.—Yes. The various deeds and the evidence was read and commented on.

LORD DAVEY.—It does not appear to have been explained to her that it did bind her private property.

Sir William Rattigan followed Mr. Asquith arguing that although the Respondent was a *purdanashin* she could not be considered a secluded woman, she understood business, managed her property, was familiar with zemindari work and had executed other deeds. He referred to the following decisions and commented on them:—

*Khatjia v. Ismail*, (I. L. R. 12 Mad. 380 at 384); *Dado Bibi v. Sami Pillai* (I. L. R. 18 Mad. 257); *Syud Fuzul Hossein v. Anjud Ali* (19 W. R., p. 523); *Asghar Ali v. Delroos Bunno Begum* (I. L. R. 3 Cal., p. 324); *Gresh Chunder Lahiri v. Musst. Bhagabathi Debi* (13 Moo. 419); *Lala Amarnath Sah v. Rani Achun Kuwar* (19 Indian Appeals 196); *Makomed Baksh Khan v. Hosseini Bibi* (15 Indian Appeals, p. 81, see p. 90); *Tulavideen Tewari v. Nawab Syed Ali Hossein* (1 Indian Appeals, p. 92, see p. 206).

Judgment reserved.

C. W. A.

## CALCUTTA HIGH COURT.

**[TESTAMENTARY AND INTESTATE JURISDICTION.]**

SALE, J. }  
1901. } In the goods of SHAFPOORJEE FRAMJEE  
9, March. } MERTHA, deceased.

*Letters of administration—Joint administration—Citations, issue of.*

This was an application by one of the daughters of the deceased for a grant of letters of administration to the estate and effects of the deceased. The deceased who was a Parsee died at Nausari in the territories of the Gaekwar of Baroda on the 9th of August 1900, leaving properties in British India, a portion of such properties being in the town of Calcutta. He died leaving him surviving a widow and two daughters by a predeceased wife. Both the daughters were married, the Petitioner residing with her husband at Calcutta and the other daughter residing with her husband at Mombassa in Africa. The deceased executed his last Will and Testament prior to his second marriage, and after his death his widow impeached the validity of the Will on the ground that the same was revoked by the subsequent marriage of the deceased. On the 24th November 1900 the widow for a consideration mentioned therein executed a release in favour of the applicant and her sister of all her right, title, share, inheritance and interest which she had against the estate and effects of the deceased and thereby renounced her right to administer the said estate. She also renounced her right to letters of administration by signing her consent at the foot of the applicant's petition.

Mr. Sinha for the applicant submitted that letters of administration could be granted to the Petitioner without issuing any citations. The Court at all times prefers a sole administration to a joint administration and acting upon this rule it grants administration *priori petenti*, i.e., to that next-of-kin or to that residuary legatee (where there are several) who first applies. See *Tristram and Coote's Probate Practice*, p. 209; *Cordeux v. Trisler* (4 Sw. & Tr. 51). The consent or renunciation of the other next-of-kin is not required, the superior diligence of the first applicant superseding all other claims. The other daughter resides out of the jurisdiction and cannot act without the prior consent of her husband. The delay in obtaining her consent or renunciation may cause damage to the estate. Besides, the present grant would not be irrevocable.

The Will became inoperative by the subsequent marriage, and letters of administration should be granted without issuing any citation on the executor named in the Will. See *In the goods of Elizabeth Graham* (L. R. 2 P. & D. 385).

SALE, J.—I think, following the English practice as shown in those cases, the order for letters of administration can go without issuing any citation.

Messrs. Fox & Mandul, Attorneys for the Applicant.  
S. R. D.

**[TESTAMENTARY AND INTESTATE JURISDICTION.]**

SUIT No. 4 OF 1901.

STANLEY, J. }  
1901. } In the goods of LUCHMEE NARAIN  
19, March. } BAGLA, deceased, RAMRICK DASS,  
v.  
MUSSAMUT BRIJCOOMARY.

*Application for letters of administration during the pendency of an application for probate—Application for allowing photograph of the Will to be taken.*

One Luchmee Narain Bagla died some time in March this year. After his death an application was made some days ago before the Hon'ble Mr. Justice Stanley on behalf of one Ramrick Dass, the sole executor named in the Will of the deceased, for grant of probate of the same. By the Will the deceased bequeathed a lakh of rupees for building and upkeep of a house to be called "*bhai brotherki mokam*" or a house to be used as the meeting place of Marwari gentlemen in connection with the subjects which affect them and a lakh of rupees for housing and providing for the maintenance of Brahmins and 2 lakhs and a half for building a school in his native village Chooroo in Bikanir and for maintaining the same in an efficient condition besides various other legacies. On that application, it having been pointed out to the Court that the widow of Bhagwan Dass Bagla, deceased, (whose adopted son the deceased was) had entered a caveat, His Lordship directed the Will to be proved in solemn form.

Then grounds were filed by the caveatrix contesting the Will on the ground of forgery, want of authority and so on.

The caveatrix now applied on notice to the other party that letters of administration may be granted to her as in a case of intestacy.

Mr. W. C. Bonnerjee for the Applicant.

The Advocate-General (The Hon'ble Mr. J. T. Woodroffe) and Messrs. Jackson, O'Kinealy and Garth opposed the application.

His Lordship directed that the application should be taken into consideration after the application for probate is disposed of, the day for which was with the consent of both the parties fixed for the 16th proximo.

Mr. W. C. Bonnerjee then applied that his client might be permitted to have the Will photographed, so that the persons well acquainted with the signature of the deceased who could not be brought to Court might see the same and say whether the signature was genuine or not. He further submitted that this was very often done in England and was done in the case of her client's husband's Will as well as in the Tarkeswar Mohun's case.

The Advocate-General said that he was not aware of any such practice in England and, so far as he was aware, no photograph was taken in the Tarkeswar case and about his client's late father's Will it was done with the consent of the parties. Here he

opposed the application as he thought that this course might lead to help the caveatrix to procure false evidence.

*Ordered*—That the applicant may be at liberty to have the Will photographed at such place and upon such notice and generally upon such terms as the Registrar might think best.

K. K. D.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 703 of 1897.

SALE, J. } BIDIYADHARI DASSEE  
1901. }  
22, March. } PRAN GOPAL KINSEN MOOKERJEE.

*Evidence Act (I of 1872), sec. 32, cl. 5—Horoscope, admissibility of—Statement as to age by a deceased relative.*

The question raised in this case was whether the Defendant was a minor at the date of the transaction in suit. In the course of the evidence for the Defendant, it was proved that at his *annaprasan* ceremony, the family astrologer, who was present, wrote out his astral name in the horoscope prepared by him, that the horoscope was thereupon made over to the father of the Defendant, who took it into the inner apartments and made it over to the mother saying "this is the horoscope of our son." It was further proved that on a subsequent occasion, when the Defendant was ill, the father took out the horoscope and consulted it. The astrologer who drew up the horoscope was, however, not called.

*Mr. Mitra* ( *Mr. Chakravarti* with him ) for the Defendant tendered the horoscope.

*Mr. O'Kinenly* ( *Mr. A. Chaudhuri* with him ) for the Plaintiff objected to the horoscope being admitted in evidence and referred to *Satis Chunder Mukhopadhyaya v. Mahendra Lal Patuk* (I. L. R. 17 Cal. 849.)

*Mr. Mitra* in reply referred to *Bepin Behary Deo v. Sreedam Chunder Dey* (I. L. R. 13 Cal. 42); *Ram Chandra Dutt v. Jogeswar Narain Deo* (I. L. R. 20 Cal. 758); *Dhummull Ram v. Chunder Ghose* (I. L. R. 24 Cal. 265), and Woodroffe's *Evidence Act*, p. 238.

The Court admitted the horoscope, not *qua* horoscope, but as a statement, under sec. 32, cl. 5, either of the family astrologer or a statement adopted by the father.

*Mr. A. H. Gillanders* for the Plaintiff.

*Mr. B. N. Bose* for the Defendant.

S. R. D.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER  
No. 220 of 1900.

GHOSE, J. } B. L. FRIZONI, Decree-holder, Appellant,  
STEVENS, J. }  
1901. }  
12, March. } RAJAH RAM NARAIN SINGH, Judgment-debtor, Respondent.

*Civil Procedure Code Act (XIX of 1882), sec. 583*

*—Assignment of decree—Appeal—Execution of decree—Assignee not made party to appeal—Remand—Suit, dismissal of—Refund of decretal amount by assignee.*

This was an appeal preferred on the 18th of June 1900 from an order of Babu Nepal Chunder Bose, Sub-Judge of Ranchi, dated the 7th April 1900, reversing an order of Babu Rajani Kant Mukerjee, Munsif of Hazaribagh, dated the 5th of December 1899.

One Luchman Ram obtained a decree for money against the father of Rajah Ram Narain Singh on the 19th of January 1897. On the 20th of January 1897 the interest of Luchman Ram in the decree was transferred by him to one Frizoni, the present Appellant. The Defendant preferred an appeal against Luchman Ram but did not make Frizoni a Respondent. On the 8th March 1897 Frizoni, as the assignee of the decree, applied for execution. The judgment-debtor objected to this and prayed for stay of execution; this prayer was refused and the judgment-debtor was referred to the Appellate Court. Execution was allowed to proceed and the judgment-debtor paid into Court the money covered by the decree on the 30th June 1897, and Frizoni withdrew the amount. On the 10th February 1898 the Appellate Court reversed the decree of the 1st Court and remanded the case, and on the 6th June 1898 the suit was dismissed. Notwithstanding the order of the execution Court stated above, the judgment-debtor made no application to the Appellate Court for stay of execution nor did he ask that Frizoni be added as a party Respondent to the appeal; the decree of the Appellate Court remanding the case for retrial was made in the absence of Frizoni, and the decree of the 1st Court after remand dismissing the suit was also made in his absence. The present application was then made by Rajah Ram Narain Singh under sec. 583, C. P. C., for execution of the decree of the Appellate Court, by which the decree of the 19th January 1897 was set aside and for getting back the money which Frizoni had withdrawn from Court. The Munsif rejected the application, and the Subordinate Judge, on appeal, reversed the order of the Munsif, and made an order directing Frizoni to pay the amount to Rajah Ram Narain Sing. From this order the present appeal was preferred.

*Held*—That sec. 583, C. P. C., can only apply to the parties to the appeal.

That the decree of the Appellate Court could not be executed against Frizoni, he being no party to the decree and not having derived any interest from the Plaintiff in the suit subsequent to such decree.

*Babu Joges Chandra De* for the Appellant.

*Babus Karuna Sindhu Mookerjee and Surendra Nath Ghosal* for the Respondent.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, APRIL 8, 1901.

[No. 20]

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### REPORTS (See Index.)

THE SOCIETY OF COMPARATIVE LEGISLATION, AMONG other valuable notes, in its journal publishes the following results as marking the progress in penology in the century which has just closed:—

- (1) The higher standard of prison construction and administration;
- (2) The improved *personnel* in prison management;
- (3) The recognition of labour as a disciplinary and reformatory agent;
- (4) The substitution of productive for unproductive labour and to a small degree required for unrequited labour;
- (5) An improvement in prison dietaries;
- (6) New and better principles of classification;
- (7) The substitution of a reformatory for a retributory system;
- (8) Probation, or conditional release for first offenders, with friendly surveillance;
- (9) The parole system of conditional liberation, found in its best form in the indeterminate sentence as an adjunct of a reformatory system and as a means for the protection of society;
- (10) The Bertillon system for the identification of prisoners;
- (11) The new attention given to the study of the criminal, his environment and history;
- (12) The separation of accidental from habitual criminals;
- (13) The abandonment of transportation;
- (14) The humane treatment of the criminal insane, the improvement in criminal procedure, more effective organisation

tion in relief and protective work and in the study of penological problems; and

- (15) The new emphasis laid upon preventive, instead of punitive or merely corrective, measures.

AMERICA TO WHICH THE WORLD IS INDEBTED FOR THE First Offenders Act and for other progressive ideas in the treatment of criminals, promises to further advance our knowledge of the prison population. We find from the pages of the same journal that the committee of the National Prison Association, United States, have recommended the establishment of prison laboratories and the employment of specialists for the scientific study of the prison population with reference to the practical needs of discipline, instruction and training of prisoners. The subject of research in such laboratories will be—

“Psychical: the mental, emotional, voluntary life-activities; measurements of sensation and other manifestations of mind through the body; and the hereditary factors. The tastes, ideas, knowledge, motives. Social: the domestic industrial neighbourhood, legal, political, and religious environment which have influenced the character and conduct. All these factors enter into every life and help to shape it, and no one of them taken alone is sufficient for an explanation.”

The committee state the utility of such a prison laboratory as

“It is useful for discipline: for the direction of aid to discharged prisoners; for the enlightenment of Legislatures, Courts, and authorities in Criminal Law and procedure. It promises to make important contributions to the various sciences of human life: to anatomy, physiology, anthropology, psychology, sociology. The prisons would thus be brought into contact with the great life of universities, and would assist millions of convicts throughout the world.”

It is little to be wondered that the American people, who have hitherto cared little for the vain-glory of war and conquest, should occupy themselves with questions that many a government at the present day have neither time or money, nor inclination, perhaps, to study. But it certainly strikes us as somewhat strange that even the Russian bureaucracy should feel any inclination and have money also to spare for reforms in its penal system. We are indebted to the Society's journal for the

following notice of the recent abolition of transportation in Russia:—

"The close of the century is signalised by a notable step taken by Russia abolishing deportation as a part of her penal system, with the exception of a small penal colony for political and habitual offenders. This is a step long contemplated by Russia, and now determined upon after the most positive evidence of the evils of deportation to Siberia. Russia is about to make provision in prisons for fourteen thousand more prisoners; and she has appropriated 3,520,000 dollars for the new buildings, which must be erected for the eight thousand who cannot be accommodated in existing prisons. This new step by Russia marks the practical abandonment of transportation by all civilised countries, with the exception of France, which still supports penal colonies; but the latter are secondary features of the French system."

IT IS MUCH TO BE REGRETTED THAT INSTEAD OF progressing with the times we are sometimes retrogressive in our legislation. The new Code of Criminal Procedure furnishes many an example in this direction. It is, however, rather strange, as Sir Raymond West remarks, in his contribution in the society's journal relating to the recent changes in Egypt, that the system of police surveillance, after it had got discredited in Egypt, should find place in the new Code of Criminal Procedure. Such powers to the police, says this eminent ex-judge of the Bombay High Court, gives them opportunity to blackmail and oppress the people. The mischief is, perhaps, aggravated by the resolution of the Bengal Government issued after the new Code came into operation, directing the police to exercise such supervision over prisoners even after their release. Such provisions of law make the taint of crime stick to a released prisoner and is an undoubted obstacle to his chances of reclamation or of his ever being able to earn an honest livelihood. We are at one with Sir Raymond West that such supervision should be limited to cases of reconviction and there too, opportunities should be given for finding sureties for good behaviour. The Government of India which has police-reform in view ought to take note of the following observations of Sir Raymond West on police supervision.

This is a matter that calls for the most careful treatment. The nightly roll-call of bad characters in Indian villages has been the means of preventing thousands of dacoities; and brigandage on the Egyptian scale of a few years ago called for a preventive measure of a similar kind. Police supervision, on the other hand, too often amongst Orientals, means police tyranny and blackmail. Few persons, except those who have had actual experience, realise the extremely debilitating effect of long confinement in gaol. It seems to produce an almost total atrophy of the organs of forethought, initiative, and persistence. Hence those who have served a long term, unless taken care of by friends, almost inevitably gravitate back again to confinement. Many become really happier in gaol than out of it—at least, when the work is light and the dietary liberal. Such men or women let loose find it very hard indeed to earn their living; they are in a measure morally disqualified for the task, which is not quite a light one for the ordinary labourer. The taint of crime excludes them from many an employment. Police surveillance may to such prove like the fascinating gaze of the serpent, leaving no practical

alternative to falling helpless into the open jaws of ruin. It is a rather strange coincidence that, while surveillance is found mischievous in Egypt, it should just have been introduced or restored in India by the new Code of Criminal Procedure. It was once proposed to limit surveillance to a term equal to that of the imprisonment awarded in the same case. It should be imposed only in cases of reconviction, and even in such cases should be alternative to finding sureties for good behaviour.

IN RECOMMENDING THE INTRODUCTION OF THE provisions of the First Offenders Act in Egypt, in preference to the suggestion of Lord Cromer for the wider application of the birch, Sir Raymond West, in an article in the Journal of the Society of Comparative Legislation, points out the advantages of the law which, though it now forms a part of our Criminal Code, is, to our great regret, seldom acted upon by our magistrates.

Here the example might be followed of the English First Offenders Act, which has worked with excellent effect. It has been imitated in India, and there is no obvious reason why it should not suit Egypt equally well. The first true consciousness in a parent of his responsibility for his child's moral guardianship is sometimes aroused by having to become answerable for producing him for punishment in case of a second delinquency. It is a wholesome tonic, which may be administered liberally in a disordered state of society without any fear of serious injury.

## CRIMINAL CASES OF 1900.

### IV.—OTHER ACTS.

It is doubtful whether a proceeding under the first part of sec. 2 and under sec. 3 of Act XIII of 1859 is a criminal proceeding. There is no offence committed:—*Averam Das v. Abdul Rahim*, 4 C. W. N. 201; 27 Cal. 131; *Re Ram Sarup*, 4 C. W. N. 253. Money not to be repaid till after the expiration of the agreement is a loan, and not money advanced on account of work to be performed:—*Tangi v. Hall*, 23 Mad. 203; *Queen-Empress v. Kandappa*, Weir 456, see also p. 455. As to money to be repaid out of wages, the Act applies:—*Queen-Empress v. Talukanam*, 7 Mad. 131.

In *Queen-Empress v. Sonai Mugh*, 27 Cal. 654, it was held that there was no jurisdiction in the High Court to hear appeals from the Chittagong Hill Tracts under Act XXII of 1860.

An open verandah is an "open place" within sec. 34 of Act V of 1861, as amended by Act VIII of 1895:—*Khan Baputi v. Bispati*, 4 C. W. N. xcii; 27 Cal. 655.

A Magistrate is not competent under sec. 22 of Act I of 1871 to pass a sentence of fine, but only an award of compensation:—*Bhagirathi v. Gangadhar*, 5 C. W. N. 32; 27 Cal. 992.

An order under sec. 54 of Act VII of 1878 must be simultaneous with the other punishment inflicted:—*Ainuddi v. Queen-Empress*, 27 Cal. 450.

Secs. 19, 20 of Act XI of 1878 are so interwoven that no offence can be committed under the



first paragraph of sec. 20, unless the offence in sec. 19 is also committed:—*Ahmed Hossein v. Queen-Empress*, 4 C. W. N. 750; 27 Cal. 692. A servant of a person exempted under sec. 27 sent to shoot birds for him is not liable under the Arms Act (*Queen-Empress v. Ganga Din*, 22 All. 118), nor a volunteer who is exempted generally (*Queen-Empress v. Luke*, 22 All. 323). A licensee is liable to punishment under sec. 22 for sale by manager, though the goods were not sold with his knowledge and consent (*Queen-Empress v. Tyab Ali*, 24 Bom. 423).

The expression "signing otherwise than as a witness" in sec. 61 of Act I of 1879 means the writing of a person's name by himself or by his authority with intent to authenticate a document as being that of the person whose name is so written. The word "person" in secs. 61, 64 includes a member of a trading partnership:—*Queen-Empress v. Khetter Mohan*, 4 C. W. N. 140; 27 Cal. 324. Sec. 29 of Sch. I contemplates an instrument contemporaneous with the advance and loan, and not a case of assignment by way of mortgage to secure a pre-existing debt:—*Queen-Empress v. Debendra*, 4 C. W. N. 524; 27 Cal. 587. The execution of a document which on its face requires to be and was unstamped is not within sec. 67 but under sec. 61:—*Queen-Empress v. Soma*, 23 Mad. 155.

The word "compartment" in sec. 110 of Act IX of 1890 means a completely partitioned division:—*In re Dadabhai*, 21 Bom. 293.

Copies of entries in the books of a Bank not a "Company" within sec. 2, cl. 1 of Act XVIII of 1891 are not admissible:—*Empress v. McGuire*, 4 C. W. N. 433.

A license under Act XII of 1896 in the name of one person does not, on his death before expiration of the period of license, descend to his heir and partner in business:—*Re Madho*, 22 All. 441.

If an order for detention in a Reformatory School in substitution for transportation or imprisonment is not properly passed, the High Court is not debarred by sec. 16 from altering or reversing such order:—*Queen-Empress v. Makimuddin*, 27 Cal. 133. An order under the Act, when the age of the offender is not found, is without jurisdiction (*Ibid*). The Appellate Court can pass an order under the Act in supersession of an order of imprisonment passed by a Magistrate but only when there is evidence, or after taking evidence as to age:—*Dy. Leg. Rem. v. Kopol*, 4 C. W. N. 225.

An arrest by the Excise Sub-Inspector in a jungle, when unaccompanied by the Police, of persons found illicitly distilling liquor is legal under sec. 39 of Act VII of 1878 (B. C.):—*In re Hriday*, 4 C. W. N. 245.

A "ferry" in Act III of 1884 (B. C.) means the exclusive right to carry passengers across the stream on payment of tolls:—*Government v. Senyat Ali*, 4 C. W. N. 348; 27 Cal. 317. An order of daily fine is illegal:—*Ram Krishna v. Mohendra*, 27 Cal.

565. See also 1 B. L. R. O. C. 41: 18 W. R. 49: 25 W. R. 6.

The jurisdiction of a Magistrate under sec. 3 of Act II of 1889 (B. C.) is ousted when a *bond fide* claim to a private fishery is shown:—*Sriram v. Dino*, 4 C. W. N. 247.

Under sec. 13 of Act I of 1892 (B. C.) a chowkidar is to assist private persons in making arrests and to report such arrests, but cannot receive persons after arrest by private persons or re-arrest them:—*Kolai v. Kalu*, 4 C. W. N. 252; 27 Cal. 366.

A dustbin is not part of the street within sec. 307 of Act I of 1884 (Mad.):—*Perumal v. Mun. Com.*, 23 Mad. 164. As to liability under bye-laws being affected by a subsequent Act, see *Parimanan v. Chairnan, etc.*, 23 Mad. 213.

An omission to perform the conditions of a license is not "doing any act in breach" of a condition:—*Queen-Empress v. Venkatasami*, 23 Mad. 220.

Under sec. 249 of Act III of 1888 (Bom.) the Municipality has no power to direct construction of urinals in a specified place:—*In re Khimji*, 24 Bom. 75. Sec. 381 relates to low ground not low-lying ground:—*Mun. Com. v. Hari*, 24 Bom. 125.

Where a Magistrate issues a warrant under sec. 46 of Act XV of 1883 (N.-W. P.) for arrears of municipal taxes, he acts in a ministerial capacity and has no jurisdiction to enquire whether arrears are due:—*Ellis v. Mun. Board*, 22 All. 111. As to the power of Boards in the N.-W. P. and Oudh to delegate, generally, their authority to make complaints in respect of municipal offences, see *Powell v. Mun. Board*, 22 All. 123.

E. H. MONNIER.

## English Notes.

CHANCERY DIVISION.—*HUNT v. LUCK, SAYER, SLATER AND HODGSON*. Before MR. JUSTICE FARWELL. 30th October 1900.

*Mortgagees - Notice of defect in title - Constructive notice - Enquiry.*

*BARNHART v. GREENSHIELDS* (9 Moore P. C. 18) followed.

The mortgagees in this case were Sayer, Slater and Hodgson. They claimed certain cottage property in Wimbledon under two conveyances from one Gilbert. Those cottages belonged to a Dr. Alfred Hunt, a medical practitioner of Hammersmith. Dr. Hunt in 1894 having had a serious palsytic seizure gave up his practice and with his wife the Plaintiff retired to Hastings. Here they became very friendly with a house agent called Gilbert. Dr. Hunt died in June 1898, and letters of administration with the Will annexed were granted to his widow, the Plaintiff. Gilbert died in the same year, and the Defendant Miss Luck, who was

a clerk in Gilbert's service, was appointed his executrix and residuary legatee and devisee. She made no defence to this action. The mortgagee Defendants alleged that in March 1896 Dr. Hunt had by deed gifted some of his cottages to Gilbert and in October conveyed the whole of his cottages to Gilbert for a consideration of £12,000. The mortgagees claimed for advances of £6,000 made to Gilbert on the security of those cottages. The Plaintiff, Mrs. Hunt, sought to have it declared that the said deeds of March and October 1896 were forgeries and assuming that her husband did sign them he was insane at the time.

The learned Judge on these questions of fact found against Plaintiff. A question of law was raised on her behalf. It was urged that assuming that the deeds were executed by Dr. Hunt and that at that time he was of sound disposing mind yet the mortgagees could not succeed for that they had constructive notice of a defect in Gilbert's title, because Woodhams, their agent, in his report on the property had ascertained that the tenants paid rent to a house agent called Woodrow, who, if Defendants had taken the trouble to enquire they would have discovered, was receiving same not for Gilbert but for Dr. Hunt.

This contention did not find favour with the learned Judge, who observes that the Courts are not now inclined to extend the doctrine of constructive trust. The law was stated in the above-named case of *Barnhart v. Greenshields*, it was not the duty of mortgagees to enquire to whom the tenants in occupation paid the rents. *Knight v. Bowger* (2 De G. & J. 421) rested on a different principle.

Action against mortgagees dismissed; as against Miss Luck the motion for judgment would stand over for the present.

*Mr. Upjohn, Q. C., and Mr. Webster* for the Plaintiff.

*Mr. Hughes, Q. C., Mr. R. Isaacs, Q. C., and Mr. Church* for the Mortgagees.

*Judgment for the Mortgagees.*

C. W. A.

QUEEN'S BENCH DIVISION.—*BAHAN v. WRIGHT AND OTHERS.* Before Mr. JUSTICE WILLS and a SPECIAL JURY. 1st November 1900.

*Libel—Reprinting a police-notice.*

This was an action for damages for libel by Armenag Bahan, a native of Smyrna, who has been a turf commission agent and book-maker in London for some years past. Mr. Bahan was at one time in partnership in a tobacco business with his brother Christopher. Since taking up his own present business, Mr. Bahan was earning £1,500 a year. He sued the Defendants, the printer and publisher of the leading journal, the *Times*, and its proprietor,

for libellous innuendo in the following paragraph which appeared in one of its issue:—

"The Metropolitan Police have published the following particulars—Wanted on a warrant for stealing pearls to the value of £5,000 and upwards (since recovered) Christopher Bahan (age and description then given). Until recently a member of the London County Council and candidate for Parliament in St. Georges-in-the-East, also a member of the National Liberal Club: mother resides at No. 1, Woodstock Road, Uxboof Road. Has a brother known as 'Darkey,' a book-maker well-known to the City Police, who frequents the Empire and Café Manico."

The latter portion and more particularly the words "well-known to the Police" were complained of.

The Defendants denied the innuendoes, said they were true in substance and in fact. The Defendants had refused to apologise, alleging that they had by no means exceeded their rights and privileges of a journalist.

The Plaintiff was examined at length, and complained that in consequence of such publication he had lost a large number of customers.

In the result the jury awarded Plaintiff £100 damages.

*Mr. Jelf, Q. C., and Mr. Warde* for the Plaintiff.

*Mr. McCall, Q. C., and Mr. Eldon Banks* for the Journal.

*Verdict for Plaintiff.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[ON APPEAL FROM THE ISLE OF MAN.

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1901.

13, March.

NELSON

v.

THE KING.

*Appeal from a jury trial.*

This application arose out of the Dumbell Banking Company's failure. The Petitioner was Mr. C. Banks Nelson, one of the Directors of that Company since 1884. He presented this petition from two convictions at two separate trials in the Deemsters Court in the Isle of Man. The first conviction was on an indictment charging him with being a party to the fraudulent falsification of the balance-sheet of the said Bank and with fraudulently securing overdrafts. The second indictment charged him with fraudulent misappropriation of the funds

and 'securities' of the Bank. He was sentenced to three years' imprisonment on the first conviction and to five years' on the second; the sentence to run concurrently.

The petition stated that Petitioner had been for many years a barrister and solicitor in that island and also was a J. P. and was possessed of ample means to meet his liabilities at the time of the overdrafts upon the Bank. He pleaded entire ignorance of banking business when he accepted the directorship, that he had signed the balance-sheet *bona fide*, believing the representations made by the manager of the Bank and accepting as correct the report of the auditors. The population of the Island was 60,000 including women and children, 10,000 persons were interested in the concerns of the Bank as depositors, shareholders, &c., and there were not many people in the island who were not involved in the Bank's affairs. The Petitioner had been constantly subjected to violent demonstrations against him, even at the trial and it was impossible for him to obtain an impartial and fair trial.

On the second indictment he was tried before a second jury. Petitioner contended that grave injustice was done to him by the ruling that evidence of his solvency at the time the moneys were obtained was irrelevant in the consideration of whether he had been guilty of fraud, but for which ruling he submitted he would have been acquitted; the jury had retired and were 6 hours in considering their verdict, and the law was again explained to them, and then were locked up until the following Monday to consider their verdict. There was a great demonstration against the jury not convicting him. On Monday they convicted him on the first count only with a recommendation to mercy.

After hearing *Mr. Lawson Walton, K. C.*, for the Petitioner, their Lordships granted leave to appeal on the second indictment, not the first.

C. W. A.

### PRIVY COUNCIL.

#### APPEAL FROM OUDH.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

LORD LINDLEY.

SIR RICHARD COUCH.  
1901.

Heard, 19, February.

Judgment, 9, March.

MUSST. JAFRI BEGUM and

TASSADDUK HUSAIN.

v.

SYED ALI RIZA under the  
guardianship of Mahomed  
Riza.

*Limitation Act (XV of 1877), Sch. II, Art. 91—Suit for declaration that portion of award invalid—Arbitrator, powers of—Devolution of estate, altering the—Partition.*

This was an appeal from a judgment of the Judicial Commissioners of Oudh modifying the decree of the District Judge of Sitapur.

The litigation relates to the property of one Syed Ashik Ali, a Shiah Mahomedan, who died on the 15th January 1885, leaving him surviving two widows Ajabunnissa and Najibunnissa and two daughters by the former, the Appellant Jafri Begum, and Abbasi Begum, the mother of the minor Respondent.

In or about 1881 Jafri Begum married the 2nd Appellant Tassadduk Husain, and three years later Abbasi Begum married the abovenamed Mahomed Riza.

At the time of Syed Ashik Ali's death Tassadduk was 25 years of age and Mahomed Riza 18 years of age. Upon the death of Ashik Ali questions arose regarding the rights of the various members of his family in and to his estate.

Special family custom was asserted and in order to ascertain amicably the rights of the respective claimants one Mahfuz Ali, the brother of Ashik Ali, deceased, was appointed arbitrator by mutual consent.

The reference was as follows:—

"As the deceased Syed Ashik Ali has on the 15th January 1885 departed this mortal world therefore we with our free will and consent appoint Syed Mahfuz Ali Sahib, Rais of Karba Pihani, Hurdai District, who is our elder and patron as umpire for the decision of the arrangement (or management) of the estate and adjustment of the dispute of the heirs of the deceased one with another."

The award provided—

That the two daughters should be absolute owners of the whole property in equal shares, that neither should have the right to partition her share.

That Tassadduk Husain should be the manager of the whole property and render half-yearly accounts to each of the daughters. The fifth clause of the award was in the following terms:—

5. That since the partition and sub-division of an integral estate belonging to a well-known gentleman, is calculated to lead to its ruin and destruction, the principle of partition should not be considered legal (i.e., eligible) in this estate, so that the constitution of the estate should continue as usual, and there may be no occasion for the mischief-monger to raise troubles.

The said award was presented to the Sub-Registrar of the District for registration on the said 19th January 1885, when, being of opinion that under sec. 88 of Act 3 of 1877, (the Indian Registration Act, 1877), which deals with documents executed by a public functionary, he was entitled to refer to the arbitrator for information respecting such document, and to require of him a description of the property according to the provision of sec. 21 of the Act, he sent the said award back to the arbitrator, calling upon him to specify the property dealt with by such award.

The said arbitrator, upon receipt of the said award,

drew up a list of the property which he had dealt with by his award.

Disputes soon after arose, Abbasi Begum's title being denied in the Revenue Courts, she was referred to a civil suit.

On the 22nd March 1890 she instituted the present suit, and on her death her son, the present Respondent, was put on the record as her representative.

By her plaint she claimed separate possession by partition of one-half share of the estate of Ashik Ali with mesne profits. She alleged that the whole 8 biswas, 5 biswanses recorded on Ashik Ali's name at the time of his death constituted a portion of his estate, and that 5 biswas thereof had never been gifted to Appellant. She also alleged that on 21st September 1883 Tassadduk Husain had from funds in his hands as manager purchased in his own name a share of the village Ludhai and she claimed one half of it.

The Defendants filed a very lengthy written statement, but the material pleas may be reduced to five.

- (1) That the suit was barred by limitation.
- (2) That by special family custom, the widows of the deceased excluded the daughters from inheritance.
- (3) That the Plaintiff could claim no title under the award, giving her a right to partition, and independent of the retention of Tassadduk Husain as manager.
- (4) That 5 biswas in Kukargoti constituted the separate property of Jafri Begum, and
- (5) That the share in Ludhai was acquired by Tassadduk Husain from his separate funds.

The District Judge fixed 18 issues raising these, and a number of collateral and immaterial questions. On a subsequent date he began the examination of the first witness Tassadduk Husain, and on the 20th April 1892 came to the conclusion that he would dispose of certain legal arguments, and postpone the determination of the amount of mesne profits till execution of the decree.

On the 21st April 1892, he delivered judgment, and decided that Plaintiff was entitled to a half share in the estate, that it was inadvisable to partition, that sufficient cause had not been shown to remove Tassadduk Husain from his position as manager, and decreed Plaintiff's one-half of the profits, the exact amount to be determined at the time of execution of the decree.

From this decree the Plaintiff alone appealed, and the Judicial Commissioners remanded the case for proper trial and determination of the other issues.

Further evidence was taken on remand, and on questions now material, the District Judge found

- (1) That the suit was not barred by limitation.
- (2) That the custom relied on by Defendants had not been established.
- (3) That the 5 biswas in dispute in Kukargoti had been given by Ashik Ali to Jafri Begum as dowry, but that the award in regard thereto

was not binding, because the arbitrator was *functus officio* at the time of expressing his opinion.

- (4) That Tassadduk Husain had purchased the share in Ludhai from his private funds.

After the receipt of these findings, the Judicial Commissioners passed final judgment. They confirmed the findings that the suit was not barred by limitation, and that the alleged custom had not been proved. They also agreed with the District Judge that the arbitrator had exceeded his powers in attempting to decide that Jafri Begum was the owner of 5 biswas in Kukargoti, but came to the conclusion that the gift of this property to Jafri Begum had not been established, and that Ludhai had been purchased from the profits of Ashik Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tassadduk Husain could be removed from the post of manager. In the result a decree for separate possession of one-half of the property in suit was passed in favour of the Plaintiff, together with mesne profits.

For the Appellant *Mr. Branson, inter alia*, contended that the suit, so far as it was to set aside an award, was barred by Art. 91 of the Indian Limitation Act having been acted upon more than three years before suit. That the proceedings of the Registrar did not affect or invalidate the award.

That the first Court was right in its finding as to Mouzah Ludhai, that under sec. 211, C. P. C., mesne profits could only be given by the decree until possession or until expiration of 3 years from the date of decree.

*Mr. Degruyther* for the Respondent supported the decision of the Judicial Court. He submitted that the opinion of the arbitrator after the return of the award to him by the Registrar was gratuitous, outside the reference to arbitration and was made when he was *functus officio*; so far as the award deals with specific interests it is good. He referred to the Transfer of Property Act, sec. 11.

In this case LORD LINDLEY delivered their Lordships' judgment and said their Lordships would humbly advise His Majesty to dismiss the appeal with costs.

The important portion of such judgment is as follows:—"As regarded the defence that the suit was barred by limitation of time their Lordships were of opinion that this suit was based on the award and was not a suit to set it aside. No doubt the Plaintiff contended that the fifth clause prohibiting partition was invalid, or, at any rate, was not binding on him, and that the arbitrator having made his award was then *functus officio* and had no jurisdiction to make the entry which he afterwards did make respecting the five biswa share of Kukargoti. But those contentions did not bring the case within Art. 91, Sch. 2 of the Indian Limitation Act, 1877. Under that Act a suit to cancel or set aside an award must be brought within three years

from the time when the facts entitling the Plaintiff to have it cancelled or set aside became known to him. It was obvious that that limitation had no application to the controversy respecting the five biswas of Kukargoti. A Plaintiff who contended that an arbitrator had no power to make an unauthorized addition to an award already made and sought to be enforced by him was not in any sense seeking to cancel or set aside the award neither did the contention that the fifth clause was *ultra vires* and invalid bring the case within the Act. The Plaintiff disputed the legal effect of that particular clause, but did not seek to cancel or set aside the award. On the contrary, he sought to enforce it so far as it was operative in point of law. As regarded the effect of the fifth clause their Lordships agreed with the Judicial Commissioner that it afforded no defence to the presentation. It might have bound the parties who agreed amongst themselves to abide by it. But as against the present Plaintiff the clause had no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan law in the absence of a special custom prevailing in the family. He had no power to make a property which was divisible by law indivisible for ever."

Mr. Branson, for the Appellant.

Mr. Degruyther for the Respondent.

*Appeal dismissed with costs.*

C. W. A.

## CALCUTTA HIGH COURT.

### TESTAMENTARY AND INTESTATE JURISDICTION.

SALE, J. } In the goods of SRIMATI GOLAP  
1901. } SUNDARI DASSI, deceased.  
25, March.]

*Probate and Administration Act (V of 1881), sec. 17—Succession Act (X of 1865), sec. 194—Renunciation by sole executor—Letters of administration with copy of Will, application for—Renunciation, withdrawal of, before actual grant to another party.*

The deceased was a woman of the town. She died leaving a Will whereof she expressly appointed her father Jogeswar Dass sole executor and *shebait* of certain Thakur established by her. She gave the income of her estate to the executor for life. The Will directed that on the death of the executor the foster daughter of the deceased Noni Bala Dassi should be the *shebait* of the Thakur.

In September last Noni Bala applied to the Vacation Judge for letters of administration to the estate of the deceased with a copy of her Will annexed alleging that the sole executor had by a letter, dated the 11th September last, renounced the executorship and had besides signed his consent at

foot of her petition which had been explained to him by an interpreter of the Court.

Pratt, J., who heard the application, ordered citation to issue to the Government solicitor and no order for grant to the Petitioner was then passed.

In November last Jogeswar Dass entered a caveat against the grant of letters of administration to Noni Bala and filed his affidavit in support alleging that he had not renounced the executorship, that facts had been misrepresented to him, that he had never signed the alleged letter of renunciation, and that he had not understood what he was consenting to in the petition of Noni Bala. He also filed an application for grant of probate to him and the usual affidavit as to assets.

Affidavits were filed on behalf of Noni Bala alleging that the renunciation was voluntary.

The matter now came on for argument on caveat.

Mr. B. Chuckeravarti (with him Mr. Garth).—The executor having renounced he cannot obtain probate. The question as to whether he renounced voluntarily cannot be decided on affidavits, and the matter should be tried on oral evidence.

Mr. A. Chaudhuri (with him Mr. O'Kinealy).—Assuming that there was no fraud and the renunciation was voluntary, still it was competent to his client to recall the renunciation and ask for probate before actual grant to any other party. This was the law in England and will govern the Courts here. See *In the goods of Robert Morant* (L. R. 3 P. & D. 151), *In the goods of Gill* (L. R. 3 P. & D. 113).

Held—Following the English law that the executor who has renounced may, before it has been recorded and actual grant made to any other party, ask that the renunciation be not given effect to and probate granted to him.

Probate was granted to the sole executor who was alleged to have renounced.

Messrs. T. H. Wilson & Co., Attorneys for the Executor.

Babu Manick Lal Seal, Attorney for Noni Bala Dassi.

S. C. M.

*Probate granted.*

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER  
Nos. 166 AND 167 OF 1899.

HILL, J. } MAHARAJA DURGA CHARAN LAHA  
BRETT, J. } and others, Defendants,  
1901. } Appellants,  
12, March. } v.  
HATEM MANDUL and others,  
Plaintiffs, Respondents.

Res judicata—Questions decided by Settlement Officer—Fair and equitable rent, determination of—Status of tenants, decision as to—Landlord and tenant, suit between on application by landlord—Bengal Tenancy Act (VIII of 1885), Ch. X—Decision of Settlement Officer, not contested.

These were two appeals preferred on the 9th May 1899 from an order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 9th March 1899, reversing an order of Babu Srigopal Chatterjee, Munsif of Baraset, dated the 24th September 1898.

The facts of these two cases are as follows:—

The Appellants are the zemindars of Taraf Chaurasi, Thana Howrah, and a survey of the lands of that estate was made under the provisions of the Bengal Tenancy Act. In the course of the proceedings, the Defendants-Appellants, the landlords, put in petitions to the Settlement Officer under sec. 104 of the Bengal Tenancy Act praying that he would under the 2nd clause of that section settle fair and equitable rents in respect of the lands held by the Plaintiffs-Respondents as tenants. Similar applications were made with regard to other tenants. The Settlement Officer held proceedings under the 2nd clause of sec. 104, Bengal Tenancy Act, and on the 6th August 1896 and the 25th July 1896 delivered his decisions in the cases affecting the Respondents in appeals Nos. 166 and 167, respectively. Notices were duly served on the Respondents in those cases, but that they did not offer any evidence. No appeals were preferred against the decisions in those cases.

The suits, out of which the present appeals arose, were filed by the Plaintiffs-Respondents in appeals Nos. 166 and 167 on the 11th November 1897 and the 17th January 1898, respectively. The claim in each case was substantially the same, *viz.*, to have the class of tenants to which the Plaintiff belonged determined, and the nature of his holding, *i.e.*, whether the rent was enhancible or not. In each case the Plaintiff claimed to be a permanent tenure holder holding lands within specified boundaries on a rent permanently fixed, which had been settled in gross and not according to any particular rate on the area of the land and which was not liable to enhancement. The correctness of the decision of the Settlement Officer in the case of each in the proceedings taken under the 2nd clause of sec. 104 of the Bengal Tenancy Act was impugned, and the relief prayed for in each was a declaration that the Plaintiff was a permanent tenure-holder and that his *jama* was not liable to enhancement, that the finding of the Settlement Officer was erroneous, *ultra vires* and void, and that it be set aside, and that it be declared that Plaintiff's rent was not liable to be enhanced notwithstanding that the land had been found on measurement to be a little more than that settled with him at the time of the original settlement.

The Settlement Officer found in the case of each of the Respondents that he was an occupancy raiyat and that the prevailing rate of rent was Re. 1 per local bigha, and in consequence of excess land held by them he fixed the fair and equitable rent for the Respondents in appeal No. 166 at Rs. 34-14-5

instead of Rs. 16-14-5-2 as admitted and the Respondent in appeal No. 167 at Rs. 33-7-2.

The Munsif dismissed both the suits holding that the questions of the settlement of fair and equitable rent and the status of the Plaintiffs had been decided by the Settlement Officer, that his decisions had the force of decrees and as they had become final the matters were *res judicata* between the parties. No allegation of fraud to invalidate the decisions of the Revenue officer was advanced.

The Subordinate Judge on appeal reversed the findings of the Munsif and remanded the suits for trial on the merits. He held that as there was no dispute as to the entries made in consequence of the decision of the Settlement Officer under sec. 104 of the Bengal Tenancy Act and as there was no decision by him of any such dispute under sec. 106 of the Act, and as the Settlement Officer had no power to settle the rents under sec. 112 of the Act, therefore his decision could not be held to bar the suits of the Plaintiffs or to make the matter in issue in these suits *res judicata* between the parties.

The Defendants preferred the present appeals against that order of the Subordinate Judge, and it was contended on their behalf that the Subordinate Judge entirely misconceived the nature of the proceedings before the Settlement Officer, and that he was wrong in holding that the decision of that officer did not operate as *res judicata*.

*Held*—That the proceedings having been taken under cl. 2 of sec. 104 of the Bengal Tenancy Act in consequence of applications made by the landlord for a settlement of the rent the decisions of the Settlement Officer had the effect of decrees and everything necessary to be decided for the purpose of arriving at the decisions in those cases must be held to have been decided in them:

That it being necessary to determine the status of the tenants in order to decide what was a fair and equitable rent, and that question as also the question as to the fair and equitable rent having been decided, they are now *res judicata* between the parties, and cannot be re-opened in the present suits. *The Secretary of State v. Nitai Singh*, (I. L. R. 23 Cal. 257) distinguished.

*Sir Griffith Evans* (with him *Babus Debendra Nath Ghose* and *Charu Chandra Ghose*) for the Appellants.  
*Babus Nilmadhab Bose* and *Shib Chandra Palit* for the Respondents.

*Appeals allowed:*

*Decrees of the first Court restored.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, APRIL 15, 1901.

[No. 21]

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### REPORTS (See Index.)

The constitution of the Division Courts, taking effect on and from Wednesday, the 10th April 1901, and until further orders, is as follows:—

**PRESIDENCY GROUP.**—The Hon'ble the Chief Justice, and Mr. Justice Banerjee.

**RAJSHAHYE GROUP.**—Mr. Justice Hill and Mr. Justice Brett.

**PATNA GROUP.**—Mr. Justice Rampini and Mr. Justice Gupta.

**BURDWAN GROUP.**—Mr. Justice Ghose and Mr. Justice Taylor.

**CRIMINAL BUSINESS.**—Mr. Justice Ameer Ali and Mr. Justice Pratt.

**PRIVY COUNCIL DEPARTMENT.**—The Hon'ble the Chief Justice and Mr. Justice Banerjee.

On the Original Side the arrangements will continue as before.

AT THE HEARING OF CIVIL RULE No. 2780 OF 1900, which came on before the learned Chief Justice and Mr. Justice Banerjee, the following question was raised, viz., "Whether a simple mortgagee is a person entitled to come in and have a sale held in execution of a rent decreée set aside under sec. 310A of the Code of Civil Procedure." In argument the case of *Nitya Nund Patra v. Hira Lal Karmakar* and another, reported in 5 C. W. N.

63, decided by Rampini and Wilkins, JJ., on the 22nd March 1900, was cited. In view of the decision in that case the learned Judges (the Chief Justice and Banerjee, J.) on the 8th of March last referred the question to a Full Bench for determination.

THE LATE MR. GLADSTONE'S INTENTION TO RESTRICT the powers of Courts of Record in taking proceedings in contempt, recently formed the subject-matter of a question in the House of Commons. The proposal of Mr. Gladstone alluded to, is one which was made on the 24th October 1882.

"I venture, he said, to intimate to the House that the law of Contempt of Court is a subject which has been brought much of late into the popular view, both on this side and the other side of the Channel, and the Government have it in contemplation—not during the present short sittings, but at the regular commencement of the next Session—they have it in contemplation—they hope at a very early period—to submit a measure dealing with the alteration of the present law."

The powers of the Court have in recent times undergone considerable limitations. The chief of these are that such powers should be "sparingly" used that, even then, "in the interest of justice." Mr. Justice Bruce refused to take notice of a personal attack on him in the newspaper press on the ground that he could afford to ignore it (2 C. W. N. cl). The power of Court to take proceedings in cases of contempt not committed in the presence of the Court or in a pending proceeding was discussed by the Judicial Committee in *McLeod's* case where Lord Morris held that committal for contempt for what is termed "scandalizing the Court itself" had practically become obsolete (3 C. W. N. cccxvi: s. c. 1899, A. C. 549) and also that a judge taking such proceedings without sufficient justification may be mulct in costs (3 C. W. N. cccxlv). No doubt last year, in the *Birmingham Daily Argus* case (*Queen v. Gray*) Russell, L. C. J., maintained that proceedings in contempt would lie for scandalizing the Court. But in the *Birmingham* case proceedings were taken because the article complained of was of such a "mischievous and vulgar character" that the "pressure of public necessity" required its repression. In this connection our articles in 3 C. W. N. cccxlii, and 4 C. W. N. cliv (154), may be referred to.

# BELGIAN EXECUTIVE AND JUDICIARY.

## SIPIDO CASE.

The Society of Comparative Legislation publishes in its journal a very interesting article on the "Legal Aspects of the Sipido Case" contributed by Dr. Speyer of the Brussels Bar. Sipido, it will be remembered, fired at the Prince of Wales at a railway station in Brussels in April last. The prisoner, who was a boy of fifteen, was tried for the offence according to the Belgian law. The boy, it would seem, had bought a revolver and cartridges worth only 3 fr. 50 c. in all, and shot at the Prince in pursuance of a bet of five francs against two taken with some other young fellows. The account of the trial, as given by Dr. Speyer, is remarkable as shewing to what extent the judicial tribunals in Belgium respect the laws of the country regardless of all questions of political expediency or diplomatic complications. This was a case which might have easily lead to political disruption with a powerful neighbour. But neither the Belgian judiciary nor the Government would interpose on such account and prevent the law from taking its usual course. Sipido was tried by a jury who found that he was guilty of attempting to commit a voluntary homicide and that his attempt was premeditated but that he had not acted with criminal discernment. The meaning of the last finding is, that being of immature age, he was not able to realize to the fullest extent the consequences of his act. Upon such finding the Court of Assizes in Belgium is bound to acquit an accused but may order the detention of such youthful offender in a reformatory till he is of mature age (21 years). The judges after acquittal, ordered Sipido's detention in a reformatory. But the law in Belgium, unlike the provision of the Indian Code, allows an appeal from such order and does not warrant the keeping of a youthful offender in custody pending such appeal. Sipido who had been in custody and to whom bail had been refused throughout the trial had to be released pending the appeal and the lad availed himself of this opportunity to cross the frontier. The Government in England made this a ground of complaint and public feeling there rose very high against the Belgian Government. The object of Dr. Speyer's article is to shew that the Government of Belgium could not interfere with the course of justice and that of all countries England should be the last to advise any such course. "Any attempt," says Dr. Speyer, "from within or without to coerce the Courts of Justice into acting against the law or their conscience is an attack on the rights and liberties of every single citizen, and as such must be resisted to the utmost." This is a principle long and lovingly cherished by the English people and the learned Doctor very appropriately cites the authority of historian Hume to remind them "that England's fleets, her power, her monarchy, her Parliament exist in reality for one object only: to maintain the liberty and the independence of the King's Bench."

It seems to us that Dr. Speyer has made out a clear case in vindication of the honour and credit of both the government and judiciary of Belgium.

After Sipido's appeal was rejected by the Court of Cassation he was traced to Paris. Persons under an order of detention in a reformatory are not contemplated under the extradition treaties. But the Belgian Government, being the guardian of youths under order of detention in a reformatory, claimed in *loco parentis* the custody of Sipido and the French Government agreeing, he was brought to Belgium, not as a fugitive criminal, but as a run away boy claimed by his father or his *locum tenens* and put into the reformatory. This not only removes any doubt as to the *bond fides* of the Belgian Government but entitles the government to respect of every civilized community for its regard for the law.

## Review.

CODE OF CRIMINAL PROCEDURE, *Sixth Edition, being the Third Edition of Act V of 1898.* By G. S. Henderson, M. A., *Bar-at-Law.* Weekly Notes, Printing Works and Thacker, Spink & Co., Calcutta, 1901. Price Rs. 16.

That in less than three years the author should have brought out a third edition of the Code of 1898 is in itself a remarkable proof of the demand of the work before us, and it is a demand that its merits may fairly claim. Of late years, at any rate, this book has steadily pushed its way to the first rank. The rapid exhaustion of the second edition and the no less rapid accumulation of decisions on the New Code, is ample justification for a third edition. The present edition includes cases selected from the Indian Law Reports series, the Calcutta Weekly Notes and the Punjab Records down to March 1891. The scheme and arrangement of this edition follows that of its predecessors, and is familiar to its readers. But we cannot help observing that the matter might have been more logically and systematically recast. Even if the notes had been re-arranged and classified, without any substantial alteration, under suitable headings, the work would have been without a rival in the field of law to which it relates. The notes are pretty full and the various Reports have been fairly drawn upon for that purpose. The cases from the Punjab Records, though seldom cited in the chartered High Courts, will prove useful to the Courts and practitioners of that province. A large number of cases has been collected from the Weekly Reporter, but we think a good many more might have aptly found a place in the work. Notwithstanding the practice in some quarters to disregard these decisions as "old cases," many of them embody valuable principles which no commentator of the new Code can afford to ignore. The new decisions reported since the last edition have been mostly incorporated in this edition, and this renders it quite up to date. As an example, we may refer to the



Full Bench rulings *In re Abdur Rahman*, 4 C. W. N. 656 : s. c. I. L. R. 27 Cal. 839, to the effect that sec. 537 cures defects under sec. 234, and to the still more recent case of *Empress v. Dwarka Nath Mondul*, 5 C. W. N. civi (106), that a Presidency Magistrate can revive a complaint dismissed by him without the order having been set aside by the High Court. Sec. 145 of the Code is of vital importance to many, specially in Bengal, and the policy or sense of the section is far from clear and its administration is sometimes positively mischievous and it is little to be wondered that a great number of the recent decisions come under this section. It is satisfactory to note that this section has been fully and carefully commented on. The same remark applies to the Appeal and Revision sections. The Index, which we have tested, includes almost the whole of the new matter added to the notes. On the whole we think that this edition will thoroughly maintain the position of its predecessors as the most reliable edition of the Code of 1898.

### English Notes.

**BANKRUPTCY COURT.**—WARD *v.* FRY. Before MR. JUSTICE WRIGHT. 12th November 1900.

*Trustee in bankruptcy—Money paid away by bankrupt after act of bankruptcy within three months—Sec. 48, Bankruptcy Act, 1883—Wagering contract—Right of trustee to recover.*

In this case Plaintiff, the trustee in bankruptcy of one Barratt, a trainer of horses, was suing to recover £500, which Barratt had paid away to the Defendant, a professional betting man. The date of the act of bankruptcy was 6th July 1899 and in due course Barratt was in the end of November 1899 adjudicated a bankrupt. About the end of July 1899 Barratt had paid away two sums of money amounting to £500 to Defendant. £200 were paid as the amount of a bet he had lost with the Defendant and £300 were deposited in respect of other bets with the Defendant. On condition that if Barratt lost those bets, which he did, the deposit was to belong to Defendant.

The question was whether Plaintiff's claim was good for the two sums which he claimed for distribution among Barratt's creditors. Defendant said that he had entered into the transactions in good faith, when he was not aware of any act of bankruptcy on the part of Barratt. That the transaction was a completed transaction previous to the receiving order and so he was entitled to retain the money.

The learned Judge now delivered a considered judgment, he held that it was settled law that there was no distinction in this respect between goods transferred by the bankrupt and monies paid away by him. The same principle applied.

It followed that subject to the proviso in the Bankruptcy Act regarding *bond fide* transactions, the trustee could sue the recipient from the bank-

rupt to recover same and in so doing he was not bound to show fraud against the recipient. *Wolverhampton Banking Co.* (14 Q. B. D. 32). The only protection Defendant could claim was under sec. 49 of the Bankruptcy Act, 1883, but even if within cl. (d) there was a "contract" or "dealing," it means a transaction having a contractual force involving a legal obligation, here the contract insisted on was an illegal one under 8 and 9 Vict., c. 109, sec. 18 being a wagering transaction and so null and void. The deposit of the £300 did not vary in any material respect from the ordinary payment of a bet. There was no valuable consideration for the change by which the £300 deposited became Defendant's property. The payment in effect was a voluntary one : *Manning v. Parcell* (7 D. M. & C. 55). The £500 were in truth paid for a debt not recoverable by law, the payment was without consideration. The Plaintiff must therefore succeed.

*Mr. Wallace, Q. C., and Mr. Hanvill for the Plaintiff.*

*Mr. Isaacs, Q. C., and Mr. Muir Mackenzie for the Defendant.*

C. W. A.

*Judgment for Plaintiff.*

**DIVORCE COURT.**—HAMILTON *v.* HAMILTON AND ASHBYNHAM. Before MR. JUSTICE GORELL BARNES. 18th March 1901.

*Proof of Australian divorce—Second marriage in India.*

The Petitioner and Co-respondent were members of the theatrical profession touring in India. The Respondent was the Petitioner's second wife whom the Petitioner married at Bombay. His first wife was an Australian lady, whom he married at Secunderabad, while he was stationed there as an officer in the Indian Army. After that marriage the husband and wife went to reside in New South Wales. While there the first wife obtained a divorce from Petitioner on the ground of his cruelty and intemperate habits. He then gave up his Australian domicile and at Bombay met and married his present wife the Respondent. While at Calcutta he discovered that his wife had been familiar with the Co-respondent, and subsequently the Respondent and Co-respondent were discovered passing as man and wife in other parts of India and ultimately at Clapham near London.

Evidence of the validity of the Australian divorce was given by a member of the English Bar also a member of New South Wales Bar, and the Indian marriage was proved by a certificate produced from the India Office.

*Mr. Bernard for the Petitioner.*

*Mr. Randolph for the Respondent.*

The learned Judge pronounced a decree nisi with custody of the child of the marriage to Petitioner.

C. W. A.

NOTE.—In the case of *Baillet v. Baillet*, heard on the 1st March before the same learned Judge where the parties, domiciled French subjects, were married at the Consulate-General

of France in London, a French Avocat gave evidence as to the validity of the marriage, and various authorities were referred to including Dicey's Conflict of Laws (1896), Hammeks' Marriage Laws (1887), *Re. v. Brampton*, 1808, 10 East's Reports, 282.

C. W. A.

**CHANCERY DIVISION.**—*RANDT GOLD MINING Co. v. WAINWRIGHT.* Before MR. JUSTICE KEKEWICH. 9th November 1900.

*Companies Act 1862—Interim injunction—Articles of association—Calls due on shares—Power to vote—Appointment of liquidator—Three-fourth majority.*

This matter came on by notice of motion; the Plaintiffs seeking to restrain the Defendant Cyril Frank Wainwright from acting as liquidator of the Plaintiff Company.

The Company was inaugurated on 5th July 1895 with a capital of £800,500 in £1 shares subsequently converted into 320,000 shares of 5 each. The bulk of the shares were issued upon which there was outstanding a small liability. On 30th July 1900, notice was given convening a meeting for the purpose of considering and if thought fit passing resolutions for the sale of the Company's undertaking to a new Company, also for voluntary winding up the Company.

This meeting was held on 8th August, the Chairman declared the resolutions carried; a poll was demanded and the meeting for that purpose was adjourned to 19th September. On that day the Chairman declared that for the resolution were recorded 90,057 votes against 71,080. Later on an extraordinary meeting was held for the purpose of winding up the Company voluntarily, at this meeting the Defendant was appointed liquidator. It appeared that among the votes counted were 41,600 held by the new Balkis Company, these shares had been forfeited for non-payment of calls by the original holders and had since been acquired by the new Balkis Company.

For Plaintiffs it was urged that having regard to Art. 67 of the Articles of Association the shares held by the new Balkis Company had no right to vote, because there were calls due on same. Also that the resolutions passed were bad for want of a  $\frac{3}{4}$ th majority.

The Defendant said there was no call due in respect of any shares in the hands of the new Balkis Company. The call was not made on them, but on the original holders on whose hands they were forfeited and that the  $\frac{3}{4}$ th majority was not essential. The learned Judge arrived at the conclusion that he must hold that under the circumstances sums of money in respect of the shares held by the new Balkis Company by purchase, were still due, and Plaintiffs' contention under the 67th article was sound and effect must be given to it by holding that such shares could not validly vote. An interim injunction would be granted prohibiting the Defendant, who was consequently not properly appointed liquidator, from acting as such.

*Mr. Renshaw, Q. C., and Mr. Clowson for the Company.*

*Mr. Sheldon for Mr. Wainwright.*

C. W. A.

*Interim injunction granted.*

**CHANCERY DIVISION.**—*In re THE ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY.* Before MR. JUSTICE WRIGHT. 14th November 1900.

*Compulsory Winding Act—Unpaid creditor petitioning, other creditors opposing—Consideration of his right to obtain such order—Right to wind up society not authorized by law.*

The above society was legally constituted in 1868, but it ceased to enjoy the full protection of the law in consequence of the repeal of the Building Society's Act, 1836. For some time the society was in a flourishing condition, but owing to the secretary having embezzled its monies the society became in an insolvent condition. With the solitary exception of the Petitioner all the other undisputed creditors agreed and accepted 12s. 6d. in the pound. That payment was made by the directors paying out of their own pockets some £800 in addition to what its assets realized. After paying the rest of the creditors there was sufficient in hand for the Petitioner. He would not take less than 15 in the pound and now applied for an order for compulsory winding up. It appeared that there had been a previous petition for the same purpose, which must have been known to Petitioner, but in which he did not join, but waited until the funds were distributed. The learned Judge in giving his judgment dismissing the petition remarks on the last-mentioned fact as one not disposing him to help the Petitioner. No probable case was shown, upon which he ought to act, that misfeasance proceedings against the directors would be productive of any good effect. There was no reason to suppose that there was any misconduct on their part. The law on the point was clear, that a petitioning creditor is almost entitled *ex debito justitiæ* to a winding up order, unless it can be shown that he will gain no benefit from it. (*In re Chapel House Colliery Co.*, 24 Ch. D. 259, and *In re Uruguay Central Railway Co.*, 11 Ch. D. 372). On the circumstances of this case the Court held that the Petitioner would gain no benefit from it. Upon the other point the Court said that the only act which justified the society's existence (the Building Society's Act, 1836) had been repealed and the status of the society in consequence was involved in great doubt. This society was formed in 1868 under the powers of that repealed statute and "formed" in the Companies Act, 1862; sec. 4 must mean formed and having its existence recognized under the provisions of another Act; upon both grounds Petitioner failed.

*Mr. Terrell, Q. C., and Mr. Waggatt for the Petitioner.*

*Mr. Swenfen Eady, Q. C., and Mr. Northcote for the Society.*

C. W. A.

*Petition dismissed without costs.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[RE-ARGUMENT OF THE APPEAL FROM  
THE MADRAS HIGH COURT.]

THE LORD CHANCELLOR.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR R. COUCH.

1901.

27, February.

VASUDEVA PAIDHI

KIFADANGA GARU,

Defendant, Appellant,

v.

MAGUNI (MAGAT) DEVAN

BAKSHI MAHAPATRUJULU,

Plaintiff, Respondent.

*Grant, personal or to a family—Presumption—Proof.*

The facts of this and the arguments at the previous hearing in November 1900 are to be found at p. lx of the present volume of the Weekly Notes. The case was now re-argued before the committee as above constituted.

During the course of Mr. Branson's statement of his case

SIR RICHARD COUCH referred him to *Gopee Krista Gossain v. Gungapersaud Gossain* (6 Moo. I. A., p. 53), as the leading case on the point, the real question being for whom was the gift intended; the form of the gift is of little importance. Can you make out that it was a personal gift?

LORD HOBHOUSE.—It seems to be a gift to Brahmins. It is a grant on a consideration, a re-clamation grant; the Raja got a rent.

Mr. Branson referred to 1 Select Reports (1794), p. 7.

LORD HOBHOUSE.—That was a case of an acquisition for money paid down at the time, 1 Sudder Decisions (1852), p. 111. Plaintiff in that case admitted himself out of Court.

SIR RICHARD COUCH.—In the present case it is admitted that they were a joint family.

Mr. Mayne.—And that they had joint property, Fulton's Reports (1843), see pp. 169, 171; 7 Bom. High Court Reports, p. 176; *Dharm Das Pandey's case* (3 Moo. I. A., p. 240), criterion is from what source the money comes.

LORD HOBHOUSE.—Treating the matter of the name which appears in the grant as a circumstance of small moment.

LORD MACNAGHTEN.—Yes, if the money comes from joint funds.

Mr. Branson also referred to 6 Moo. I. A. at p. 538.

LORD HOBHOUSE.—There is a case in the 19th Weekly Reporter at p. 231.

SIR RICHARD COUCH.—There is a case in the 6th W. R. at p. 69 which shews that property standing in one man's name is no index to his being the real owner.

THE LORD CHANCELLOR. — That is on the assumption that it was a joint estate.

LORD HOBHOUSE.—How do you begin your separate property here, is it not by the grant?

Mr. Branson.—Yes.

LORD DAVEY.—A joint member may hold separate property.

LORD HOBHOUSE. Is this a gift. If it is a gift it is wholly unexplained, you must prove that it is a gift personal to the donee. You have not shown that the donor the Raja was a friend, see Sir Thomas Strange.

SIR RICHARD COUCH referred to Golap Chunder Sarkar's book.

Mr. Branson. The presumption is that if one makes a gift to me he is a friend.

LORD HOBHOUSE.—Where property is acquired by no funds at all, what is the presumption?

Mr. Branson. There Plaintiff must prove that the grantee treated it as joint property. Presumption arises from acquisition. Here there was no use of joint funds.

Mr. Branson then referred to the evidence of possession and next submitted that certain documents which had been since discovered at the collector's office records conclusively proved that the grant was to his client alone. These documents the Madras High Court had wrongly refused to admit on application for a review.

Mr. Mayne for the Respondent submitted that those documents were forgeries, he relied on 3 Moo. I. A., p. 210, and 19 W. R., p. 231.

SIR R. COUCH.—There is a case to the same effect in 13th Moore.

Mr. Mayne.—To claim property as separate property the party who so claims it must show that it was acquired without any detriment to family property. In the case of a gift it is to be ascertained with what intention it was given and with what intention it was received. If you cannot get at that then it must be seen how it was treated and dealt with by the party to whom it was given.

Mitak., Ch. 1, sec. 4, treats of personal consideration consistent with the passage.

LORD HOBHOUSE read from Sir Thomas Strange, see also pp. 216 and 217.

6TH MARCH.

Mr. Branson, before Mr. Mayne resumed his argument, referred their Lordships to 1 Strange, p. 209 (Ed. 1830); *Pertab Singh v. Subans Lal* (1 Select Reports, p. 121 at p. 122-3); Strange, Vol. 2, p. 365-6 (Shrotrium); 3 Colebrook, para. 332 *cf. seq.*, sloka 345; Mitak., Ch. 1, see 4 sloka 384; Mayne last edition, see secs. 281, 288, 291.

Mr. Mayne, continuing referred to Manu, Ch. 9, 206; the Appellant must bring himself within that article, he must show that the grant was made under circumstances special to himself otherwise it is to be assumed that it was for the benefit of the family.

**LORD DAVEY.**—What if the origin of the property is not known?

**Mr. Mayne.**—This was a grant for benefitting Brahmins for the benefit of the grantor. The village is described as Agraharam—Manu, Ch. XI, para. 6.

**LORD HOBHOUSE.**—By that motive you suggest that the notion of a personal grant is got rid of.

**Mr. Mayne.**—Yes. He then went on to show that what was done after the grant was consistent with the gift to the family, common enjoyment and common liability going on until 1887. He referred to the receipts down to that year.

The criminal proceedings in 1888 show that for the first time Appellant asserted his possession.

**THE COURT.**—How is that evidence, moreover, it does not show when Appellant got possession.

**Mr. Mayne** referred to sec. 13, Evidence Act. He first asserted his right.

**LORD HOBHOUSE.**—Defendant does not show when he got possession.

**LORD DAVEY.**—There is a body of evidence that tenants paid rents to Appellant.

**Mr. Mayne.**—There is no documentary evidence. There is nothing to corroborate the raiyat's evidence, submits that should not be accepted.

**Mr. Branson** replied.

C. W. A.

*Judgment reserved.*

# PRIVY COUNCIL.

[APPEAL FROM OUDH]

**LORD HOBHOUSE.**

**LORD DAVEY.**

**LORD LINDLEY.**

**SIR R. COUCH.**

1901.

MUSSAMMAT AZIZUNNISSA

TASSADUK HUSAIN KHAN.

22, February.

*Maintenance—Value of appeal.*

This was an appeal from a decision of Mr. Bleunerhasset, the Judicial Commissioner of Oudh, which had reversed on second appeal the decisions of two lower Courts in Oudh, that of the Subordinate Judge of Rai Bareli and also of the District Judge of Rai Bareli.

The question involved in this suit was whether the Appellant was entitled to the declaration she sought that the right to receive Rs. 70 per month which Chhedu Khan, the Respondent's father, had obtained a decree for, ceased at his death.

Plaintiff is the grand-daughter of one Abdul Hakim Khan to whom one moiety of the Amanwan Talukdari estate belonged. Her interest was one-fourth in that estate. The other Defendant to the suit was Mahommed Said Khan, the talukdar of the 12 annas portion: he admitted Defendant-Respondent's right to receive the said allowance. Abdul Hakim Khan was the brother of Chhedu Khan, and uncle of the Respondent.

Chhedu Khan died on 20th December 1889, and

the Respondent had since received the said annuity and was in receipt of it when this suit was instituted.

The ownership of the whole estate Amanwan before the eight-anna share of it came to Abdul Hakim Khan, was with one Aladad Khan; he had two daughters, one of whom married Abdul Hakim Khan, and the other one married Saadat Khan, and these two sons-in-law became, in right of their wives, the owners of one moiety each of the estate.

During the rebellion these two brothers were in confinement, when by means of Respondent's exertions with the rebel Government, they were released. They had been taken prisoners by one Raja Jagpal Singh, the talukdar of Tiloi.

By way of return for such services, on the 31st January 1858 (15th Jamadi-us-Sani 1274 Hijri), Abdul Hakim Khan executed an agreement which covenanted that in consideration of the services rendered, "I shall have no objection to the giving of my brother's half share in the estate, when I get into possession of the estate, rather, at the time of the execution of the lease, I, the declarant, shall myself get the name of the said brother entered therein conjointly with my own."

In addition to the above agreement, there was a special contract made before Major Orr, Deputy Commissioner, attested by him, and signed by Abdul Hakim Khan and Saadat Khan, they stipulating that the names of Chhedu Khan, brother of Abdul Hakim Khan, and of one Shujaat Khan, brother of Saadat Khan, should be entered in the Khewat.

Considerable litigation took place between Chhedu Khan and his brother Abdul Hakim Khan, in 1860, 1863 and 1868, Chhedu Khan claiming a moiety of Abdul Hakim Khan's share for himself and his heirs for ever.

On the 5th August 1863 Major Macandrew, the Deputy Commissioner, decreed to Chhedu Khan Rs. 70 per month from the date Abdul Hakim Khan entered into possession of the Amanwan estate chargeable against the Defendant's share.

Abdul Hakim Khan appealed to the Commissioner, Col. Barrow. He referred the matter to arbitrators; certain talukdars met by consent of parties and addressed the following award to Col. Barrow.

"Under your orders this case was committed to us for disposal. Accordingly we having summoned both the parties, and enquired into the case took from them a deed of agreement to abide by our award. After having taken the deed of agreement, we decide as follows:—

"That from 1871 F. Abdul Hakim should always pay to Chhedu Khan Rs. 70 per mensem, and that the latter should give up his claim in respect of previous years, and should realise from Abdul Hakim Khan Rs. 70 every month.

"Parties being present, our decision stated above was read over to them. Chhedu Khan accepted it but Abdul Hakim Khan did not.

"The arbitration award, together with the deed of agreement, is submitted to you for orders.

"Moreover (we hold) that Chhedu Khan should always remain obedient to Abdul Hakim Khan."

Thereupon Col. Barrow passed the following order:—

"In every way Abdul Hakim's obligation to provide for his brother is proved and it has been likewise acknowledged by public opinion, for a former *punchayet* awarded, in September 1859, that he should pay Rs. 400 per annum. They did not consider the deed marked B a valid one, but still they decreed the money payment. Mr. Capper in the Revenue Court and Colonel Macandrew in the Civil Court have decreed Rs. 70 per mensem as the sum that should be paid monthly by Abdul Hakim to Chhedu Khan, and now these talukdars without the remotest interest in the matter have fixed on the same amount. They have remitted the arrears, and all things considered, I do not conceive a better decision can be come to. I uphold then the decision of the lower Court awarding Rs. 70 (seventy rupees) a month to Chhedu Khan to be paid by Abdul Hakim, but reverse so much of the decree as awards arrears of instalments."

Such allowance having been continued as aforesaid to Chhedu Khan's son. The present suit was instituted by the Appellant, she having succeeded in two Courts, but ultimately her suit being dismissed by the said Judicial Commissioner, she now appealed to His Majesty in Council.

Mr. Degruyther for the Appellant relied on the arbitration award urging that the right to receive payment was limited to the life of Chhedu Khan and pointed to various misstatements in the Judicial Commissioner's judgment. He referred to (L. R. 12 I. A., p. 163 and to L. R. 12 I. A., p. 214.)

Mr. C. W. Arathoon first raised a preliminary objection to the appeal, urging that as the Appellant's right to the annuity was to one-fourth of the sum of Rs. 70 a month, the Judicial Commissioner under sec. 596 could not give leave to appeal the amount in appeal between the parties to the suit being under the appealable value.

LORD LINDLEY.—But the decision would govern the whole annuity.

Mr. Arathoon.—The Appellant is not interested in the Respondent's right to get the three-fourth from her co-sharer owning the three quarters of the taluk, who moreover has admitted Respondent's right. Chhedu Khan's claim against Abdul Hakim Khan was to half the estate and a claim based on a contract, not a maintenance claim granted out of favour. The obligation Col. Barrow referred to was a legal obligation. Mr. Arathoon referred to the earlier proceedings.

Mr. Degruyther was not called on to reply.

On March 9th Sir Richard Couch delivered their Lordships' judgment advising His Majesty to allow the appeal with costs. The judgment refers to the two cases cited by Mr. Degruyther and concludes as follows:—

Their Lordships did not see in the circumstances

under which the award was made any of which would enable them to pronounce that the Rs. 70 a month were to be paid after the death of Chhedu Khan. The last line of the award seemed to indicate that it was for him personally. If Chhedu had any title to a share in the taluk before the Government took possession of it in 1858, he had none after the *sanaal* which was granted by the Government, as his name was not in it. That was noticed by the Commissioner in the judgment he gave before the reference to the arbitrators. Chhedu's right was only under the agreement, and the Commissioner concluded his judgment by saying that the issue was reduced to "what consideration is Chhedu Khan entitled to in consequence of Abdul Hakim's promises and agreements with him?" The arbitrators said in the award that they had inquired into the case, and they might have considered that justice would be done by giving to Chhedu the Rs. 70 per month for his life, that being a sufficient reward for his services in obtaining the release of Abdul Hakim and Saadat from prison."

C. W. A.

*Appeal allowed with costs.*

## PRIVY COUNCIL.

[APPEAL FROM THE PUNJAB.]

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1901.

February.

AHMAD YAR KHAN and  
others,

THE SECRETARY OF STATE  
FOR INDIA and another.

*Grant—Construction.*

This was an appeal from a decision of the Chief Court of the Punjab of 24th January 1898 confirming that of the Divisional Judge of Lahore by which the Plaintiffs-Appellants' claim to proprietary right in the Hajiwah canal 50 miles long in the district of Multan was rejected.

The canal was excavated by the Plaintiffs' grandfather Ghulam Mustafa Khan and their father Ghulam Kadir Khan by permission obtained from the Commissioner of the district in the year 1861 at a cost of about 9 lakhs of rupees expended by the said ancestors of the Plaintiffs, and remained in their possession until 10th December 1888.

It passed in its course from the Sutlej river through many villages owned by persons not parties to this suit, whose consent Plaintiffs' ancestors had obtained under agreements to supply them with water.

The Government waste lands of over 60,000 acres which were farmed by Plaintiffs and others were incapable of cultivation for want of water. The canal terminated in waste lands cultivated by the Plaintiffs' said grandfather, and it was admitted that Government very largely benefited by such undertaking. Farms of waste lands were limited to the period of the existing settlement. In considering the course to be adopted in the new settlement, proposals were

made for a lease to Plaintiffs' father of a large tract. After much correspondence these negotiations ended in the Viceroy sanctioning in proprietary right a grant of 60,000 acres to Plaintiffs' father in December 1879. In the settlement records the canal was entered as the property of Plaintiffs said father.

A formal deed was executed on 26th March 1886 after suggestions from Plaintiffs' father that certain of its terms should be amended which was not agreed to. The Chief Secretary to the Punjab Government signed it for the Respondents: Plaintiffs' father signed it on his own behalf.

Upon the death of Plaintiffs' said father disputes arose among his four sons, the Plaintiffs-Appellants being the three younger sons: owing to such quarrel, Government officials took over possession and management of the canal first temporarily then permanently on 27th February 1890.

Plaintiffs then instituted this suit claiming proprietary right in the canal for an account, injunctions and other reliefs.

Defendants denied the Plaintiffs' right to the canal outside the 60,000 acres grant, and relied on the said agreement. The 8th clause was follows:—

"The canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee. Provided always that in consideration of the premises the said grantor, his successor and assigns shall at all times hereafter whenever he or they shall think necessary be entitled without the consent of or permission from the said grantee, his heirs, legal representatives and assigns, to take into his or their own hands and control the management and distribution of the water of the said canal without payment of any compensation whatsoever, and further to clear the said canal and recover the cost of clearance and management by a canal rate to be levied on the area irrigated."

The main question for determination in this suit were the rights of the Plaintiffs in the canal prior and subsequent to the deed of the 20th March 1886, the finding on the latter question involved the legal construction of that deed.

On the 7th June 1895, the Divisional Judge delivered judgment, and found

- I. That prior to the 20th March 1886, Plaintiffs had no legal rights in the Hajiwah canal as soon as the lease of the *bar barani* lands terminated any rights they may have had terminated also.
- II. That the proprietary rights were in the hands of the Government, who did not confer them on Ghulam Kadir by the *sanad* of 1886, and that Ghulam Kadir by accepting the *sanad* after the Financial Commissioner's reply to his petition of the 7th July 1885, "accepted the position, and admitted that there were no further rights beyond those detailed in the *sanad*, and that outside the grant he had no proprietary right," and waived all

claims in consideration of the gift of the land.

111. That on the true construction of paragraph 8 of the *sanad*, the Defendant 1 was "entitled to take into his own hands through his subordinate officers, at his pleasure, all the powers which were exercisable by the Plaintiffs in the Hajiwah canal," and dismissed the suit with costs.

An appeal to the Chief Court of the Punjab was also dismissed on the 24th January 1898. The Judges of that Court held:

- (1) That by the sanction originally given to construct a canal, all that was granted to Ghulam Mustafa Khan was permission to make a canal for the purposes of his lease, and that in the event of that lease not being renewed on its expiry his rights in the canal would lapse with the lease.
- (2) That the position taken up by Government in the letter of the 17th November 1890, was consistent with the deed of 1886 and with the letter of the Financial Commissioner of the 3rd August 1885, and that Ghulam Kadir Khan's signature of the deed without amendment establishes the intention of the parties to have been as now contended for by the Government.
- (3) That the Plaintiffs were not entitled to any relief even with regard to such rights as they were now admitted by Defendant to possess.

It was submitted that having regard to the enormous expense incurred by the Plaintiffs' grandfather and father in constructing the canal in question, amounting to 9 lakhs of rupees, and to the rights in the land of the canal and the water conveyed in the canal previous to the grant, to the arrangements made with several proprietors of the villages over whose land the canal passes, it is unreasonable to suppose that Plaintiffs could have intended by clause 8 of the deed in question to concede to the Government the power at its will to deprive them of those valuable rights merely in consideration of the grant of waste lands, which might at any time be rendered valueless by the Government assuming the exercise of this power and fixing a water rate which might leave the Plaintiffs no margin of profit. The title of the Government was questioned on behalf of the Appellants as regards the canal.

Mr. Mayne, Mr. C. W. Arathoon, Mr. Degruyther and Mr. A. K. Khan for the Appellants.

Mr. Arthur Cohen, K. C., and Mr. Branson for the Respondent.

The case was argued on 20th, 21st February and on the 6th March, and judgment was reserved.

*Judgment reserved.*

C. W. A.

# THE Calcutta Weekly Notes.

Vol. V.]

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[No. 22

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VERY UNUSUAL PROCEDURE SEEMS TO HAVE BEEN adopted by the High Court in the case of *Empress v. Sadak Ali and others*, popularly known as the Noakhally murder case. We have not been able to find any precedent for remanding a capital sentence case for retrial by the Court below when the High Court had a complete record and considered the whole of the evidence before it. The order of remand is all the more remarkable as it has reference to only one of several co-accused whose offence arises out of one and the same transaction, and the evidence on record has a bearing on the whole case. We could have understood the order if the remand had been under sec. 375 of the Code of Criminal Procedure for the purpose of further enquiry or for taking additional evidence. No doubt, sec. 376 gives the High Court the power to order a new trial on the same charge. But if a retrial was ordered under that section it is a matter of ordinary judicial fairness that the remanding Court should not comment on the evidence or express any opinion as to the credibility of any particular witness or witnesses.

If it is not tolerated by the law that publicists should make any comments on a pending case lest there should be prejudice in the trial, on what principle is it to be justified that an Appellate Court should remand a case for retrial with findings as to who is to be relied on, and who not, and what inferences arise from the evidence recorded in the previous trial. It is manifestly placing a subordinate Court and the assessors, in an almost impossible position, namely, to arrive at any independent finding.

The order and directions of the remanding Court transgress the fundamental principles of judicial trial in another respect. A very material issue in the case is whether the Police had placed obstacles in the way of a proper judicial enquiry into it and whether a certain police-officer had perjured himself during the trial and attempted to pass off a certain forged document as genuine. We cannot comprehend how a Court not finally disposing of the case but remanding it, as against the principal accused, for a new trial, can record any finding with regard to such issues. Still this is what the learned judges have done. This seems all the more unfortunate as certain Rules in connection with those issues are still pending before the same Court.

The Court has thus in sending the case for retrial, not only anticipated the functions of the lower Court, but has also rendered itself incompetent to sit as an Appellate Court in any proceedings connected with this case. We have every confidence that the learned Chief Justice will take steps to ensure a proper judicial enquiry into the whole case rather than allow this remand judgment to throttle it, so far at least as the conduct of the Police is concerned. The proper course for the High Court in this case, in our humble opinion, would have been to maintain a judicial unconcern with regard to the irrelevant matters in the Sessions Judge's judgment until the hearing and then, after censuring Mr. Pennell for the impropriety of his language and for the introduction of irrelevant matters in his judgment, to proceed to dispose of the whole case on the record before it or to remand the same for retrial on the ground of bias of the judge or prejudice to the accused, if their Lordships were of that opinion.

The following extract from remand judgment shows clearly that their Lordships were not altogether unconscious of the possibility of influencing the lower Court upon the retrial :—

"In view of the course which we propose to take, so far as Sadak is concerned, we do not wish to express, nor would it be expedient or right that we should express any opinion on the facts to which we have referred. But we think we are entitled to explain the conclusion to which the general evidence has led us as to the time when and the circumstances under which this crime appears to have been committed, &c., &c."

We see no justification for what follows and hardly any for what precedes the above. The truth or otherwise of the whole case will have to be decided by the Court below, on what their Lordships call "the general evidence," and it does not seem right for their Lordships not only to pass on their own conjectures on a subordinate Court, but also to detach portions of this "general evidence" and mark out particular exhibits and stamp them as true or untrue. It is indeed very hard on the accused to be sent for retrial before a subordinate Court with the suggestions of a superior Court as to how and what he may be found guilty of. Had anything similar been done, at any other time, by any lower Court their Lordships would surely have quashed the judgment.

We commend the following portion of the judgment in the above case as laying down a very wholesome rule for the guidance of judicial officers.

"We desire to lay down emphatically for the information of the subordinate judiciary, that in a criminal trial there is one issue and one issue only for the determination of the Court, *viz.*, the guilt or innocence of the person or persons accused. The high position of a judge, and the immunity with which the law surrounds his office and utterances, are based on the assumption that he forms his judgment upon a calm and dispassionate consideration of the facts before him, and gives expression to his views in a judicial spirit without importing into it personal feeling or personal bias. It would be intolerable if a judgment was to be made the vehicle for giving vent to individual grievances or personal animosity, or for the purpose of posing as a champion of public liberty. The introduction upon the record, against all rules of law and principles of evidence, of documents which have not the faintest bearing on or connection with the case which the Sessions Judge was trying, with the plain object of enabling him to ventilate his own grievances, real or fancied, and delivering a homily to the public upon the general wrong-doing of high-placed officials, has made a travesty of justice. The judgment in this case, in my opinion, and I say this with extreme regret, infringes every canon of judicial decorum and judicial propriety."

WE PROPOSED RESERVING OUR COMMENTS ON THE decision of the Judicial Committee in the case of *Kalidas Mukerjee v. The East Indian Railway Company* [2 C. W. N. 609 : 3 C. W. N. 781 : 5 C. W. N. cxxxii (131)] till we could report it *in extenso*. But having regard to the fact that our contemporaries in England are expressing an unqualified approval of the Privy Council view of the case, it is necessary to

point out that the Judicial Committee have, according to our view, misconceived the case altogether. It is a practice with the Judicial Committee not to disturb the findings of facts of the lower Courts except under exceptional circumstances. But in this case their Lordships have apparently departed from that rule, and overruled the findings of the High Court on grounds, which have, to say the least, caused considerable surprise in India. The Lord Chancellor observes in his judgment that charcoal stoves are provided in third class railway compartments in this country for the convenience of passengers. This statement alone was sufficient for his Lordship's judgment being received with ridicule in India. The evidence upon which his Lordship has made that statement has been wholly misunderstood. No less remarkable is his Lordship's statement that bombs which are exploded in this country on festive occasions are of the size of cricket balls as also his findings that a consignment of fireworks intended for a Hindu marriage and accompanied by two men could be carried as small parcels or concealed in tin boxes or canvas bags, giving them the appearance of the usual personal luggage of third class passengers. It is in evidence that the consignment contained rockets, and it did not suggest to the Lord Chancellor that Indian rockets with three feet or more of their brittle tail made of jute sticks or split bamboos, were difficult to conceal. It will excite no less surprise that the English Lord Chancellor implicitly relied on the expert evidence that six of these bombs of the size of "cricket balls" and concealed as a small parcel caused all the havoc that the explosion, in this case, did. Expert evidence is generally at a considerable discount now-a-days and the judicial estimate of such evidence which we often get from across the seas also confirms this view. In this case the expert evidence was such that neither counsel or judge in this country ever considered it worth while to discuss it seriously. There was substantive evidence as to quantity of fireworks carried and the evidence given by the expert in this case as opposed to it was altogether laughable. It is well known that fireworks intended for marriage festivities are of a miscellaneous kind and ordinarily they are carried in large baskets. The explosion and its result abundantly showed that there must have been a very large quantity of fireworks. The report of an enquiry by the Railway Company showed that their servants were aware of such traffic in explosives by passenger trains. Their conduct showed that by the exercise of ordinary care and precaution they might have, as they really did afterwards, prevented such dangerous traffic. From such facts proved the Courts below came to the conclusion that the presumption of negligence on the part of Company's servants was so strong that it could only be rebutted by evidence. We do not understand how the dead man's father living over a thousand miles away was to bring home any evidence of the conduct of Railway



servants in allowing fireworks to be taken into the carriage in which the deceased was travelling. Any one who has been in this country, knows how difficult it is for a third class passenger to carry any luggage free. The allowance being only 15 seers or about 28lbs, one would at once admit the difficulty of carrying a bundle of fireworks without the knowledge of the Railway servants who pass the luggage. The Lord Chancellor is somehow possessed with the idea that the Indian Judges have held that it is obligatory on the Railway servants to search the contents of personal-luggage carefully and it is on this account that the press in England agreeing with the Lord Chancellor have condemned the decision of the Courts below. The judges here only meant that when the bye-laws require and as a matter of fact Railway servants do pass luggage such a quantity of fireworks could not have been taken into the carriage without their connivance. If such cases had been tried by a jury in this country as they are in England, we are sure, they would have come precisely to the same conclusion as the learned judges did. The error into which the Lord Chancellor has fallen, both as to particular facts and the final conclusion has arisen from want of experience of things as they are in India. This case shows how necessary it is to have more judges with Indian experience on the Board.

This is what the *Law Times* says on the above case:—

Last week judgment was given by the Committee of the Privy Council in the case of the *East Indian Railway Company v. Kalidas Mukerjee*, which raised a question of general interest. The action was by a father to recover damages for the death of his son by the alleged negligence of the company. The lad was travelling in a smoking carriage into which two other passengers entered, bringing with them a number of bombs and fireworks intended for a Hindu wedding. The carriage had the usual small charcoal stove for the use of smokers, and by chance the fireworks caught fire, exploded, and all three occupants of the carriage were killed. Both the Indian tribunals condemned the company in 1,500 rupees damages and costs. The Lord Chancellor, in giving judgment reversing the decision of the Indian tribunals, said there was nothing in the size or appearance of the guilty articles to attract the attention of the officials, and there was no duty imposed on them to search every parcel a passenger took in with him into the railway carriage. Many of us have before now wished that the habit of travelling like the famous "Mrs. Brown," of Scratchley's inimitable creation, had died with her. But of the two evils, if the decision had been otherwise and railways had been compelled to institute an irksome examination of every parcel a passenger carried with him, the chance of a Guy Fawkes entertainment would be the lesser. In India everything that a native can by any possibility get into the carriage he carts in, and what he cannot stow away he sits upon. The importance of the decision to an Indian railway company is so immense, that one is not surprised they decided to appeal to this country rather than let such a decision stand on the record.

## English Notes.

COURT OF APPEAL.—THE BRITISH MOTOR CAR SYNDICATE, LIMITED *v.* TAYLOR AND SONS, LIMITED. Before the LORD CHIEF JUSTICE, LORD JUSTICE RIGBY, and LORD JUSTICE WILLIAMS. 6th November 1900.

*Patent—Infringement—"User," what amounts to—Measure of damages.*

MINTER *v.* WILLIAMS (4 A. & F. 251) questioned.

The question in this case was whether purchasing in England articles which had been infringed and sending them to Paris to be disposed of did or did not constitute an infringement of the patent. The patent of the Plaintiffs which had been infringed was for starting gas motor engines. That patent was infringed by Messrs. Richter and Green and the Plaintiff Motor Company had obtained a judgment against them for such infringement. The patent of Plaintiffs conferred on them the usual privilege for 14 years within the United Kingdom and prohibited others from "either directly or indirectly making using or putting into practice the invention or part of same."

The Defendants had in good faith purchased 27 starters from Messrs. Richter and Green prior to Plaintiffs' judgment against that firm. Nineteen of such starters they had sent off to Paris to be sold; and their branch there sold these to foreign firms. Plaintiffs, the Motor Company, not being able to obtain satisfaction on their judgment from Richter and Green, now sued the Defendants for damages for infringing their patent. Defendants denied liability *quoad* these 19 starters.

MR. JUSTICE STIRLING had held that they were liable and assessed £5 damages on each of the 27 starters. The present appeal was by the Defendants from such decision of Mr. Justice Stirling.

The Appeal Court supported that decision. A case of acquisition for trade purposes had been made out. In fact a sale in this country of eight of them had been proved, which showed that the purchases of the whole lot were made for profit. A user of them was established (*Orley v. Hobden*, 8 C. B. N. S. 686). As regards the measure of damages the view expressed in *The Pneumatic Tyre Co. v. Puncture Proof Co.* (16 P. R. 209) was adopted. The amount was rightly assessed by Mr. Justice Stirling as damages actually sustained by Plaintiffs.

MR. BOWFIELD, Q. C., and MR. LANE in support of the Appeal.

MR. FLETCHER MOULTON, Q. C., and MR. WALTER for the Respondents.

C. W. A.

*Appeal dismissed with costs.*

COURT OF APPEAL.—WATTS *v.* DRISCOLL and WATTS. Before the LORD CHIEF JUSTICE, LORD JUSTICE RIGBY and LORD JUSTICE WILLIAMS. 30th November 1900.

*Partnership Act, 1900—Rights of the mortgagee of the share of one partner.*

In this case the Plaintiff was James Watts, the father of the Defendant Watts. James Watts was on terms of intimacy with the Defendant Driscoll, a fishmonger, carrying on his business in London in order to get his son into that business; during the latter part of the year 1898, Plaintiff agreed to purchase from Driscoll for the use and benefit of his son, the Defendant, one-half share in the partnership business for £1,500. In accordance with the terms of the purchase the two Defendants became partners in the business. The articles of partnership were executed dated the 9th January 1899. Thereupon the Defendant Watts, on March 1899, assigned to his father all his partnership interest, etc., to secure the advance. The two Defendants could not satisfactorily work together and in about five months after they had become partners, Defendant Watts sold his interest in the concern to Driscoll for £500 and a deed of dissolution was carried out. This matter was done unknown to the Plaintiff Watts. It was found by the learned Judge, Mr. Justice Farwell, who originally tried the action, that the Defendant Driscoll knew that the Defendant Watts had entered into the business in consequence of advances made by the father, and had given to the father an assignment of his interest in the partnership and that the son, Defendant Watts, had no money of his own.

Plaintiff now claimed a declaration that he was entitled to a charge upon the share of his son in the partnership assets and claimed all proper and necessary accounts. He succeeded before that learned Judge.

On this appeal by the Defendant Driscoll the Court of Appeal, on a consideration of the Partnership Act, 1890, with particular reference to sec. 31 thereof, held that the mortgagee was entitled to the account which he claimed and dismissed the appeal.

*Mr. Hughes, Q. C., and Mr. Onslow* in support of the Appeal.

*Mr. Bramwell Davis, Q. C., and Mr. Boome* for the Plaintiff.

*Appeal dismissed with costs.*

C. W. A.

**CHANCERY DIVISION.**—*THE HOME and COLONIAL STORES v. COLLS.* Before MR. JUSTICE JOYCE. 21st December 1900.

*Obstruction of ancient lights—Ordinary and extraordinary amount of light.*

*WARREN v. BROWN* (1900, 2 Q. B. 722) followed.

The abovenamed company sought an injunction to prohibit the erection by Defendant of a building to a height of 42 feet in the place of one taken down which stood under 20 feet in height. The site is in Worship Street, No. 44, in the City of London. Plaintiff complained that by such erection injury would be caused to his ancient lights to

his premises adjoining. The learned Judge in his judgment entered into an explanation of the situation of the premises, of the litigants, of the height of the neighbouring buildings, of the position of the rooms where injury was apprehended, the mode in which they were lighted previously, and observed that there was no evidence to support Plaintiff's case that an extraordinary amount of light from the Worship Street windows had been enjoyed for anything like the period of 20 years; it was most likely that Plaintiff's premises had undergone reconstruction recently. From the evidence of expert witnesses, it would appear that the proposed edifice would not affect the letting or selling value of Plaintiff's premises; at the height of 42ft. it would not be high enough to reach any line drawn at an angle of 45 degrees to the horizon from any point in the base of the third and fourth windows on the ground floor of Plaintiff's buildings which are the windows, if any, that are most likely to have diminished light. No doubt Defendant's building of 36ft. width directly south of those windows would cut off a portion of the sky which is now visible from within Plaintiff's office and to some extent render the use of artificial lights necessary more frequently, but considering all these it was clear that Plaintiff's building after the proposed erection would still be well and sufficiently lighted for all ordinary purposes of occupancy as an office or place of business. It was impossible to reconcile all the authorities quoted. The case of *Warren v. Brown*, the most recent pronouncement, should govern the present case. The action failed.

*Mr. Eady, Q. C., and Mr. Vernon* for the Plaintiffs

*Mr. Bray, Q. C., and Mr. Nutter* for the Defendant.

*Suit dismissed with costs.*

C. W. A.

**QUEEN'S BENCH DIVISION.**—*HANSON v. WALLER.* Before MR. JUSTICE KENNEDY and MR. JUSTICE DARLING. 18th December 1900.

*False imprisonment—Manager acting within the scope of his authority in causing arrest—Implied authority.*

The Defendant was the proprietor of a public house, and the Plaintiff, a barman, was in his employ. Defendant used to visit the public house daily but he left the management of it in the hands of one Moseley. On one occasion Moseley went down to the cellar and believing that Plaintiff was running whiskey from the cellar into a cart and so stealing it, gave him in charge. On the way to the police-station, Moseley discovered that he had made a mistake; he withdrew the charge of stealing and Plaintiff was at once released.

Plaintiff's claim for false imprisonment against Defendant was nonsuited by the County Court Judge of Marylebone on the ground that there was no evidence that the manager was acting within the

scope of his authority in causing the arrest. On this appeal by Plaintiff the Court relying on the case of *Jones v. Duck*, decided by the Court of Appeal (see the *Times* of 16th March 1900) where it is said:—"A servant had implied authority to give a person into custody if it was necessary to do so in order to protect his master's property. The cases also showed that a servant might have such implied authority derived from the exigency of the particular occasion."

*Held*—That there was no evidence in this case sufficient to present a case which might succeed against the Defendant. It was not within the sphere of the duty of a public house manager to arrest people, nor had he any particular duty to decide whether to arrest. There was no case of exigency either, there was no whiskey which could be saved by a prompt arrest to justify the action. The arrest was not for the necessary protection of the master's property. Moreover Moseley had ample opportunity of consulting the Defendant, so that there was not even any element which rendered it reasonably necessary to cause the arrest without the employer's previous consent. The learned Judges also relied on the Privy Council decision of *Bank of New South Wales v. Owston* (4 App. Cas., p. 270), in dismissing the appeal.

*Mr. Sankey* for the Plaintiff-Appellant.

*Mr. Lincoln Reed* for the Defendant-Respondent.

C. W. A.

*Appeal failed.*

QUEEN'S BENCH DIVISION.—*TROTT v. NATIONAL DISCOUNT COMPANY*. Before MR. JUSTICE KENNEDY. 12th November 1900.

*Principal and agent—Authority, apparent—Money received from a customer—Misappropriation.*

THE BRITISH MUTUAL BANK v. CHARNWOOD FOREST RAILWAY (18 Q. B. D. 714) distinguished.

One Staden was acting as an assistant secretary in the Defendant company's office. A part of the company's ordinary business was to transact investments in the various British and Foreign securities. The Plaintiff was a clerk in the city and was acquainted with Staden. On the latter's suggestion he handed over £300 to him for the purpose of being invested on the purchase of 30, £10 shares of the Defendant company. Staden did not do so but absconded with the £300. The Plaintiff brought this action against the Defendant company for the money so made over to Staden to invest in the said shares. The question was whether the company was liable to make good the loss so caused. The learned Judge held that the company was liable. He was of opinion that if Staden had not actual authority he was clothed with apparent authority. In this matter Staden was doing what he had, as a matter of practice, done before in the Defendant's office. He held that when the money was paid by

Plaintiff to Staden, it was payment to the Defendant company. It was paid expressly for the principal, and the mere fact that Staden as the agent when he received the cash meant to misappropriate it did not exonerate the Defendant company. The above noted case was distinguishable.

*Mr. Bray, Q. C.*, and *Mr. Bailhache* for the Plaintiff.

*Mr. Joseph Walton, Q. C.*, and *Mr. Lochnis* for the Company.

C. W. A. *Judgment for Plaintiff with costs.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL.—Appeal from Madras. VASUDEVA PAIYI KHADANGA v. MAGUNI DEVAN BAKSHI MAHA PATRULU. 23rd March 1901.

LORD DAVEY delivered their Lordships' judgment recommending His Majesty to dismiss the appeal with costs.

Our notes of this case will be found at 5 C. W. N., p. clxi.

The appeal was decided on the question of limitation.

*Mr. Branson* for the Appellant.

*Mr. Mayne* for the Respondent.

PRIVY COUNCIL.—Appeal from Oudh. JUGDISH BAHADUR v. SHEO PARTAB SINGH (5 C. W. N., p. cxlv).

LORD DAVEY delivered their Lordships' judgment advising His Majesty to dismiss the appeal with costs.

*Mr. Branson* for the Appellant.

*Mr. Mayne* and *Mr. Cowell* for the Respondent.

PRIVY COUNCIL.—Appeal from the Calcutta High Court. ANNODA MOHAN ROY CHOUDHRY v. BHUBAN MOHINI DEBI (5 C. W. N., p. cxlvi).

LORD HOBHOUSE delivered their Lordships' judgment advising His Majesty to dismiss the appeal with costs.

*Mr. Asquith, K. C.*, *Sir William Rattigan, K. C.*, and *Mr. Mayne* for the Appellant.

Respondent was not represented.

C. W. A.

## PRIVY COUNCIL.

[APPEAL FROM THE SUPREME COURT OF CEYLON.]

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

1901.

23, March.

PERRERA

v.

PERRERA.

*Will—Sound disposing mind—Will prepared under instructions.*

Two questions were raised in this appeal: (1) Was the document propounded as the Will of Abraham Perrerá properly executed according to the law of Ceylon? (2) Was the testator of sound disposing mind when he signed that document?

Upon the first point Appellant's counsel referred to Ordinance 7 of 1834, sec. 2, as the first legislation, also to the later Ordinance 7 of 1840, sec. 3, which was in the following terms:—No Will should be valid, unless the signature of the testator was made or acknowledged by the testator, in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution; or if "no notary shall be present" then the testator's acknowledgment was to be in the presence of five or more witnesses. No form of attestation was necessary.

The Will was acknowledged by the testator and his mark placed on it in the presence of five witnesses who deposed to the fact that the licensed notary Goonarātne was present at the time, but had declined to attest it for fear of displeasing a wealthy client of his; that Goonarātne had drawn the Will on the testator's instructions and at his suggestion and the testator had executed it before the five witnesses. He had also explained to the testator his position, owing to his said wealthy client's threat who was inimical to the Will.

The dispute arose on the words in the said ordinance "if no notary shall be present."

For the Appellant it was contended that he was not merely physically present but was present to see to its proper execution and acted as notary to the last; consequently as it was not attested by him the Will was not duly executed.

Their Lordships concurred with the majority of the Ceylon Court, that those words implied, if no notary shall be present "acting in his notarial capacity."

They say "Mr. Mayne in his able argument did not contend that the mere bodily presence of a notary would vitiate the execution of a Will attested by five witnesses. He admitted that if a notary were drunk or asleep or mentally incapacitated he would not be present within the meaning of the Ordinance. But he contended that in this case the notary was not only present but acting in a notarial capacity up to the very last moment, when, as he argued, it was too late for him to stand aside or retire from his position. Their Lordships have some difficulty in following that argument, when the view of the minority of the Court of Ceylon that mere bodily presence of a notary who did not attest, vitiated the attestation of the five witnesses required by law, was abandoned; it was difficult to see any sound distinction between the case of a notary who was present but incapable of performing his notarial duties, and the case of a notary who was present and refused for some reason or other to perform those duties. Nor is it easy to see what difference

it made whether the notary who was present refused to perform his notarial duties at the last moment or had refused at some earlier time to act on the occasion in his notarial capacity."

Upon the question whether the testator was of sound mind their Lordships held, that having regard to all the circumstances of the case the diagnosis of Drs. Poneska and Rockwood who were not present at the execution of the Will ought not to outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses. Mr. Mayne had adopted the argument of the minority of the Court below, that it was not enough to prove that the testator was of sound mind when he gave instructions for his Will and that the document drawn in pursuance of such instructions was signed by him as his Will, if it was not shown that he was capable of understanding its provisions at the time of signing.

On this argument their Lordships state that that was not the law and referred to *Parkar v. Felgate* (8 P. D. 171) where Sir James Hannen had laid down the law correctly in saying:—(p. 173) "If a person has given instructions to a solicitor to make a Will and the solicitor prepares it in accordance with such instructions, all that is necessary to make it a good Will if executed by the testator is that he should be able to think thus far:—'I give my solicitor instructions to prepare making a certain disposition of my property. I have no doubt that he has given effect to my intention and I accept the document put before me as carrying it out.'"

*Mr. Mayne* and *Mr. P. Cassel* for the Appellants.

No one appeared for the Respondents.

C. W. A.

*Appeal dismissed with costs.*

## PRIVY COUNCIL.

[ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1901.

"23, March."

AJUM GOOLAM HOSSEIN & Co.,  
and HAJEE CASEM JOOSUB,  
v.

THE UNION MARINE  
INSURANCE COMPANY.

*Marine insurance—Underwriters—Burden of proving unseaworthiness of ship—Risk of loss from unascertainable causes—Presumption of unseaworthiness.*

The action was brought on four policies of insurance on cargoes shipped on board the steamship *Taif* to be carried from Port Louis in Mauritius to Bombay. The underwriters defended the action on the ground that she was unseaworthy when she left the port of St. Louis. The sole question in the appeal was whether they had proved, the onus being on them, that their contention was sound.

The Supreme Court of Mauritius by a majority had decided that the underwriters had proved the unseaworthiness of the vessel, the Chief Justice dissenting.

In their Lordships' judgment, it is conceded that the undoubted fact that the *Tuif* capsized and sank in less than 24 hours after quitting St. Louis without encountering any storm or other known cause to account for the catastrophe, gave the underwriters great advantage, for if nothing more was known they should succeed in the action. The natural inference would be that the ship was unseaworthy. In such case a jury should be directed to act on such presumption. The question then was, were other facts material to the enquiry as to the seaworthiness of the ship proved? Such facts must be weighed against the unaccountable loss of the ship, and unless the balance of the evidence warranted the conclusion that the ship was unseaworthy when she left port, such unseaworthiness could not be properly treated as established, with the consequence that the defence would fail. The danger and error of acting on presumption in favour of unseaworthiness was pointed out in *Pickup v. Thames Mersey Marine Insurance Co.* (3 Q. B. D. 594) and *Anderson v. Morrice* (L. R. 10 C. P. 58).

Then after considering a great mass of evidence produced in the case by the parties in support of their theories, and referring to *Steel v. The State Line Steamship Co.* (L. R. 3 Ap. Cas. 12) in support of the statement that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board, their Lordships say that this case was one of some difficulty, and it was not surprising that the underwriters defended it, but the evidence disclosed that they were forced from one theory into another as regards the unseaworthiness and they have failed to prove their case. The result was that all was conjecture, the real cause of the loss was unknown and could not be ascertained from the evidence adduced. "But underwriters took the risk of loss from unascertainable causes; and after carefully weighing all the evidence and bearing in mind the presumption of unseaworthiness on which the underwriters relied, their Lordships had come to the conclusion that unseaworthiness at the time of sailing was not proved." His Majesty would be recommended that the appeal should succeed.

*Mr. Asquith, K. C., Mr. J. B. Mathews, and Mr. Laureston Batten* for the Appellants.

*Mr. Joseph Walton, K. C., Mr. Horridge, K. C., and Mr. Bateson* for the Respondents.

*Appeal allowed with costs.*

C. W. A.

## PRIVY COUNCIL.

[APPEAL FROM THE ALLAHABAD HIGH COURT.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

1901.

23, March.

RAJA BALWANT SINGH

THE SECRETARY OF STATE FOR INDIA.

*Special leave to appeal—Limitation—Suit for refund Limitation Act, Art. 14.*

The Petitioner, Raja Balwant Singh, in his petition stated that he filed a plaint in the Sub-Judge's Court at Agra and therein stated that as zemindar of the two villages, Kaitha and Gangui, he was liable to pay the irrigation rate levied on properties in the said village in respect of land, which being entered as unirrigated at the time of the last settlement, had since been irrigated by means of canals.

From Fasli 1292 to 1296 sums amounting to Rs. 4,543 were erroneously levied upon the proprietors and repaid by Petitioner as irrigation rates payable in respect of lands which at the time of settlement were irrigated by canal or well water or otherwise.

Petitioner discovered this mistake on 13th May 1891 and an application for refund was made on the 14th May and was rejected on the 1st August 1891 by the Collector.

The Respondent in his written statement, so far as is material to this application, set up that the suit was barred by limitation, which question was raised as an issue.

On the 6th August 1896 the Sub-Judge dismissed the suit as barred by limitation. As regarded the cause of action alleged to arise from the said order refusing a refund of 1st August 1891, he considered that it was barred by Art. 14 of the Limitation Act.

If the monies claimed had been paid under a mistake which was for the first time discovered on the 13th May 1891, he thought that the case would be governed by Art. 96, and not by Art. 16 and that the suit would be in time. After examining the evidence on this point, the Sub-Judge recorded the following opinion:—

"In short I find from the evidence of Har Pershad that he discovered the mistake more than three years before the institution of this suit, and I further find from the evidence of Peara Lal that Raja Baldeo Singh and Balwant Singh were informed of the excess payment."

Against such decision Petitioner appealed to the District Judge of Agra, who confirmed the decree dismissing the suit, though he differed from the Subordinate Judge on the grounds for so doing. In his judgment, dated 21st December 1896, he states:—

"There is no reservation in Art. 14 such as is

contended for by Appellant. The order of the Collector was passed in his official capacity after enquiry had been made; if the present claim were to be decreed, that order would in effect be set aside and unless the claim is decreed the order will remain valid. The suit therefore is in effect one to set aside the Collector's order and it cannot, it may be said, be withdrawn from the category of such suits by being described in another way. I was inclined at first to think that Art. 14 did not apply, but on fuller consideration I have come to the conclusion that the suit should be dismissed as not having been brought within one year from the order of the Collector dated 1st August 1891."

He then proceeded to consider the case as affected by Art. 96 and differing as to the credibility of witnesses concluded as follows:—

"I think it may fairly be held that the mistake in question was only definitely discovered, that is, made certain, on the day before the application was presented to the Collector; on this finding of fact if Art. 96 applies to this case, the suit was within time and the appeal should be allowed but, as above stated, I am of opinion that Art. 14 should be applied and the appeal fails."

Petitioner appealed next to the Allahabad High Court which (Justices Blair and Burkill) on 12th December 1899 dismissed the appeal finding as follows:—

"In our opinion the suit does not lie by dint of sec. 241, 2nd para. of cl. (1) of the Land Revenue Act, XIX of 1873, and sec. 45 of Act VIII of 1873. This question was not raised in the appeal or indeed elsewhere at all. The Court below dismissed the suit by application of Art. 14 of the Limitation Act."

Petitioner's application for leave to appeal to Her Majesty in Council was refused on the 23rd March 1900, the High Court (The Chief Justice and Justice Banerjee) being of opinion that it was not shown that the amount at stake exceeded the amount claimed Rs. 4,543 and because a proper construction had been placed on the provisions of sec. 241 (2) of Act VIII of 1873. "Having regard to sec. 45 we think that the owner's rate in question in the suit was within the meaning of the later Act a sum which was realizable as revenue. We do not think there is sufficient doubt in the matter to make the question involved a substantial question of law."

*Mr. Mayne* for the Petitioner referred to the several sections of the Limitation Act and to the said Land Revenue Acts, and urged that the Courts in India had erred in law inasmuch as the liability contended against in the present suit was a recurring liability, the amount in dispute was really much beyond the appealable amount, and the questions raised were difficult questions of law.

THEIR LORDSHIPS granted leave to appeal on the usual terms.

C. W. A.

*Leave granted.*

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

HARINGTON, J. } DWARKA NATH ADDY  
1901. }  
15, April. } BHAGGABUTTY CHURN SEAL.

*Enlargement of time for delivery of an award.*

Under an order of Court, dated 23rd May 1893, all matters in dispute in this suit were referred to the decision of certain arbitrators. The time for the submission of their award to the Court was limited by that order to three months from the date of service on them of an office copy of the order or such further time as they might allow themselves by endorsement on the order to that effect. The arbitrators made and submitted their award on 1st April 1898, but as they had not determined some of the matters referred to them the award was remitted for their reconsideration. Subsequently the time for the completion of the award was extended on several occasions by the arbitrators and by the last endorsement made by them on an office copy of the order the arbitrators allowed themselves time till the 31st January 1901. On that date they signed their award but through an oversight they failed to forward it to the Registrar for the purpose of having it filed in Court. On the following day however they sent it to the Registrar. The Registrar refused to accept it as it was out of time. Under these circumstances *Mr. Bagram* moved, on notice, for extension of time on behalf of the Defendant and relied on an affidavit sworn by the arbitrators setting out the above circumstances. The Court desired to be satisfied that there was authority for the proposition that an application for an extension of the period for making an award may be granted when made after the expiry of that period.

*Mr. Bagram.*—The arbitrators had completed all acts of a judicial character. The award was not completed as the making of an award includes its delivery. Had the award been completed the application would have been too late, according to a decision of the Privy Council reported in *Raja Har Narain v. Chaudhrani Bhugwant Kuar* (L. R. 18 I. A. 55). If this application be held to be too late it would be impossible to invoke the aid of sec. 514 of the Code of Civil Procedure under circumstances similar to these. An order for extension may be made after expiry of the period for making an award. *Har Narain v. Bhugwant Kuar* (I. L. R. 10 All. 137), *Umernay Premji v. Shamji Kanji* (I. L. R. 13 Bom. 119).

THE COURT.—You may have your order on the authority of the Bombay case.

*Messrs. Gregory & Jones*, Attorneys for the applicants.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, APRIL 29, 1901.

[No. 23.]

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### REPORTS (See Index.)

WE WELCOME THE ANNUAL STATEMENT OF THE Bar Council. We shall feel greatly indebted to this vigilant guardian of the interests of the Bar if it succeed in reducing the unwritten rules of professional etiquette into writing.

SOME OF THE RULES SETTLED UPON BY THE COUNCIL during the past year are of limited operation in India as they relate mostly to King's Counsel. There seems to be some unwritten rule with the Government at home never to honour any counsel practising in India with the silk gown. But still juniors will be interested to learn that the Bar Council has decided that in all ordinary cases the brief fee of a junior should be two-thirds or three-fifths of the fee of the K. C. who leads him. Another interesting rule, for which we have hardly any necessity in this country, is that members of the Bar ought not to furnish signed photographs of themselves for publication in legal newspapers.

THE FOLLOWING QUESTION WAS PUT TO THE BAR Council: Is a colonial Barrister, who is not, in addition, a member of the English Bar, entitled to appear before the Judicial Committee in any case from any colony, or only in a case from the colony to which he belongs? The Council very discreetly observes that it is doubtful whether he could claim such a right but it is improbable that he will be refused. It would be interesting to learn what answer the Bar Council will have to give if our friends, the vakils, would confront the Council with a similar question on the ground that they have as

good a right as any to be heard in that one Court for the whole Empire.

A FULL REPORT OF THE PRIVY COUNCIL DECISION IN the case of *Kulidas Mukerjee v. East India Railway Company* will be found in this issue. It will appear that so far as their Lordships' findings on facts go, they fully justify our comments in the last number. But as regards their Lordships' exposition of the law is concerned, no exception to it can be taken. The liabilities of "common carriers" do not attach to Railway Companies. The law, however, requires that they should exercise every care and diligence in the carriage of passengers. But we think that the facts of the case will bear out that the Railway Company had *prima facie* failed to exercise even a reasonable amount of care and diligence. Had they done so, such extensive explosion could not have taken place. The theory of their having been carried in the form of third-class passengers' personal luggage is untenable. We know that bombs are nearer the size of foot-balls than that of cricket balls. It was in evidence that a list of fireworks was found on the person of one of the deceased which made mention of a very large quantity of them. The Company alleged that the bulk of them was carried by road on carts and that only samples of them were carried in the train, of which there was absolutely no evidence offered by the railway. Having regard to the extent of the explosion, the Courts here discredited this story and very rightly (see 2 C. W. N. 609 : 3 C. W. N. 781). If therefore a large quantity of fireworks was carried it is very unlikely that they could have been carried surreptitiously. When every ticket of third-class passengers is examined and all personal luggage passed at the ticket barrier by Railway servants, it is a very reasonable presumption that a large quantity of fireworks could not have been taken into the carriage without their connivance. Such was the common-sense view of the matter taken by the Courts below. If their Lordships mean that it was incumbent on the deceased lad's father, who lived far away, to adduce evidence as to the appearance or the dimensions of parcels as they were before explosion, it seems to us that it is requiring him to do an impossibility and to consult him on that ground is most unreasonable. While we accept their Lordships' law we regret that we cannot say as much as

regards its application to the particular facts of the case.

The *Times* in a leading article makes the following observations on the above case:—

"No important case from India has recently come before the Privy Council. But a word may be said about that of '*The East Indian Railway Company v. Kalidas Mukerjee*,' an appeal from the High Court at Calcutta. The father of a boy, who had been killed in an explosion in a third-class compartment on his journey between Secunderabad and Dheri, sought to recover damages. The Railway Company had nothing to do with the explosion that was caused by bombs, which two passengers with fireworks, intended for use at a Hindu wedding, had surreptitiously brought into the compartment. Apparently acting under a complete misapprehension as to the liability of a Railway Company in respect of the conveyance of passengers, the Courts below, without any evidence of negligence by the Company, held that the Plaintiff was entitled to recover—a decision which has been unhesitatingly set aside. Such a decision creates distrust and uneasiness. It prompts curiosity as to the strange things in the way of home-made justice, which might come to light if access to the Judicial Committee were easy and cheap."

It is unfortunate that the *Times* should have selected this case for such observations.

## Reviews.

THE TRANSFER OF PROPERTY IN BRITISH INDIA. By H. S. Gour, M. A. (Cantab), Bar-at-Law: Calcutta, Thacker, Spink & Co.

Mr. Gour is to be congratulated on his analytical commentary on the Transfer of Property Act. He has evidently spared no pains to make his work useful to the profession, while the special requirements of the student, trying to master the intricacies of the law relating to Real Property in India, have not been lost sight of. The arrangement which the learned author has adopted is clear and simple, and the treatment of the various subjects condensed in the few short sections of the Act is extremely methodical. The annotations on the subjects of *notice* and *lis pendens* may no doubt have been made fuller in detail, but it is satisfactory to observe that the subdivisions of the subject have been discussed with great care. In one place, however, it strikes us that the import of the cases decided by the different High Courts in India, has not been very well brought out. We refer to the conflicting rulings of the various High Courts as to who are necessary parties in a mortgage suit under sec. 85. The learned author has added an elaborate introduction dealing with the origin of the idea of property, and the usefulness of the book has been enhanced by a carefully-prepared Index.

The Transfer of Property Act has been looked upon as one of the monsters of legislative production in this country. Its provisions are in places singular-

ly full, and in others, deficient and wanting. In some matters it has imposed burdens unsuitable to the country, and in others it has neglected to provide necessary safeguards. Since the Act was first passed, it has had to be twice amended. Of the original draft only five sections remained after it passed through various Select Committees; and when finally passed into law, it was stated that endeavours had been made to render it capable of easy administration by "non-professional judges." It is admittedly fragmentary in character, and at the very outset of it one is struck by the singularity of the fact that the term "Immoveable property" has a negative definition. We are therefore very thankful to Mr. Gour for his learned notes on the subject, and we have no hesitation in saying that it is one of the best legal works we have had the good fortune of coming across in this country.

The get-up of the book is very commendable.

THE PRINCIPLES OF BUDDHIST LAW. By Chantoon of the Middle Temple, Bar-at-Law. Holder of the Inns of Court Studentship, 1888. Law Lecturer of the Rangoon College. Published by Myles Standish & Co., Rangoon.

On this side of India we are hardly familiar with the Buddhist law and we welcome this little work which gives within a small compass all that is useful to know on the subject. The author complains of the indefinite character of the existing materials with which he had to deal, but we must congratulate him on the success of his attempt to bring them under well-defined and appropriate heads. The author has given us a translation of certain portions of the *Manu* Thara Shwe Myin, and also the leading cases on the subject. We hardly feel competent to deal with the subjects treated in the work, but so far as we are able to judge the author has dealt with them in a clear and thoroughly efficient manner.

SEABORNE'S LAW OF VENDORS AND PURCHASERS OF REAL PROPERTY. By W. Arnold Jolly, M. A., 5th edition, Butterworth & Co., 12 Bell Yard W. C., Law Publishers, 1901.

It is hardly necessary to say that this work has been found by the profession of much practical utility. The recent changes in the law of descent and transfer of land and the large number of decisions bearing on the subject have been carefully dealt with. In this edition we find the author has changed the arrangement of the subjects owing to certain suggestions made by his critics, beginning with the law on the subject of "contract of sale." The book will be found to be a very valuable addition to one's Law Library.

AN EPITOME OF ROMAN LAW. By W. H. Hastings Kelke, M. A., of Lincoln's Inn, Bar-at-Law. Published



by Sweet and Maxwell, Limited, 3 Chancery Lane, London. 1901.

This is an Introduction to Roman Private Law and gives within a small compass a great deal of information, and is not wanting in detail. The author has given us a short history of the development of the law and an intelligent classification of the subject, which should be of great assistance to the student. The chapter dealing with contracts has been put upon a chronological basis and those dealing with procedure and the meanings of certain words and phrases in common use are particularly helpful.

PERSONAL PROPERTY LAW. By W. H. Hastings, Kelke, M. A., of Lincoln's Inn, Barr-at-Law. Published by Sweet and Maxwell, Limited, 3 Chancery Lane, London. 1901.

This is also a student's handbook and is intended as a supplement to the author's "Epitome of Real Property Law." One of the most useful portions of the book is where specimens of certain instruments in full or in shortened form have been given. The subject has been clearly dealt with, and care has been taken to preserve the distinction between the law so far as it deals with property and contracts.

### Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [CIVIL REVISIONAL JURISDICTION.]

RULE No. 3114 of 1900.

MACLEAN, C. J.	}	RAI PASHUPATI NATH BOSE,
BANERJEE, J.		JUDGMENT-debtor,
1901.		Petitioner,
26, April.		v.
		RAI NANDA LAL BOSE, Decree-
		holder, Opposite Party.

*Stay of execution of a decree pending the hearing of an appeal against an order in the execution case—Code of Civil Procedure (Act XIV of 1882), sec. 244, ci. (c) and 545—Appeal not pending against the decree which is being executed.*

In a suit for partition (Suit No. 115 of 1889) in the Court of the Second Subordinate Judge of 24-Pergunnahs, a sum of Rs. 24,000 was decreed to be paid by the Petitioner to the opposite party by way of owelty, in certain instalments. The Petitioner paid Rs. 22,000 and the opposite party took out execution for the balance Rs. 2,000 together with interest. The Petitioner objected on the grounds, *inter alia*, that the decree sought to be executed was set aside and rendered nugatory on the ground of fraud by a decree passed by the

Original Side of the High Court in Suit No. 311 of 1898 between the same parties and as such, the decree was incapable of execution. The Court executing the decree overruled this objection and allowed execution to proceed.

Against this order, the judgment-debtor, Petitioner, preferred an appeal to the High Court which is still pending in this Court and pending the hearing of the said appeal he moved this Court and obtained this rule calling upon the opposite party to show cause why execution of the decree should not be stayed until the disposal of the appeal by the High Court upon the Petitioner's furnishing adequate security.

In showing cause, the opposite party contended, *inter alia*, that as there was no appeal pending in this Court against the decree sought to be executed, this Court had no jurisdiction to stay execution thereof under sec. 545, C. P. C.

*He'd*—That the High Court had jurisdiction to pass an order for stay of execution pending the hearing of the appeal.

Dr. Ashutosh Mukherjee and Babu Jnanendra Nath Bose for the Petitioner.

Dr. Rush Behari Ghosh and Babu Siva Prosanna Bhattacharjee for the Opposite Party.

*Rule made absolute.*

J. N. B.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 446 of 1899.

RAMPINI, J.	}	MOHUNT SANESH DAS, Defendant,
GUPTA, J.		1st party, Appellant,
1901.		v.
26, April.		RAM PERTAB SINGH, Plaintiff, and anr., Defendants, Respondents.

*Bengal Tenancy Act (VIII of 1885)—Landlord and tenant—Occupancy holding, transferability of—Custom—Recognition by landlord with respect to a portion of the holding.*

The suit, out of which the present appeal arose, was one brought by the Plaintiff to establish his right to 6 bighas and odd cottahs of land. The allegations of the Plaintiff material to this report were that Plaintiff purchased the lands at an execution sale in the *benami* of Ram Bilash Singh who subsequently executed a deed of relinquishment in favour of the Plaintiff on the 27th December 1886; that in a settlement proceeding the Settlement Officer entered 3 bighas 1 cottah 1 d. of land in the name of the Plaintiff and the remainder of the land in the name of Defendant No. 2 who had no title thereto. The Plaintiff thereupon brought the present suit.

The defence of Defendant No. 1 who was the landlord was mainly that occupancy right was not transferable by village custom. The Courts below held that as the Defendant No. 1, who was landlord,

accepted the Plaintiff as his tenant with regard to a portion of the lands covered by the sale certificate, this was sufficient evidence to prove the custom of the transferability of tenancy rights in the village. The first Court gave the Plaintiff a decree for the declaration he sought and the lower Appellate Court also upheld the decree of the first Court.

Defendant No. 1, the landlord, preferred this second appeal.

On behalf of Plaintiff-Respondent it was, amongst other matters, contended that inasmuch as the Defendant No. 1 relied on the settlement provided in the deed of release executed by the Plaintiff's *benamdar* in his favour, this should be held to amount to a recognition of his right as tenant to the entire land of 6 bighas and odd.

*Held*—That the recognition of the Plaintiff by the landlord as tenant to a portion of the holding is not sufficient to prove the custom of transferability.

That the landlord is at liberty to recognise the purchaser of a holding to such an extent as he pleases, and because he admitted the Plaintiff to be a tenant of 3 bighas and odd it does not follow that he recognised him as tenant of 6 bighas and odd.

That there was no estoppel in this case inasmuch as the Plaintiff's purchase was not brought about by the admission made by the landlord, and the purchase was prior to this admission.

[The case was remanded to the lower Appellate Court for a fresh decision upon the question of custom as to transferability upon the evidence (if any) on the record].

*Babu Nalini Ranjan Chatterjee* for the Appellant.

*Babu Shoroshi Charan Mitter* for the Respondent.

*Case remanded.*

S. C. S.

# [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

NO. 24 OF 1899.

RAJ NARAYN, minor, by MUSST.

CHATRI KOER, Defendant No. 3,

Appellant,

v.

KHOBDARI RAI,

Plaintiff, Respondent.

RAMPINI, J.  
GUPTA, J.  
1901.  
10, April.

*Res judicata*—*Civil Procedure Code (Act XIV of 1877), sec. 13*—*Suit for declaration of title—Possession, proof of—Declaration in favour of Defendant, effect of, as against Co-defendants—Partition—Exchange—Transfer of Property Act (IV of 1882), sec. 118.*

This was an appeal preferred on the 3rd of January 1899, against the decree of Babu Behari Lal Mullick, Subordinate Judge of Sarun, dated the 17th September 1898, modifying the decree of Babu Prasanna Kumar Gupta, Munsif, 1st Court, of Chapra, dated the 23rd March 1898.

The suit out of which this appeal arose was brought by the Plaintiff for a declaration of his title to certain property and for confirmation of his possession therein. The Plaintiff claimed the whole of the property under the following titles, namely, one-half by right of inheritance from his father, one-eighth by exchange from the Defendants Nos. 4 to 6 and three eighths by right of inheritance from one Hamman.

The contesting Defendant was the Defendant No. 3, who traversed the whole of the Plaintiff's case and put him to proof of his title as well as of his possession.

The Court of first instance gave the Plaintiff a Decree.

The Subordinate Judge, on appeal, modified the first Court's decree and gave the Plaintiff a declaration of his right to  $\frac{3}{4}$ th of the property and a declaration of confirmation of possession to that extent.

The Defendant No. 3, the only contesting Defendant, preferred this appeal, and on his behalf it was urged, first that the declaration in favour of the Defendants Nos. 4 to 6 given by the lower Appellate Court was *ultra vires*, and, secondly, that the lower Appellate Court was wrong in holding that the exchange of the one-eighth share of the property said to have been effected between the Plaintiff and the Defendants Nos. 4 to 6 was valid on the ground of the transaction having been really a partition.

The Court in delivering judgment held :—

That where the Plaintiff and the Defendants were the joint owners of a certain property, but the Plaintiff alone was owner of another property, and the Defendants had no share in the latter, and by an oral arrangement, not reduced into writing, the Plaintiff alleged he got the former property in its entirety and the Defendants got their share in the latter the transaction cannot be regarded as a partition but is an exchange within the meaning of the Transfer of Property Act, and the transaction not being reduced into writing and registered was invalid under sec. 118 of the Act.

*Gyanessa v. Mobarukunessa* (I. L. R. 25 Cal. 210) distinguished.

That in a suit for declaration of title to property the Plaintiff must prove that title and cannot get a declaration merely on the ground of possession.

That the declaration of the lower Appellate Court in favour of the Plaintiff as against the Defendant-Appellant can alone be operative against him and that any declarations made in favour of other Defendants cannot bind the Defendant.

That there can be no *res judicata* between Co-defendants.

*Babu Dwarka Nath Mitter* for the Appellant.

*Babu Surendra Nath Roy* for the Respondent.

*Decree modified*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, MAY 6, 1901.

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### REPORTS (See Index.)

ON THE REOPENING OF THE HIGH COURT AFTER THE Mohurram vacation the following changes have taken place on the bench. Mr. Justice Ghose and Mr. Justice Taylor are sitting in the Criminal Revisional and Appellate Court, and Mr. Justice Ameer Ali and Mr. Justice Pratt are hearing civil appeals of the Burdwan Group. On the Original Side Mr. Justice Sale is presiding at the Calcutta Court of Criminal Sessions.

IT IS BELIEVED IN LEGAL CIRCLES IN ENGLAND THAT the present Lord Chancellor will before long retire from office, and in that event Lord Alverstone the present Lord Chief Justice will succeed to the woolsack.

WE HAVE OFTEN ALLUDED TO THE RELUCTANCE OF THE Courts in England and America to place much reliance on what is termed expert evidence. Our academic young contemporary of the Columbia University publishes in the March number of the Review a very interesting article on "Opinion Evidence." The article is thus summed up at its conclusion.

The consensus of judicial opinion is decidedly unfavorable with respect to the force or value of this species of evidence, and undoubtedly it is open in this respect to all the criticism that it has received from the courts. In many cases the witness, from causes that have been mentioned, becomes an interested partisan on the side of the case to which he owes his employment and is generally confronted with one equally interested on the other side. In the conflict of opinions that generally follows,

the jury frequently find their way out of the difficulty by disregarding all evidence of this character. It is discredited from the beginning, largely in consequence of the means by which it has been obtained. It remains true, however, that if the abuses incident to the presentation of such evidence could be removed, the opinion of a capable and disinterested expert would frequently be of great value in the investigation of questions of fact. It would be much easier and wiser to root out these abuses than to dispense with this kind of evidence altogether.

## Review.

THE CODE OF CRIMINAL PROCEDURE, BEING ACT V OF 1898, WITH A COMMENTARY AND NOTES. *By Sir H. T. Prinsep, Kt. & Thacker, Spink & Co., Calcutta.*

Familiar as Mr. Justice Prinsep's Code is to us, we would hardly recognise it as the same book which has been so well known during the last quarter of a century. Of the author's last edition, we did not hear much. That is, perhaps, because some very unfortunate errors crept into the text. But the author has now made complete amends for it by putting in the present edition a large amount of solid work. In this edition the author has treated his subject more in the manner of a commentary on the Code than as a mere classified digest. The Code of Criminal Procedure has never been regarded as a master-piece of legislation, and we cannot help admiring the candour of the author's observation that "in attempting to provide for almost every detail, the Code has become disjointed." When we remember the opportunities that had been given to the author for its consolidation in 1898, we cannot help noticing a sort of subdued humour running through his own remarks. But what the author had failed to do as a legislator, he has taken pains to fulfil as a commentator. The plan adopted by him is by appending an explanatory note to each section and to support it by authorities given in the foot-note. The advantage of this system of annotation is, that a reader often gets from it a far more clear grasp of the subject, than it is possible to obtain from the scrappy case-note form of annotation so commonly adopted for the elucidation of codified law. Advantageous as this method of annotation may be, from a student or jurist's point of view, the case-hunting lawyer will

perhaps be slow to appreciate it. They ordinarily value an annotated edition by the facility it offers to find out some decisions to fit in with their cases. We cannot say that from a practical point of view they are altogether wrong. But still we are sure that a perusal of the author's annotations below each section would amply repay the trouble even to the busiest lawyer and that the commentaries will prove especially valuable to judicial officers. We find the Code noted up with most of the recent cases, either in the body of the book or in the addenda. But still we have noticed omissions. For instance, under sec. 438 we find no reference to Mr. Justice Prinsep's own decision in *Kefatullah*, 5 C. W. N. 71, to the effect that in sec. 145 proceedings when a District Judge is of opinion that they are defective in law, he may refer the case to the High Court and thus save the parties the trouble and expense of moving it themselves. Many cases under the old Code have also been omitted. With regard to some of these we would have preferred their being retained and distinguished with special reference to the amended law till they were declared obsolete from the Bench. References to unreported cases may be very valuable to practitioners in Calcutta but are not of much use to those who practise in the mofussil for the simple reason that they have no access to the judgments. Such references are, however, of great assistance to us and if we find any of them of special importance, we shall be happy to report them in these columns. The references given in the notes to the other sections, Acts, Rules and Orders, local or general, which have a bearing on the subject, also add considerably to the usefulness of the book. The thorough recasting of the notes on a new plan has, in our opinion, not in any way detracted from the intrinsic merits of this well-known work.

THE LAW OF BENAMI. By P. C. Sen. Price Re. 1. Messrs. Sen & Co., Kannaagar.

This little book contains the law relating to *benami* and fraudulent transactions. The important cases relating to the subject are all to be found arranged under their different heads. The book is divided into eight chapters, one of which relates to the right of the *benamidars* to sue; we have examined this chapter carefully and find that all the important cases have been referred to and the subject is treated in a manner which reflects credit on the author.

THE KAIYASTHA SAMACHAR: A monthly English Journal. Edited by Sachchidananda Sinha, Bar-at-Law.

The Kaiyastha community claims many eminent lawyers amongst its ranks and we are not surprised to find in the pages of their journal excellent

reviews of law books and contributions of considerable merit dealing with such important subjects as the proposed restriction of civil appeals. It is, however, somewhat noticeable that many of these legal contributions proceed from Brahminical pens. But the editor himself hails from the Kaiyastha community, and his survey of the legal, social, political and literary world is highly interesting and instructive. The journal though not a legal one, yet being under the guidance of a lawyer, maintains a very healthy legal tone in its pages.

## English Notes.

PROBATE COURT.—EDMONSON v. EDMONSON AND OTHERS. Before MR. JUSTICE BARNES. 28th March 1901.

*Construction of Will—Contingency—Conditional Will.*

This case relates to the proper meaning to be placed on the following clause in a Will. "In case I should not return home, owing to death, I hereby give and devise."

The Will was made by one Thomas G. Edmonson, on 23rd June 1871, when he was about to proceed to Norway. He was a resident of Caton in Lancashire. He returned to England in September 1871. In February 1876 he went on tour to Palestine whence he returned in the following month of May.

Prior to starting for Palestine he had sent the Will to his unmarried sister with a request that it should remain in the envelope unopened. The Will was found after his death in his said Caton residence in the envelope, the testator's desire being faithfully carried out by the Plaintiff, his said sister. It was kept in the deed-box to which the testator had daily access. In May 1900 the testator went to Scotland on a fishing tour and he suddenly died there. The Plaintiff, the said sister, claimed probate of the said Will. The Defendants resisted such claim on the ground that the Will was a conditional Will, effective only in case of the testator's death in Norway in 1871 and they asked for a declaration of intestacy.

The learned Judge gave a considered judgment. He referred to *In the goods of Porter* (L. R. 2 P. & M. 22) and *In the goods of Spratt* (13 the Times Law Reports 67) and he held that the Will was only made in contemplation of the trip to Norway in 1871 and was a conditional Will and consequently pronounced against it.

The parties had agreed that the costs should come out of the estate.

The judgment sets out the following passage from the judgment of Lord Penzance in the first of the two cases abovenamed:—

"It is a common feature of Wills in respect of which this sort of question arises that the testator

therein refers to a possible impending calamity in connexion with his Will, and the question arises whether he intends to limit the operation of the Will to the time during which such calamity is imminent. If the language used by him can by any reasonable interpretation be construed to mean that he refers to the calamity and the period of time during which it may happen as the reason for making a Will, then the Will is not conditional; but if he refers to the calamity or the possible occurrence of some event as a reason for a certain disposition of his property, and mixes up the disposition of the property with the event so that it is dependent on the other, then the Court must hold the Will to be conditional."

*Mr. Inderwick, K. C.*, and *Mr. Priestly* supported the Will.

*Mr. Deane, K. C.*, and *Mr. Willock* for the Defendants against the Will.

*Judgment for Defendants.*

C. W. A.

ADMIRALTY COURT.—THE TURRETT COURT. Before THE RIGHT HON'BLE THE PRESIDENT. 11th March 1901.

*Costs—Taxation—Costs of transcript of short-hand writer's notes.*

In a collision case between two steamships, the President had held the "Turrett Court" alone to blame. The action involved questions of an extremely technical character. For the Plaintiffs in that original action, who were the owners of a vessel called the *Ramellies*, a short-hand writer was employed who took down the evidence of experts, who dealt on the operation of steam-reducing valves and other such matters.

Those costs were disallowed by the Registrar to Plaintiff who had recovered judgment in that action with costs. The Registrar had refused them on the ground that such costs were only allowed when the successful party had applied for them at the hearing. The owners of the *Ramellies* appealed.

The learned President accepted the view of the Registrar; general costs do not include the costs of a short-hand writer's notes, these require a special direction. An application should be made at a time before the order is drawn up and he therefore directed that the taxation should stand.

*Mr. Batten* for the Plaintiff.

*Mr. Stephen* for the owners of the Turrett Court.

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 357 of 1900.

MACLEAN, C. J.      SURJI KUMAR DUTT and another,  
BANERJEE, J.      Defendants, Judgment-debtors,

1901.

3, May.      AROON CHANDRA ROY and others,  
Defendants, Decree-holders.

*Limitation Act (XV of 1877), secs. 7, 8—Application by a minor jointly interested with other persons who attained majority.*

\* The facts of the case material to the report are as follows:—

The decree sought to be executed was passed in 1890; it directed Defendants-Judgment-debtors 12 and 13 to pay Rs. 831 to Defendants 1, 2 and 3 the Respondents as owelty of partition. Defendants 2 and 3 were minors at the time. In 1897 Defendants 2 and 3 for the first time applied for execution alleging that Defendant 2 had attained majority within 3 years before the date of the application and that Defendant 3 was still a minor. Defendants 12 and 13 the judgment-debtors objected that the application which was made seven years after the date of the decree was barred by limitation. The first Court held that sec. 7 of the Limitation Act applied to the case and therefore the application was within time. On appeal the lower Appellate Court upheld the judgment of the first Court.

The judgment-debtors preferred this appeal.

It was contended in second appeal on behalf of the judgment-debtors that sec. 7 applied only to cases where all the decree-holders were minors and did not apply to a case, where some only of several persons entitled to make an application were minors.

The contention was overruled and it was

*Held*—That sec. 7 of the Limitation Act applied also to a case where only some of several persons entitled to apply were minors.

*Govindram v. Tutia* (1 L. R. 20 Bom. 383), *Zamir Hasan v. Sundar* [22 All. 199 (F. B.)] followed.

*Seshan v. Raja Gopal* (13 Mad. 236), *Vinayakaram v. Rappayya* (16 Mad. 436), *Narayanan v. Danodaran* (17 Mad. 189) dissented from.

It was further held that sec. 8 was not applicable to the case as one of several joint decree-holders cannot give a valid discharge.

*Babus Basanta Kumar Bose and Harendra Narayan Mitter* for the Appellants.

*Babus Saroda Charan Mitter and Hari Bhushan Mookerjee* for the Respondents.

*Appeal dismissed*

S. C. S.

## Extract.

## THE CHUPRA CASE.

*(From the Law Times.)*

Some months ago the Government of India issued a resolution respecting the allegations against four European officers of the Champaran (Bengal) District, made by the district judge, Mr. Alfred Pennell, I. C. S., in deciding an appeal from the decision of a subordinate court in what has since been known as the Chupra case. While not absolving the officers in question from blame, the resolution criticised the apparent animus of Mr. Pennell's judgment, and described the whole affair as casting discredit on the Government, and as being calculated to weaken materially its authority and prestige. Mr. Pennell was transferred to the Noakhali District, the acknowledged insubordination of which led the native Press to describe the transfer as a punishment for judicial independence. Interest in the matter had, however, died away, when it was revived by a judgment given last month by Mr. Pennell in a case of alleged murder, followed by his commitment to prison, bail being refused, of Mr. Reilly, the district superintendent of police, on a charge of perjury and forgery in connection with the trial. The judgment, extending over 300 pages of manuscript, enters at length into the question of Mr. Pennell's personal relations with the Bengal Government, whom he accuses of attempting to "bury the scandal" of the Chupra case and of "shielding subordinates." He asked why, if his judgment in the Chupra case was wrong, the local Government did not appeal against it, and said there was the less reason for its hesitation to do so since two of the judges of the court, whom he named, had "a strong personal animosity" against him for private reasons. He complained that leave had been refused him, and controverted the views set forth in the resolution of the Government of India, remarking that he had been longer in the country than Lord Curzon and knew more about the mofussil than most of his Excellency's advisers, and he would have nothing to do with politics or considerations of political expediency. On application to the Calcutta High Court, Mr. Reilly, the incarcerated police official, was liberated on bail, and a rule was issued requiring the district magistrate, as representing the Crown, to show cause why the case against Mr. Reilly should not be transferred from Mr. Pennell's court. At the end of last month Mr. Pennell applied for casual leave, but on the recommendation of the High Court, to whom such applications from district judicial officers are invariably referred, it was refused. Mr. Pennell, however, left Noakhali and proceeded to Calcutta for the ostensible purpose of personally handing to the Chief Justice the record in the murder case. Sir Francis Maclean, according to affidavits sworn on Mr. Pennell's behalf, refused to see him or to receive the record. On the recommendation of the High Court Mr. Pennell was ordered on the 3rd March to return to Noakhali forthwith, and the next day he was directed to make over personally to the officiating registrar the entire record. Both orders were disregarded, and the High Court recommended the immediate suspension of Mr. Pennell for gross insubordination and misconduct. His suspension was accordingly gazetted, and his friends complain that, although Mr. Reilly has been suspended, a similar notification has not been published in his case. Mr. Pennell is understood to justify his presence in Calcutta without leave on the ground that his court was closed on the days in question on account of public holidays, and his refusal to return on the plea that the copying of the record he had to deliver over to the High Court was not then completed, and that it was necessary to remain to file certain affidavits. The refusal to make over the record he bases on the ground that the officiating registrar was not entitled to receive it. His case is warmly espoused by the native Press of Calcutta.—*Times*.

## HYPNOTISM AS AN EXCUSE FOR CRIME.

The frequency with which the plea of hypnotism is being entered as a defence against criminal charges is becoming disquieting, chiefly because of the credence that is accorded to it in the vulgar mind. A recent case at Red Bud, Illinois, carries the matter to a *reductio ad absurdum*, and yet shows the dangerous hold that the notion of hypnotism as conferring an immunity from responsibility has taken upon people at large, from whom, of course, juries are drawn. A young man deliberately killed another young man after previously expressing his intention of killing him "on sight." He then gave himself up, and pleaded that he had killed his victim because the latter "had hypnotised him to his detriment." The coroner's jury acquitted the prisoner, apparently without any hesitation.

It is not by any means established that hypnotism can compel a person to the performance of any act otherwise morally impossible to the subject, or such as to revolt his moral sense in a moral condition. Hypnotism does not differ essentially from other forms of suggestion. It is all of a piece with the worked up fury of a crowd incited to violence by the diatribes of a mob orator, or the thousand and one forms of suggestion to which we all respond, by reflex action as it were, nearly every day of our lives. Under the influence of the slightest suggestions, we daily perform almost unconscious acts. But were the suggestions such as to prompt us to something totally at variance with our preconceived ideas and natural qualities and impulses, the spell would be broken and the influence of the suggestion be at once dissipated.

We are not forgetting that in hypnotic *séances* it is a very common sight to see some inoffensive and amiable subject ferociously seeking to stab perhaps his dearest friend with a paper knife or to shoot him with a ruler or other harmless object. But there are cases to show that under such circumstances the sub-consciousness is aware of the actual harmlessness of the procedure, and that, under circumstances in which real harm could be done or when such would wrongly seem to the subject to be possible, the subject becomes rebellious to the influence of the suggestion.

Further, if these absurd pleas of hypnotism are to be accepted, then in all forms of mob violence and crowd suggestion we must logically hold the doers of violence unanswerable for their acts. The capacity to recognise evil is by no means necessarily equivalent to the power to resist the impulse thereto, and there are many cases in which, without any pretence of hypnotism consciously or unconsciously exercised from without, the subject, while fully conscious of the gravity of the offence, is powerless to resist his impulses—which is only another name for "self-suggestions." The question of responsibility is one, therefore, for a careful examination of the subject, rather than of the circumstances, and what has to be decided is not whether the person was the subject of suggestion, whether from another person—"hypnotic" so-called—or from his own depraved impulses but whether he was so far a defective as to be really unable to resist them. The man who is "hypnotised," the subject of "crowd suggestion," and the victim of morbid impulses, most commonly of the sexual type, stand in the same category and should all be judged by the same rules. Not all subjects of morbid perversion are irresponsible; neither are all people who plead "hypnotism" as an excuse for their crimes, nor all transgressors under the influence of crowd suggestion, as in lynchings, mob violence, and the like. Such a plea should be received with the greatest caution, and in regard to hypnotism, as in the other cases, the entire morbid chain of perversion should be clearly demonstrated before the subject is held to be irresponsible and is absolved from the consequences of his crime.—*New York Medical Journal*.

# THE Calcutta Weekly Notes.

Vol. V ]

MONDAY, MAY 12, 1901.

[No. 25]

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### REPORTS (See Index.)

MR. JUSTICE PRINSEP, THE SENIOR PUISNE JUDGE of the Calcutta High Court, will officiate as Chief Justice during the absence, on leave, of Sir Francis Maclean, who goes home to be present at the King's Coronation.

THE PROVISION MADE BY THE BENGAL GOVERNMENT in the Provincial Budget for the appointment of a new judge and additional ministerial staff for the Calcutta High Court, has met with the approval of the India Government. This was a foregone conclusion. But the sanction of the Secretary of State will yet have to be obtained. There is, however, little doubt that it will be given as a matter of course. But the question is whether that sanction will be asked for and obtained by wire, or will come in the usual course. In any event we expect that Mr. Justice Henderson, who is now officiating for Mr. Justice Sale on leave, will be confirmed in his present position with retrospective effect.

MR. JUSTICE PRINSEP'S RULING IN THE CASE OF *King-Emperor v. Bhilepa Alam* (post p 506) bearing on the question of the criminal liability of a person who may have lost all sense of responsibility from disease brought on by habitual intemperance, would commend itself as being consistent with approved

principles. We wish, however, that the learned judge had fully set out the facts in his judgment. As it was a reference which was disposed of *in camera* and the records returned to the lower Court soon after, we regret very much to have to report the case without fully setting out the facts. The facts stated in the judgment however sufficiently explain the principle. We had on previous occasions pointed out how the defence of even a raving lunatic would be a psychological impossibility if sec. 81 of the Indian Penal Code had to be interpreted strictly, as it has often been done by the Courts in this country (5 C. W. N. cxevii). This is all the more the reason why the sound common sense view taken by the learned judge will be generally welcomed.

THE CASE OF *Stuart v. Freeman* NOTED BY US IN THIS issue is of great importance both to the insurers and the insured. The *Law Journal* commenting on it says :

The facts in *Stuart v. Freeman* were so remarkable that it is not to be wondered at that scarcely any similar cases can be recalled. The plaintiff was the assignee of a life policy, which contained the usual condition that the insurance would lapse if the premium was not paid within thirty days of the time when it became due. The premium was paid and accepted by a clerk of the insurers at three o'clock on the thirty-first day, but the person on whose life it was effected had died an hour before, a fact of which both parties were ignorant. Mr. Justice Grantham held that the insurers were not liable, and, indeed, it seems clear that the policy had lapsed, and that the acceptance of the premium by the clerk in ignorance of the true circumstances could not operate as a waiver or estoppel, so as to prevent the defendants from setting up this defence. A somewhat similar case is *Pritchard v. The Merchants' Mutual Life Insurance Society* (27 Law J. Rep. C. P. 169) the only difference being that the policy in that case contained a condition that the policy could be revived after default in payment of the premium, upon proof that the person insured was in good health.

## CAN A MORTGAGE DECREE BE KEPT ALIVE FOR MORE THAN 12 YEARS?

The question, whether a mortgage decree, which directs the sale of the mortgaged property in the first instance, and if insufficient, the personal and other properties of the Defendant to remain liable for the balance of the decretal amount, can be kept alive for more than 12 years from the date of the decree or the date on which the money was made payable under the decree, is of considerable import-

ance and it may be useful to ascertain the existing state of the law with regard to it.

The only provision of law which lays down that a decree shall not be executed after 12 years from the date of the decree is to be found in sec. 230 of the Civil Procedure Code. The first paragraph of that section no doubt deals with decrees generally, but the 3rd paragraph which lays down the 12 years' rule refers to decrees for the payment of money or delivery of other property; a mortgage decree certainly does not come under that category. It has been held by the Calcutta High Court in the cases of *Jogmaya Dassi v. Thakomani Dassi* (I. L. R. 24 Cal. 473), *Fazil Howladar v. Krishna Bundhu Roy* (I. L. R. 25 Cal. 580), *Kartie Nath Pandey v. Jaggernath Ram Marwari* (I. L. R. 27 Cal. 285), and also by the Allahabad High Court in the case of *Ram Charan Bhugut v. Sheobari Roy* (I. L. R. 16 All. 418) that a decree which directs the sale of the mortgaged property first and if insufficient, the Defendant to remain personally liable, is a mortgage decree and is not governed by sec. 230 of the Civil Procedure Code, and 12 years' limitation does not apply to such decrees. The Madras High Court in the case of *Kammachi Kather v. Pakker* (I. L. R. 20 Mad. 107) took a contrary view, but the Calcutta High Court dissented from it. The majority of cases on that point support, however, the view taken by the Calcutta and Allahabad High Courts. Therefore the law on the subject must be taken as laid down by the Calcutta and the Allahabad High Courts in the cases mentioned above.

The next question which is more important is, whether that part of the decree which makes the Defendant personally liable for the balance of the decretal amount which remains due after the sale of the mortgaged property, is also governed by sec. 230 of the Civil Procedure Code. It can be gathered from the opinions expressed in the cases of *Fazil Howladar v. Krishna Bundhu Roy* (I. L. R. 25 Cal. 580) and *Kartie Nath Pandey v. Jaggernath Ram Marwari* (I. L. R. 27 Cal. 285) that that portion of the decree, referred to above, is governed by sec. 230 of the C. P. C., but there is a conflict of opinion expressed in those two cases as to the date from which 12 years' limitation should begin to run. In *Fazil Howladar's* case that question was not directly in point. That case involved a question whether execution can proceed against the mortgaged property after 12 years from the passing of the decree; but the remarks which their Lordships made in that case tend to shew that personal liability was barred, as the decree which was passed on 16th May 1864 was executed on 30th November 1896, that is, after 12 years from the date of the decree. It is necessary to quote their Lordships' words to give an exact idea of what their Lordships meant.

Maclean, C. J., observed,—"I may here remark that in this case, as regards any personal liability of the Defendants to pay the money, both the Courts below

have held that the application is too late, and the execution proceedings decreed are confined to a realisation of the property only."

Banerjee, J.—"The Courts below have already held that so much of the decree as authorizes the decree-holder to realise the judgment-debt out of any property of the judgment-debtor other than the mortgaged property is barred under sec. 230 of the Code and the only question now before us is, whether that portion of the decree which directs the realisation of the mortgaged debt by sale of the mortgaged property is also barred under sec. 230. The question ought, in my opinion, to be answered in the negative."

From the above remarks it is clear that that part of the decree which makes the Defendant personally liable for the balance of the decretal amount which remains due after the sale of the mortgaged property is governed by sec. 230 and becomes barred after 12 years from the date on which money was made payable under the decree. But in the case of *Kartie Nath Pandey* (I. L. R. 27 Cal. 285) the remedy against properties other than the mortgaged property was sought to be enforced on 5th November 1897 although the date of the decree was 26th February 1880, and it was held that the remedy against properties other than the mortgaged property was not barred as the decree was converted into a money-decree only after the sale of the mortgaged property on 5th July 1888 and not before, and that the 12 years' limitation began to run from the date on which the mortgaged property was sold, and it was found that it failed to satisfy the decree and a balance stood in favour of the decree holder. If this principle were applied to the case of *Fazil Howladar* (I. L. R. 25 Cal. 580) it would seem to follow that the personal liability did not become barred, since in that case the mortgaged property was not sold and the cause of action to enforce the personal liability did not then at all accrue. The law laid down in the case of *Kartie Nath Pandey* (I. L. R. 27 Cal. 285) as regards the enforcement of personal liability in respect of the balance of the decretal amount which remains due after the sale of the mortgaged property seems to us to be the more reasonable.

In any case we should like to see the decision in the case of *Fazil Howladar* (I. L. R. 25 Cal. 580) explained.

### CRIMINAL CASES OF 1901.

**BAIL.**—The High Court has jurisdiction to release an accused on bail pending an appeal to the Privy Council (*Queen-Empress v. Subramanya Ayyar*, 24 Mad. 161). The High Court under special circumstances granted bail in *In re Reilly*, 5 C. W. N. cviii.

**DISPOSAL OF PROPERTY.**—Ordinarily property in stolen goods remains with the owner (*I. N. W. P. 298*, see 10 Mad. 25), unless purchased in market overt (see 20 W. R. 38); but property in cash, and



bill or notes, which circulate as cash, is inseparable from possession, in the absence of fraud (*1 N. W. P. 298*; *7 Mad. H. C. R. 233*; *3 Cal. 379*). Coin when it is not legal tender, falls in the first category (*In re Mathur*, 25 Bom. 702). The object of sec. 522 is to restore the state of things existing at the time of dispossession, and under sub-sec. (2), a third party should seek remedy in the Civil Court. (*Rameswar v. Biswanath*, 5 C. W. N. 374, distinguishing 23 Bom. 494). It applies only where the dispossession is by actual force, and not by "show of force" (*Srihari v. Lal Khan*, 5 C. W. N. 257); *Ram Chandra v. Jityandria*, 25 Cal. 434; *Ishar v. Dina*, 4 C. W. N. 307). Sec. 523 does not apply to property produced in Court but remaining in the hands of the Police. Where certain logs were seized by the Police, not in connection with the pending case of rioting, but in a case of theft, which broke down for want of prosecution; held that the order was one within sec. 523 (*Nasib v. Rukhmini*, 5 C. W. N. 415).

TRANSFERS.—The rule laid down in *In re Wilson*, 18 Cal. 247, and *Dupeyron v. Diver*, 23 Cal. 495, that even a semblance of bias causing reasonable apprehension in the mind of a party is a good ground of transfer, is again enunciated in *Bakta Singh v. Kali Prasad*, 28 Cal. 297, and *Lalit Mohan v. Surja*, 5 C. W. N. 749; s. c. 28 Cal. 709. (See also *19 All. 64*; *25 Cal. 727*; *25 Bom. 179*). Presence of a Magistrate at a search, during which he came to know of the facts of the case, held a good ground for transfer (*Gya Singh v. Mohamed*, 5 C. W. N. 864). It has been held in *In re Pandurang*, 25 Bom. 179, that sec. 526 does not apply to cases under sec. 145, Cr. P. C., but the Calcutta High Court considered the point doubtful, and founded the jurisdiction of the High Court, in such cases, upon sec. 15 of the Charter Act (Ghose, J.), or sec. 29 of the Letters Patent (Taylor, J.):—*Lalit Mohan v. Surja*, 5 C. W. N. 749; s. c. 28 Cal. 709. The Court ought to stay proceedings on receipt of a telegram from an accused or his pleader that a rule has been granted by the High Court. (*Ratnessari v. Empress*, 2 C. W. N. 498; *In re Surjya*, 5 C. W. N. 110; but see *19 Mad. 375*), and precipitate action after such telegrams, especially when coupled with other circumstances, (e.g., cancelling bail on application under sec. 526, cl. (8) shows bias:—*In re Surjya*, 5 C. W. N. 110. Under sec. 528 the District Magistrate can transfer a case under sec. 145, Cr. P. C., to a Sub-ordinate Magistrate, though the land or water is not within his local jurisdiction, provided such Magistrate was vested with the powers of a proper class (*Raj Mohan v. Prosunno*, 5 C. W. N. 686). The case of *Ayer v. King-Emperor*, 5 C. W. N. 488, is a peculiar decision, and is of a class with *Nukheda v. Ripu*, 4 C. W. N. 239. When several persons are accused of an offence, and only one is sent up and tried, the trying Magistrate is *junctus officio*, thereafter. There is no other case before him then, and a District

Magistrate, in taking action against the others whom the Magistrate has refused to summon upon subsequent complaint, acts either under sec. 190, or sec. 437, but sec. 528 seems inapplicable. The view that the trying Magistrate has seisin of the whole case even as against others not before him is contrary to the actual fact. Secs. 192, 528 refer to a "case," and not an "offence" as being transferred, and there is no case with reference to the persons not actually before the Court. The rule requiring notice to the opposite party under sec. 528 does not apply when the transfer is at the request of the trying Magistrate (*Queen-Empress v. Kuppu Muthu*, 24 Mad. 317).

IRREGULAR PROCEEDINGS.—Sec. 529 (f) cures an erroneous order of transfer in good faith of a case under sec. 145, Cr. P. C. (*Raj Mohan v. Prosunno*, 5 C. W. N. 686. See *4 C. W. N. 821*). The words "not empowered" show that the section applies where the Magistrate is not competent by virtue of his position or powers vested in him to pass order (*13 Bom. 502*; *5 C. W. N. 686*; *23 Cal. 898*, p. 901, but see *5 C. W. N. 252*). Where a Magistrate deliberately disregards the offence actually complained of, and tries for a minor offence, it is not a mere irregularity, but the proceedings are absolutely void under sec. 530 (*Kailash v. Joyvanti*, 5 C. W. N. 252). This was the view also of *8 Bom. 307*, but is opposed to *13 Bom. 502* and *Ayyan v. Villayappa*, 24 Mad. 675. The negative form of the language of sec. 536 lends some support to the view that when an accused is wrongly tried by jury, the trial shall not on that ground only be invalid, i.e., the trial shall not be treated as a nullity, not that it shall be treated for all purposes as a valid jury trial (*King-Emperor v. Parbhassankar*, 25 Bom. 680, p. 693). This is the true view of the section. The onus of showing a failure of justice under sec. 537 is, in the view of Benson, J., on the accused (*King-Emperor v. Tirumal*, 24 Mad. 523, p. 532). One would have thought that an irregularity having occurred, the presumption would be on the other side. Sec. 537 cures an irregularity in passing an order of discharge under sec. 494, Cr. P. C., instead of an acquittal (*Queen-Empress v. Hussein*, 25 Bom. 422, p. 428), and want of sanction (*Sundar v. Sital*, 28 Cal. 219; but see *22 Cal. 176*, p. 179).

MISCELLANEOUS.—In *Empress v. Mungroo*, 5 C. W. N. xlvii, a Judge presiding at the Original Criminal Sessions of the High Court examined a Presidency Magistrate as to his mode of recording a confession. Sec. 31 of the Court Fees Act is not modified by sec. 545, Cr. P. C. (*Queen-Empress v. Yamana*, 24 Mad. 305).

COMPETENCY.—Authorization of a prosecution, as distinguished from initiating or directing the same, does not render a Magistrate incompetent within sec. 556 (*Queen-Empress v. Chenchi*, 24 Mad. 328).

E. H. MONNIER.

(To be continued.)

## English Notes.

CHANCERY DIVISION.—IRELAND v. HART AND OTHERS. Before Mr. Justice Joyce. 20th January 1902.

*Pledge of shares—Blank transfer—Equitable owner—Inchoate right—Rectification of register.*

Some shares in a Limited Liability Company had belonged to the Plaintiff, the wife of one H. C. Ireland. She being desirous that he should attend meeting and vote in matters concerning the Company had the said shares transferred and registered in her husband's name in the Company's books. Mr. Ireland being in need of money borrowed from the Defendant Hart on the security of those shares which he purported to deal with as his own. Hart was unaware of the said transfer by the wife to the husband. Mr. Ireland had executed a blank transfer which signed by him together with the certificate for the said shares he handed to Hart. The loan not being repaid, Hart filled in the blank transfer and on 23rd November 1901 left it with the certificate for registration into his own name at the Company's office. The Secretary not being satisfied called on Mr. Ireland who requested that the registration should be delayed. The directors made no objection to the delay, and on the same day the writ in this action was issued on behalf of Mrs. Ireland, and an *interim* injunction was granted restraining the transfer of the shares. The question arose in this case, whether under the above circumstances the Defendant Hart, as a *bona fide* purchaser for value without notice of Mrs. Ireland's equitable title, was entitled to be registered as the proprietor of the said shares.

The learned Judge held that he was not. The judgment states that the transfer in question was valid and Hart had authority to fill up the blanks in the transfer as it suited his purpose because the articles of association of the Company did not require a transfer of shares to be by deed [vide *In re Tahiti Cotton Co.* (17 Eq. 273)].\* The directors were not bound to register the transfers at their first meeting. They were entitled for a reasonable time to put off registration in order to enable them to make enquiries, yet in this case having regard to the form of the articles of the Company, the legal title to the shares was not acquired as against an equitable owner before registration, or at all events until the person seeking registration had established a present and absolute right to be registered. Hart had merely an inchoate right and therefore Mrs. Ireland's prior equitable right prevailed (see *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20).

Mr. Hughes, K. C., and Mr. Mitchell for the Plaintiff.  
Mr. Goodman for Hart.

C. W. A.

Judgment for Plaintiff.

\* REPORTER'S NOTE.—This case, cited as *ex parte* Sargent, was commented upon in *France v. Clark*, 26 Ch. D., see pages 264-5.

KING'S BENCH DIVISION.—STUART v. FREEMAN. Before Mr. Justice Ridley. 14th April 1902.

*Insurance policy—Payment of premium after due date.*

PRITCHARD v. MERCHANTS ASSURANCE COMPANY (3 C. B. N. S. 622) followed.

The Hon'ble Francis C. Lawley was indebted to the firm of Algor Stuart & Co. of which Plaintiff was a member in the sum of £2,500. To secure same, Mr. Lawley insured his life in the General Life Assurance Company and assigned the same to Plaintiff. The Defendant Freeman was the manager of that Insurance Company. It was provided by the policy, that in the event of any of the quarterly payments being in arrear for over 30 days the policy was to become void. The premium due on 18th August became in arrear on 17th September 1901. Between 3 and 4 o'clock on 18th September 1901, Plaintiff paid to Defendant and he received the arrears due. Both parties were then ignorant that just an hour previously Mr. Lawley had died (*i.e.*, at 2 o'clock on 18th September 1901).

The Plaintiff on Defendant's refusal to pay the £2,500 on the policy brought this action to recover it. On the facts it was contended on behalf of Defendant that the policy had become void by reason of the premium being in arrear and a subsequent payment after the death of the insured cannot revive it.

The learned Judge accepted that view on the authority of the above case as conclusive and gave judgment for the Defendant holding that there was no liability on the part of the Insurance Company to pay under the circumstances disclosed.

Mr. Elton Banks, K. C., Mr. Arthur Powell, K. C., and Mr. Marshall in support of the claim.

Mr. Duke, K. C., and Mr. Hall for the Defendant.

Decision in favour of Defendant.

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL.—Appeal from Madras. RAJA BOMMADEVARA VENKATA NARASINHA NAIDU AND ORS. v. RAJA BOMMADEVARA BHASHYAKARLU NAIDU AND OTHERS. 18th April 1902.

SIR ANDREW SCOBLE delivered their Lordships' judgment advising His Majesty to dismiss the appeal with costs in favour of Respondents who appeared, except costs of appendix.

Mr. Mayne and Mr. Nayadu for the Appellants.

Mr. Jardine, K. C., Mr. Phillips, Mr. Shephard, and Mr. Krishnan for the Respondents.

C. W. A.

## PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1902.

Heard, 12, and  
19, March.

Judgment,

• • 18, April.]

THE SECRETARY OF STATE  
FOR INDIA IN COUNCIL

v.

KRISHNAMONI GUPTA  
and others, and the  
Cross Appeal.

Chur land—Adverse possession—Limitation.

KALI CHURN SAHOO v. SECRETARY OF STATE  
(I. L. R. 6 Cal. 725) overruled.

The suit relates to certain *chur* lands. Those lands are claimed by Plaintiffs (locally known as the Banibaha Baboos) as re-formed lands of their Mouzah Thowkuri of Taraf Selem pore, Pergunnah Anurabad, being a portion of lands released to their ancestors in 1827 by the Revenue authorities as appertaining to their permanently-settled estates of Selem pore and Durgapore in the Farid pore and Pubna Towjis respectively.

The Government claimed them as appertaining to their *khas mehals* of Danchi Sonakonder and Gachehadabo.

A local investigation was made by an Amin in this suit and a map prepared by him. The Sub-Judge of Farid pore determined the dispute on the basis of the *thak* and survey maps of 1858-9 as showing that they established Defendant's title. He also held that as more than 12 years had elapsed since that survey, and the proceedings thereafter show that Government had been in possession, and Plaintiffs had failed to prove their possession, the suit was barred by limitation.

Against the decision of the Subordinate Judge, the Plaintiffs appealed to the High Court.

Judgment of the High Court was delivered on the 8th June 1898.

The Court found that the Plaintiffs had sufficiently shown that the lands now claimed are the lands lying to the north of Iswar Chunder Das's line, and is part of the tract of 9,407 bighas released to Plaintiffs in 1827, as forming part of their permanently-settled estate. The Plaintiffs' title being proved, the learned Judges went on to consider whether the suit was barred by limitation. They held that, as regards the lands lying on the north of the river bank, as it existed in 1869, limitation did not apply, the possession of Government being for a period of less than 12 years, but they held that as to those lying to the south thereof, Government had acquired an adverse title by being in possession for over 12 years.

They therefore drew a line almost midway across the disputed land as shown on the Amin's map, and marked that line with their name placed thereon, and so decreed such of it as lay to the north, and

dismissed the claim to those to the south thereof, each party paying his own costs. The learned Judges say that the applicability of the law of limitation by adverse possession under the circumstances of this litigation was one of some difficulty and of considerable importance.

Mr. Arthur Cohen, K. C., and Mr. Branson for the Appellant contended that the suit was barred by limitation. They did not contest the decision of the High Court that Plaintiffs, the Banibaha Baboos, had proved that the lands in dispute were part of their permanently-settled lands, but they urged that that as from 1849 to 1859, then from 1859 to 1869 Plaintiffs had been in possession as lessees under Government, after their claim to hold those as their *zemindari* or free hold was denied by the Revenue authorities, Government had adverse possession and Plaintiffs' claim was barred by limitation; to get rid of that claim Plaintiffs must prove 60 years' possession against Government; the High Court had found at most a few months' possession which was not sufficient. It was urged that Government having been in possession when the land was dry, it must be presumed that their possession continued when the land was covered with water.

The following authorities were noticed:

Kali Churn Sahoo v. Secretary of State (I. L. R. 6 Cal. 725), Shrin Mohan Ghose v. Mothura Mohan Roy (I. L. R. 7 Cal., see 231), De Burres v. Shey (22 W. R., see 276), Taylor v. Hali (2 Smith Leading case, p. 634).

Mr. Mayne and Mr. C. W. Aruthoon for the Respondents and cross-Appellants contended that the suit was not barred by limitation.

The *ijarah* settlement from 1849 for about 10 years were of the *jajira* or Island *chur* lands. Those lands were taken possession of by Government under the wrong interpretation of the law then prevailing in India which was set right in the *Lopez case* (13 Moore I. A 467). That settlement did not comprise the lands now in dispute. The lands south of the line marked by the present Amin as the resumed line of 1845 are not lands the Plaintiffs now claim. Therefore that settlement does not help the Defendant. The settlement of 1858-9 for another 10 years did include parts of the land now in dispute, but those lands were in 1869 submerged and it cannot be said that the Government, as it is now admitted as a wrong-doer, had adverse possession of it as against the rightful owner. Indeed the Government had not any possession at all. The case in the 7th Calcutta Series was in Plaintiffs' favour.

[LORD DAVEY—Mr. Justice White in that case seems to have at first taken the view you are now suggesting. His Lordship read the passage].

Mr. Mayne.—Yes. The case in the 6th Calcutta is bad law.

Reference was then made to Savigny on Possession by Sir Erskine Perry (1848), Book 3, pp. 245, 253, 258 and 265.

[LORD DAVEY.—You say there was neither corporeal possession in Government nor the *animus*].

*Mr. Mayne*.—Yes, a failure in either is sufficient for me. Savigny says, possession is lost whenever the power of dealing with the subject ceases.

Reference was then made to *ex parte Fletcher* (5 Ch. D. at 813) and *Jones v. Chapman* (2 Exchequer 821).

[LORD MACNAGHTEN.—That case was referred to in *Lowes v. Telford* (1 App. Cas. 414) before the House of Lords.

LORD DAVEY.—Under what article is it said this suit is barred.]

*Mr. Cohen*.—Article 144.

*Mr. Mayne* referred to article 142 and observed upon the “discontinuance.”

[LORD DAVEY drew attention to the *Squire's* case from Australia (13 App. Cas., p. 793)].

As regards the Secretary of State's appeal it was submitted that there was not 12 years' adverse possession.

As regards the cross-appeal reference was made to Regulation I of 1793, to the case of the Secretary of State in 17 Indian Appeal, at p. 40, and it was contended that the Government had no right to a double assessment of lands permanently settled. The argument in the High Court on that point was supported.

LORD DAVEY delivered their Lordships' judgment, advising His Majesty to dismiss both appeals. The Appellants in each case to pay the costs of the respective appeals.

In the course of the judgment it is said that *Kali Churn Sahoo's* case (1 L. R. 6 Cal. 725) was erroneously decided and should be overruled.

*Mr. Arthur Cohen, K. C.*, and *Mr. Branson* for the Secretary of State.

*Mr. Mayne* and *Mr. C. W. Arathoon* for Krishna-  
moni Gupta and others.

C. W. A.

## CALCUTTA HIGH COURT.

[FULL BENCH REFERENCE.]

CR. REV. NO. 756 OF 1901.

MACLEAN, C. J.

PRINSEP, J.

GHOSE, J.

HILL, J.

HENDERSON, J.

1902.

30, April.

MIRZA MAHOMED ASKARI,

Petitioner,

v.

MIR AHAMED HOSSEIN,

Opposite Party.

*Discharge of accused person*.—*Re-issue of process upon accused on the same facts*.—*Magistrates, mofussil or provincial, power of*.—*Acquittal*.—*Further enquiry, order for, if necessary, before re-issue of process*.—*Code of Criminal Procedure (Act V of 1898), secs. 253, 215, 403, 437*.—*Warrant-case*.

This was a rule issued against the order of

Moulvi Serajul Huq, Esq., Deputy Magistrate of Alipur, dated the 31st July 1901.

The facts of the case material to this report were as follows :—

Mir Ahamed Hossein lodged a complaint against the Petitioner Mirza Mahomed Askari before Moulvi Serajul Huq, Deputy Magistrate of Alipur, charging him with offences under secs. 426, 295 and 297 of the Penal Code. The case came on for hearing on the 27th July 1901 and on an application made on behalf of the Petitioner, who was absent, his personal attendance was dispensed with by the Magistrate. On the same day a petition was put in by the complainant stating that inasmuch as the Petitioner Mirza Mahomed Hossein had expressed his regret and made an apology to him, he was willing to withdraw the case. On the 29th July 1901 the Magistrate passed an order on the said petition to the following effect :—“Under the circumstance represented the accused is acquitted under sec. 248, Cr. P. Code, of the charge under sec. 426, I. P. Code. He is discharged under sec. 253, Cr. P. Code, in respect of the offences under secs. 295 and 297, I. P. Code.”

On the same day a counter-petition was filed on behalf of the accused stating that he had not expressed his regret or made any apology as stated by the complainant and that the complainant withdrew from the case as the case was entirely groundless and frivolous. On the 31st July the complainant made another application to the Deputy Magistrate praying that the case against the Petitioner might be revived as on the denial of the regret and apology by the Petitioner the only ground for the withdrawal was removed and it became nugatory. The Deputy Magistrate thereupon made the following order :—“Summon the accused under secs. 295 and 297, Indian Penal Code, for the 15th August 1901.”

Against that order the Petitioner moved the High Court and obtained the present rule on the ground that there having been a previous order of discharge by the Magistrate, he was not competent to re-issue summons on the accused unless and until that order of discharge was set aside.

On the hearing of the rule before Prinsep and Stephen, JJ., their Lordships on the 27th January 1902 made the following reference to the Full Bench :—

The Magistrate in this case, on the 19th July, discharged the accused of offences under secs. 295 and 297, Indian Penal Code, and, on the 31st idem, on the representation of one of the parties that he had proceeded on a misrepresentation, he has commenced proceedings in regard to the same offence by issue of summons on the accused. A Division Bench of this Court has, on these facts, granted a rule to consider why the order “summoning the Petitioner to consider such charges should not be withdrawn upon the ground that, having regard to the earlier order of the same Magistrate of 29th

July discharging the accused in respect of charges under these very sections, he has no authority to make the order in question."

The question raised is, in our opinion, the same as that raised in the recent Full Bench case of *Dwarka Nath Mandal v. Beni Madhab Banerjee* (5 C. W. N. 457: s. c. I. L. R. 28 Cal. 652), in which, however, the Full Bench considered the proceedings of a Presidency Magistrate, whereas, in the present case, the proceedings are those of another Magistrate. No doubt there is no reported case in which it has been held that a Magistrate is not competent to take proceedings after an order of discharge unless an order for further enquiry shall have been passed under sec. 437, Code of Criminal Procedure. But this interpretation of the law has been laid down in the cases of *Nil Ratan Sen v. Jogesh Chandra Bhattacharji* (I. L. R. 23 Cal. 983) and *Kamal Chandra Pal v. Gour Chand Audhikari* (I. L. R. 24 Cal. 286), in respect of an order dismissing a complaint and unless we are prepared to follow the reasons upon which those cases were decided, we feel that we should be interpreting the law in a manner opposed to that expressed by the learned Judges in those cases. We are not prepared to accept this view of the law and we, therefore, refer the matter for decision by a Full Bench. The point referred is whether a Magistrate in a warrant-case having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence unless an order for further inquiry shall have been passed under sec. 437, Code of Criminal Procedure, having the effect of setting aside such order of discharge.

*Babu Bankim Chandra Sen* for the Petitioner.—The cases of *Nil Ratan Sen v. Jogesh Chandra Bhattacharji* (I. L. R. 23 Cal. 983) and *Kamal Chandra Pal v. Gour Chand Audhikari* (I. L. R. 24 Cal. 286) were rightly decided—Relied on the dictum in I. L. R. 23 Cal. at p. 988. The question so far as it affected the Presidency Magistrate was set at rest by the Full Bench decision in *Dwarka Nath Mandal v. Beni Madhab Banerjee* (5 C. W. N. 457: s. c. I. L. R. 28 Cal. 652); but there was a clear distinction between a Presidency Magistrate and a Mofussil Magistrate. The distinction followed from the existence of sec. 437 in the Code. That section provided a special remedy and it was significant that while it gave the superior Courts in the mofussil, such as the Court of Sessions and District Magistrates, powers of revision in such matters, it excluded from its operation the Presidency Magistrates, who possess higher status and powers in other matters than the Mofussil Magistrates. See the remark of the Chief Justice in the case of *Dole Gobinda v. The Empress* (5 C. W. N. 169 at page 172) and also the remark of Prinsep, J., in the case of *Apoorba Coomarr Sett v. Probode Coomari Dass* (1 C. W. N. 49 at page 51). The Code made no distinction between one kind of discharge and

another, so far as the remedial measures were concerned. The case of *Hari Das Sanyal v. Suriatulla* (I. L. R. 15 Cal. 608) was also referred to.

*Babu Srish Chandra Chowdhury* for the Crown.—The case had been practically decided by the Full Bench case in I. L. R. 28 Cal. 652. Sec. 403 laid down that "a discharge" was not an "acquittal." Sec. 369 spoke of whether the order of discharge was a judgment. It had been answered in I. L. R. 28 Cal. 652. The order of discharge was not a judgment. Sec. 437 related to the revisional powers of superior Courts and not to original proceedings. It only showed how far enquiries should be directed but said nothing about setting those aside. The general principle was laid down by the Chief Justice in *Dole Gobinda v. Empress* in I. L. R. 28 Cal. 210. The case mentioned in the referring order would be substantially met by the same argument.

*Monti Shamsul Huda* for the Complainant.—Whether the order of discharge was or was not a judgment was not material. Sec. 403 did not say that where an order of discharge was in force it would be a bar to a fresh trial.

*Babu Bankim Chandra Sen* in reply.—Sec. 403 did not stand in his way. It should be read along with the other sections of the Code. Explanation II of sec. 215 of Act X of 1872 which corresponded with sec. 253 of the present Code had been omitted from the present Code.

*Held by the FULL BENCH* (GHOSH, J., dissenting).—That the question had been practically answered in the Full Bench case of *Dwarka Nath Mandal v. Beni Madhab Banerjee* (5 C. W. N. 457: s. c. I. L. R. 28 Cal. 652); that there was no difference in principle between the cases of Presidency and Mofussil Magistrates; that sec. 437 of the Code was an enabling section and it could not take away the powers of a Magistrate otherwise vested in him; that the question referred should be answered in the affirmative.

*Per GHOSH, J.*—That for the reasons stated in his judgment in *Dwarka Nath Mandal v. Beni Madhab Banerjee* (5 C. W. N. 457: s. c. I. L. R. 28 Cal. 652), the question should be answered in the negative; but that in the present case the order of discharge was not a judgment and the Magistrate could re issue summons.

*Rule discharged.*

H. P. C.

#### [CIVIL REVISIONAL JURISDICTION.]

RULE No. 3098 OF 1901.

PRATT, J. ABED-MOLLAH, Auction-purchaser,  
GEIDT, J. Petitioner,  
1902.

8, May. ] DILJAN MOLLAH, Opposite Party.

*Civil Procedure Code (Act XIV of 1882), sec. 310A—Under warrant, whether may deposit money under the section and apply for setting aside the sale of a holding—Person whose immovable property*

has been sold," meaning and extent of—*Applicability of the section—Jurisdiction.*

This was a rule against an order of Babu Rajani Nath Mitter, Munsif of Basirhat, dated the 14th September 1901.

The facts of the case material to this report were as follows:—

A *jama* of the judgment-debtor was advertized for sale. Diljan Mollah, an under-tenant or sub-*raiyat* of the judgment-debtor, applied under sec. 310A of the Code of Civil Procedure to have the sale set aside on payment into Court of the decretal amount and interest, &c., as provided by that section. The Munsif held that the principle laid down in the Full Bench case of *Paresh Nath Singh and others v. Nobogopal Chattopadhyay and others*, (5 C. W. N. 821; s. c. I. L. R. 29 Cal. 1) was applicable to the case inasmuch as a sub-tenancy under the Bengal Tenancy Act was an incumbrance, and permitted the applicant to deposit the money and ordered that on such deposit the sale be set aside.

Against this order the Auction-purchaser Petitioner moved the High Court and obtained the present rule.

On behalf of the Petitioner it was contended that the Full Bench case relied on by the lower Court did not intend to nor did it in fact lay down any such rule; that in that case the question was whether a simple mortgagee could come in under sec. 310A and apply for the setting aside of a sale and it was held that he could; that it did not decide nor was the case before the Full Bench that an under-*raiyat* could come in under that section. On the contrary in the case of *Administrator-General of Bengal v. Mahomed Khobli* [5 C. W. N. 132 (cxxxv)], Reference No. 5A of 1900, decided by Prinsep and Hill, JJ., on the 13th March 1901, it was held that a *hoveladar* under a tenure-holder was not a person whose immoveable property had been sold within the meaning of sec. 310A, C. P. Code. The case of *Bepin Behary Sarmokar v. Kali Das Chatterjee* (6 C. W. N. 336) was also relied upon.

*Held*—That an under-tenant or an under-*raiyat* was not a person whose immoveable property could be said to have been sold within the meaning of sec. 310A and that such a person could not come in and apply to have the sale of a *jama* or holding set aside under that section.

*Paresh Nath Singh v. Nobogopal Chattopadhyay* (5 C. W. N. 821; s. c. I. L. R. 29 Cal. 1) distinguished.

Reference No. 5A of 1900 and *Bepin Behary Sarmokar v. Kali Das Chatterjee* (6 C. W. N. 336) cited.

Moulvi Z. R. Zahid for the Petitioner.

Babu Sarat Chandra Dutt for the Opposite Party.

Rule made absolute; order set aside.

H. P. C.

# List of Business for the Judicial Committee of the Privy Council.

APRIL AND MAY, 1902.

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## INDIAN APPEALS.

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<b>Bengal.</b>			
Sham Koer v. Duh Koer and anr.	26-6-00 and 16-7-00 —	Whether the High Court overruling the District Court, which heard the Appellant's suits on their merits, rightly dismissed the suits on the ground of limitation.	T. L. Wilson and Co. (A.) Dallimore and Son (R.)
Rupan Singh and ors. v. Duh Koer and anr. (Consolidated appeals.)	22-1-02		
<b>Madras.</b>			
Raja Chelikam Venkayya and ors., representative of Raja Chelikam Appa Rao, deceased v. Raja Chelikam Venkataramanayya and ors. (Appeal and cross appeal consolidated.)	9-1-00 and 11-6-00 — 4-2-02	Whether certain family property was held by two brothers as joint tenants or tenants in common; whether a certain Will was revoked, and, if not, what is its true construction; estoppel.	R. T. Tasker (A.) Lawford, Waterhouse and Lawford (R.) R. T. Tasker (R.)
<b>N.-W. P. Allahabad.</b>			
Sri Gopal v. Pirthi Singh and ors.	10-6-99 — 25-2-02	Whether a suit to enforce a bond was barred. Civil Procedure Code, ss. 13 and 43.	Pyke and Parrott (A.) Thomson and Co. (R.)
<b>Bengal.</b>			
Gopal Chunder Bose v. Kartick Chunder Dey and ors.	23-4-01 — 6-3-02	Construction of a Will.	Watkins and Lempriere (A.) W. W. Box (R.)
<b>Hyderabad.</b>			
Nidhanji and ors. (representatives of Gan-garun deceased) v. Sitarun and ors.	31-12-98 — 21-8-02 (By order of Re-fuse.)	Claim by Respondents to a half share of certain joint family property, and for partition.	Woodcock, Ryland and Parker (A.) <i>Ex parte.</i>
<b>Bengal.</b>			
Shamwati Koer and ors. v. Jago Bibi.	26-6-00 — 27-8-02	Validity of a mortgage bond alleged to have been executed under the authority of Respondent, a Parda woman. Special leave to appeal granted.	T. L. Wilson and Co. (A.) Dallimore and Son (R.)

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, MAY 20, 1901.

[No. 26]

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### REPORTS (See Index.)

THE KING HAS NOTIFIED THAT HIS BIRTHDAY WILL be observed on the 24th of May yearly.—*Reuter.*

THE EMPEROR'S ANNOUNCEMENT THAT HIS MAJESTY'S birthday will be observed on his mother's birthday will be greatly appreciated in India. The 9th of November, which is the King's birthday, also happens to be the Lord Mayor's Day in London. It is very considerate of the King to have decided that the City of London should not thus be deprived of a holiday. That the King did not fix his birthday celebration a day earlier or later in November, but settled that the Royal birthday should continue to be celebrated as before on the 24th of May, shows His Majesty's devotion to the memory of his mother. Such filial sentiment is so popular in the East that it will add considerably to the popularity of the King amongst his Oriental subjects.

THE ANNOUNCEMENT IN THE PUBLIC PRESS THAT A telegram has been received from Darjeeling stating that the Bengal Government does not intend to

gazette May 24th, as a public holiday has been received at Calcutta with considerable surprise.

WE REGRET TO ANNOUNCE THE PREMATURE DEATH of Sir Arthur Strachey, the Chief Justice of the Allahabad High Court. We had the unpleasant duty of criticising his exposition of the law of sedition which met with the approval of the Indian Legislature and was followed by his promotion to his past position. But now that death has so early closed upon his worldly career we have nothing but sorrow for him and the deepest sympathy for Lady Strachey. Free from passion or prejudice and in all fairness to the memory of the dead we must say that he never proved unequal to any of the high positions to which he had been so rapidly raised. He was always courteous, patient and painstaking as a judge and, barring his forced construction of the sedition section of the Penal Code, his decisions generally commanded confidence.

THE READINESS WITH WHICH THE MONEY FOR A marble statue of Lord Russell of Killowen has been subscribed, is without a precedent in the history of the Bench. The only other instance that at all approaches it is the legacy of £1,500 that was left by a grateful client out of which the splendid monument above Lord Mansfield's grave in Westminster Abbey was erected. But there is a vast degree of difference between the two. While the late Lord Chief Justice's statue is being paid for by the profession and the public, Lord Mansfield's memorial was erected by a private party for whom he had succeeded, when at the Bar, in recovering a large estate. The tribute that the public have given to Lord Russell has not been won by him by merely his forensic talent but by the far more sterling qualities that made him command respect on the bench and enjoy the confidence of the public. His statue will be erected in the Central Hall of the Royal Court of Justice. The work has been entrusted to Mr. Brock, R. A., who expects to complete the plaster model before the Long Vacation during which it will be kept on view at the spot selected for the marble statue to enable the public and the profession to judge of the great artist's future work. Erskine's statue which was also paid for by the public ought to find a place close to that of the late Lord Chief Justice.

WE ARE GLAD TO NOTICE THAT A JURYMAN'S representation of their grievances in respect of a waiting room has elicited a response from the Court that the matter is, under consideration and may before long be remedied. But we cannot but express our regret that the complaint of starvation by Crown witnesses did not attract any attention at all. The Code of Criminal Procedure, sec. 544, contemplates it to be the duty of a Criminal Court to exercise its discretion with regard to the payment of the reasonable expenses of witnesses. The judges in the mofussil always consider it a part of their ordinary duty to enquire into such matters and make the necessary orders as provided by law. Instances have come to our knowledge where judges, moved by the hardship of cases similar to this, have gone out of their way to help the aggrieved even out of their own pocket. We are much grieved, therefore, that in a Court, high above them all, a complaint of starvation should have passed unheeded.

WE INVITE ATTENTION TO MR. JUSTICE RIDLEY'S recent decision on a money-lending transaction at a usurious and oppressive rate of interest, which we reproduce at length in our notes column in this issue. If may be of some assistance in the interpretation of the sec. 16, (3), ill. c. of the Indian Contract Act as amended by Act VI of 1899. As for the portion of Mr. Justice Ridley's decision dealing with the general principles governing cases of harsh and unconscionable bargain, our article on the same subject at p. cxiii, in Vol. III, C. W. N., may also be referred to. It is but right that a decision of such vital importance should be appealed from and we shall await with interest the pronouncement of the Appeal Court and of the House of Lords on this question. We expect the present Lord Chancellor will retire by the time this judgment is taken to the final Court of Appeal. In the meantime we may take the general principles of law, which is but another name for strong common sense, as our guide in the interpretation of our, by no means lucid, codified laws.

### English Notes.

COURT OF APPEAL.—SADBROKE v. HOLE. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and ROMER. 8th March 1901.

*Libel—Communication in a post-card—Publication—Privileged communication.*

Defendant wishing that certain building works should be done to his house property received tenders from several builders for his specification. Finding that certain mistakes had been made in taking out the quantities he wrote as follows on a post-card to one of the builders.

"Quantities sent to you by architect are entirely

wrong." The Plaintiff was the architect's clerk and was responsible for the correctness of the quantities.

There was also another post-card, but the libel was based on the first post-card above set out.

Defendant pleaded privileged communication. Mr. Justice Ridley held that the publication was not privileged and the jury gave verdict for Plaintiff for £5.

The COURT OF APPEAL allowed the appeal finding that the privilege covered the libel; there was privilege between the Defendant and the builder. The publication to persons other than the builder could not be substantiated. The post-cards did not contain Plaintiff's name and was not intelligible to others than the person to whom it was sent. The post-card was not *prima facie* publication about the Plaintiff at all. Plaintiff had failed to connect the libel with himself. There was no evidence of express malice. The mere fact of communication in a post-card was not evidence of malice.

*Mr. Firminger for the Defendant.*

*Mr. Kemp, K. C., and Mr. Earle for the Plaintiff.*

*Appeal allowed.*

C. W. A. •

COURT OF APPEAL.—ROBINSON v. W. H. SMITH AND SON. Before the MASTER OF THE ROLLS, LORDS JUSTICES WILLIAMS and ROMER. 16th April 1901.

*Master and servant—Negligence—Dangerous occupation—Duty of master towards a child.*

The Plaintiff was a boy of 12 years of age. He was occupied as a newspaper lad at the Walsall station and commenced his services on 5th December 1898. His duty was to procure papers from one of the station platforms and deliver papers fetched from there to the town. That platform was surrounded by a line of railways. There was a foot-bridge over the line, but the newspaper boys were in the habit of crossing the line, a path notified to passengers as dangerous. The newspaper boys did not use the foot-bridge which was a longer route than that across the metals. The evidence disclosed that the Defendants' servant who had charge of the book-stall had not warned Plaintiff of the danger he was running into. On 24th February 1899 Plaintiff, about 180 yards from the station, was knocked down by a passing train while he was delivering papers and by that accident he lost his leg.

In his action for damages for personal injuries caused as above, the County Court Judge of Walsall dismissed the claim on the ground that there was no evidence of negligence to go to the jury.

The Divisional Court on the boy's appeal was of opinion that the non-suit was wrong, that the employment being of a dangerous character, a duty was thrown upon Defendants of special warning.

On the Defendants' appeal the Court of Appeal was of opinion that the case should go before a jury,



the duty which the Defendants owed to the child was a superior duty to that which they owed to a man. The master should have ordered the boy to use the bridge and not cross the metals. The mere knowledge by the Plaintiff of the danger was not sufficient to exonerate the Defendants. A new trial was ordered.

*Mr. Bankes and Mr. T. Lawes* for the Defendants.

*Mr. Ruegg, K. C., and Mr. Hamilton* for the Plaintiff.

C. W. A.

*New trial ordered.*

COURT OF APPEAL.—TIMMINS *v.* THE LEEDS FORGE COMPANY. Before the LORDS JUSTICES A. L. SMITH, VAUGHAN WILLIAMS and ROMER. 21st July 1900.

*What is an "accident."*

This was a case under the Workman's Compensation Act, 1897. The decision of Judge Greenhow of the Leeds County Court was in favour of the workman. The question was whether the injury to the workman was caused by an "accident." For the Company it was argued that the workman was employed in his ordinary work, he was aware that the planks he was lifting were frozen by the unusual frost which had then recently occurred. There was nothing fortuitous or unexpected and so it was not an accident. *Hensey v. White* (16 The Times Law Reports 64) was relied on.

THE COURT said:—In consequence of rain and frost the planks had been frozen together, the workman was engaged in removing piles of them, as he went lower down the harder the planks stuck together and the more exertion was required on the workman's part. In removing the lower planks he ruptured himself. In the opinion of the Court there was evidence upon which the County Court Judge could find that the injury was caused by something fortuitous and unexpected by reason of the planks sticking together.

The appeal would be dismissed with costs.

*Mr. Bairstow* for the Appellants.

*Mr. T. Atkinson, Q. C., and Mr. Cumpton* for the Workman.

C. W. A.

*Appeal dismissed.*

COURT OF APPEAL.—SAFFREY *v.* MAYER. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and STIRLING. 5th November 1900.

*Gaming—Money paid—8 and 9 Vict., c. 109—The Gaming Act, 1892, 55 and 56 Vict., c. 9.*

The question in this action arose under the Gaming Act, 1892, whether the transactions which took place between Plaintiff and Defendant came within that Act, or whether, as held by Mr. Justice Darling, what the parties did amounted to a mutual agreement to enter into a partnership to back race horses;

The Plaintiff Saffrey was the trustee in bankruptcy of one Claude Vanton. The last-named advanced £500 to the Defendant Mayer on the understanding that the latter would work his newly invented system of making money by backing horses. The profits to arise, it was settled, were to be equally divided, and the Defendant was to be liable for half the £500 advanced. Having lost the £500, the Defendant gave promissory notes for £250 to Plaintiff and obtained from him a further sum of £150 as advance.

The present action was to recover £433 as due under the said promissory notes. Plaintiff succeeded before Mr. Justice Darling who heard the cause without a jury, but on the Defendant's appeal, the Court of Appeal unanimously reversed that decision on the ground, that on a right understanding of the facts the transaction between the parties fell within the purview of the Gaming Act. Reference in the judgment was made to *Tatum v. Reeve* (1893, 1 Q. B. 44) which, it is said, was rightly decided.

*Mr. Abneger* for the Appellant.

*Mr. Jones, Q. C., and Mr. Kisch* for the Respondent.

*Appeal allowed with costs.*

C. W. A.

KING'S BENCH DIVISION.—ANDERSON *v.* COLLINSON. Before the LORD CHIEF JUSTICE and MR. JUSTICE LAWRENCE. 17th April 1901.

*Seduction action—Judgment in bastardy proceedings—Estoppel.*

The Plaintiff alleged that her daughter had been seduced and brought this action against the seducer for damages. Previous to this action the girl herself had commenced bastardy proceedings against the Defendant and had obtained an order of affiliation. That order was made by the Justices pronouncing the Defendant to be the father of the girl. At Quarter Sessions such order was quashed. The question in the present seduction action was whether Plaintiff was estopped by the result of the bastardy proceedings from alleging that Defendant was the father of the child. Defendant contended that the decision of the Quarter Sessions was a judgment *in rem* not merely *inter partes*.

The Darlington County Court Judge left the matter for decision of the jury who found for Plaintiff £250 damages.

On this application on behalf of the Defendant for a new trial or judgment, the Court, as above constituted, state that all that was decided by the *Queen v. Glynne* (L. R. 7 Q. B. 16) was that the question of paternity of the child was concluded as between the parties by the affiliation decision; concluded as between the girl and the Defendant. This action was brought by the girl's mother.

The County Court Judge was right and the application failed.

*Mr. Compton for the Plaintiff.*

*Mr. Manisty, K. C., for the Defendant.*

C. W. A.

*Judgment for Plaintiff.*

KING'S BENCH DIVISION.—WRIGHT v. GLYN. Before MR. JUSTICE GRANTHAM. 20th April 1901.

*Master and servants—Dealing of servant with tradesmen—Liability of master.*

The Plaintiff in this case was the personal representative of a corn merchant, named Trigg. The Defendant, Mr. Glyn, had made an arrangement with his coachman paying the latter under such arrangement a certain sum as wages which was to include the cost of foraging his horses. Plaintiff's case was that the coachman ordered forage from his establishment on behalf of his master the Defendant Glyn, without telling the manager of Mr. Trigg of the arrangement with his master. The coachman left Mr. Glyn's service in November 1898 on Mr. Glyn leaving for Australia. On Mr. Glyn's return he for the first time received a bill for the amount £95 unpaid for forage supplied. The defence was that there was to the knowledge of Mr. Trigg's manager a common practice for owners of horses to enter into the arrangement Mr. Glyn had adopted with his coachman and such knowledge put Plaintiff into enquiry.

The learned Judge following *Remell v. Sampayo* (1 C. & P. 254) and *Precious v. Abel* (1 Esp. 350) gave judgment for Plaintiff with costs.

*Mr. Theobald Mathew for the Plaintiff.*

*Mr. Lochnis for the Defendant.*

C. W. A.

*Judgment for Plaintiff.*

KING'S BENCH DIVISION.—JAMES WILTON & Co. v. OSBORNE. Before MR. JUSTICE RIDLEY. 19th April 1901.

This was an action by a firm of money-lenders to recover from the Rev. James Osborne, a Lincolnshire rector, the sum of £56, alleged to be due on a promissory note.

MR. JUSTICE RIDLEY, in stating the facts, said that the Defendant had obtained from the Plaintiffs a loan of £40, and had given them a promissory note, which had been renewed 14 times, each renewal costing £6. In November the Defendant wished to pay off the capital, and he applied to the Plaintiffs to ask on what terms that could be done. Their first answer was that the capital could be paid off if he gave them a promissory note for £60, payable in four instalments of £15, the total sum being payable at once if any instalment was not paid. The Defendant asked for better terms, and in the result he gave them a promissory note for £56, payable in four quarterly instalments of £14, and in default of one payment the whole remaining balance was immediately to become due and payable. It was on this note that the action was brought. The first instalment had not been paid, so that the whole sum became immediately payable, and the interest worked out at 160 per cent. His Lordship then read the following written judgment:—From these facts it appears to me that the interest charged in respect of the transaction now sued upon must be regarded as excessive, and that the whole transaction was harsh and unconscionable in the sense that the charges made were excessive and extortionate. As to the original note, and the renewals of it, I am not sure that the charges then made would properly

ly be so described, although the interest did amount to 60 per cent. "Excessive" means excessive with regard to the circumstances, and here the Defendant was not in a position to pay the amount advanced, nor was there any security for its repayment. But it is not necessary to decide that, thinking as I do about the note subsequently taken and now sued upon. It is now contended that, under the first section of the Money-lenders Act, 1900, the Court has power to reopen the transaction and order an account to be taken, or in some other way grant relief to the Defendant, and as the point is, I believe, a new one, I took time to consider my decision. It appears to be established by a series of decisions that a Court of equity will not grant relief in such cases merely because the charges or interest are excessive. Every case has indeed to be judged by its own circumstances; but unless the borrower be of the class known as expectant heirs (which requires distinctive consideration) the rule is that, assuming him to be of full capacity, relief will not be granted unless it can be shown that he has been overreached, tricked, or deceived, and that the money-lender has taken an unfair and undue advantage of his weakness and necessities. The general rule is that neither excess of interest nor exorbitance of charge will suffice unless the element of unfair dealing is found to have existed. The authorities for this principle are fully set out in the judgment of Mr. Justice Denman in *Nevill v. Snelling* (15 Ch. D. 679), and I do not think it necessary here to go through them. That case was decided in 1880, and I have not been able to find a later decision which in any way alters the conclusions at which he arrived—conclusions which, I agree, result from the authorities then quoted. On an analogous subject, indeed—namely, that of donations alleged to have been made under undue influence—the case of *Allcard v. Skinner* (36 Ch. D. 145) may be referred to. In that case, at p. 181, Lord Justice Lindley, in classifying the cases of that kind in which the Court will invalidate the gift, says:—"First there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor." And again, at p. 182, he says:—"What, then, is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors; the Courts have always repudiated any such jurisdiction. *Huguenin v. Bailey* (14 Ves. 273) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance, and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked, or misled in any way by others into parting with their property is one of the most legitimate objects of all laws." That case, no doubt, is not in point on the present occasion, but it was decided upon a subject analogous to this—*Lord Aylesford v. Morris* (8 Ch. App. at p. 491)—and it shows that in the setting aside of gifts, as also in relieving from bargains for the repayment of loans, equity considers not improvidence, folly, and imprudence, but unfairness, overreaching, or coercion to constitute a proper ground for its interference. Thus it seems to me clear that this case is not one of those in which a Court of equity would have interfered. The Defendant was not overreached, nor was advantage taken of his necessities. He exercised his own volition and he made terms. The bargain was improvident and foolish, but no pressure was put upon him which can be called undue or unfair. Therefore he would not have obtained relief in a Court of equity apart from the recent statute. But it was contended that this Act of Parliament has altered and

extended the rule previously laid down by the Courts. First it was said that some amendment was intended because of the very title of the Act—"An Act to amend the law with respect to persons carrying on business as money-lenders." But there are amendments of the law contained in the Act, even if there were none in this respect, quite sufficient to satisfy the title. It is not necessary to enumerate them; but the registration of money-lenders would be one, and it seems to me that an enactment directing all Courts to apply doctrines peculiar hitherto to Courts of equity is clearly an amending enactment. But, secondly, it was argued that the words themselves of the Act properly bear the meaning contended for. These are (section 1) that where "there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive . . . or any other charges are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of equity would give relief, the Court may reopen the transaction." In the first place, in order to make the Act applicable, there must be evidence to satisfy the Court either that the interest or that the charges made are excessive; and there must, in the second place, be also evidence that the transaction is harsh and unconscionable or is otherwise such that a Court of equity would give relief. Excessive interest or charges will not of themselves suffice. There must be besides something harsh or unconscionable, or such circumstances as would give rise to a claim for relief from a Court of equity. Mr. Chitty argued that the words "harsh and unconscionable" must be used in a different sense from heretofore because the following words, "or otherwise is such that a Court of equity would give relief," would of themselves include every case in which that Court has hitherto acted; in other words, that the second clause is exclusive of the former and is intended to cover all cases in which such a Court would give relief, while the former clause is intended to include other cases in which hitherto it would not have given relief, and by consequence such a case as the present. Some reliance, in support of this view, was placed on sub-sec. 7 of this same section by which in Scotland this section is to be read as if the words "or is otherwise such that a Court of equity would give relief" were omitted. It was said that unless the words "harsh and unconscionable" were read as suggested, Scotland would reap no benefit from the new law. But sub-sec. 7 was obviously inserted because in Scotland there is no Court of equity as distinguished from the general jurisprudence of the country and it seems to me that it might quite as well be argued that their omission in the case of Scotland is of little importance, because by their insertion in the case of England it was only intended to include some other particular case of relief granted by the Court which could not be classed under the general head of harshness or unconscionability. Such, for instance, was the case of *Gordon v. Street* (1899, 2 Q. B. 641), which, however, was decided on the ground of fraudulent concealment, the contract having been repudiated as soon as the fraud was discovered. But the sense so contended for does not appear to be the natural sense of the words used, in which sense, if possible, they must be construed. Read in that sense, the section includes all cases where the charges or interest are excessive and where there has been conduct for which, as harsh, unconscionable, or unfair, a Court would give relief. The words from "or otherwise" onwards are, in fact, added to give completeness to the definition. So far as regards England, it was possible and, indeed, desirable to add them; but so far as Scotland is concerned the definition was complete without them.

His LORDSHIP gave judgment for the Plaintiffs for the amount claimed with costs. A stay of execution was asked for, it being mentioned that the Irish Courts had taken a different view of the Act. The learned Judge granted a stay on the terms of the Defendant's giving security.

Mr. Lawson Walton, K. C., and Mr. C. F. Lowenthal for the Plaintiffs.

Mr. T. Willes Chitty for the Defendant.

**DIVISIONAL COURT.**—*In re BETTS.* Before JUSTICES WRIGHT and DARLING. 25th March 1901.

*Bankruptcy*—Where debtor's proceedings are an abuse of the process of the Court.

*Ex parte PAINTER* (1895, 1 Q. B. 85) followed and explained.

In this case the Registrar of the Brighton County Court following the decision in the above case had held that the mere fact that a debtor having no assets presents his own petition for the express purpose of preventing the application of the debtor's act is not of itself a ground for annulling an adjudication.

Upon this appeal of the Official Receiver, the Court, while admitting the decision in *Ex parte Painter* to be good law, held that a limit must be placed on the Bankrupt's course of proceedings, and that if his proceedings were a device, an habitual attempt by filing his own petition to frustrate all consequent liability, when orders are made on him on judgment summons, his proceedings amount to an abuse of the process of the Court and should not be countenanced. It was clear on the Registrar's findings that the Bankrupt has been avoiding the payment of his debts. The receiving order must be rescinded.

The debtor appeared in person.

Mr. M. Mackenzie for the Official Receiver.

*Appeal allowed.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

STANLEY, J.	}	KHETTER NATH MITTER
1901.		v.
4, May.		MANICK LALL SEIT.

*Civil Procedure Code (Act XIV of 1885), sec. 372*

—*Mortgage suit*—Assignment of mortgage decree—Sale—Confirmation of sale—Substitution of the name of assignee of decree on the record—Withdrawal of sale-proceeds—Attorney's lien.

This was a mortgage suit in which a decree had been made and the mortgaged properties sold and the sale-proceeds paid into Court. In the meantime the mortgage decree had been assigned to the applicant Girindra Nath Bhose. The assignee of the decree now applied on notice for the substitution of his name in place of the Plaintiff, the assignor.

Mr. A. Chaudhuri for the assignee made the application.

*Mr. Sinha* for the attorney of the assignor.—I have a lien over the money in Court for costs due to me. So long as notice is given to me before the money is drawn out I do not oppose the application, but I should point out that it is questionable if the Court can now make an order for substitution. Sec. 372, Civ. P. C., does not apply, as there has been a sale which has been confirmed and the suit is at an end.

*Mr. Chaudhuri.*—The money has still to be drawn out. In mortgage suits the proper parties can be placed on the record until everything which has to be done in connection with the suit has been done. The assignee may be added and not substituted for the assignor.

STANLEY, J.—I think it is a convenient course in a suit like a mortgage suit to place the assignee on the record even after confirmation of the sale, but the name of the judgment-creditor should not be expunged from the record. Let the assignee's name be added and any application for withdrawal of the sale-proceeds must be on notice to the assignor which means notice to his attorney also.

*Mr. Sinha* asks for the costs of the application.

STANLEY, J.—I will give you liberty to apply on the distribution of the funds for your costs of this application.

*Babu Abinash Chunder Dey*, Attorney for the Assignee.

*Babu A. T. Dhur*, Attorney for the Assignor.

S. R. D.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

In the matter of sec. 39 of the  
HARINGTON, J. Small Cause Court Act  
1901. MOTILAL  
8, May.

KHAME CHAND.

*Presidency Small Cause Court Act (XV of 1882), sec. 39—Transfer of suit to High Court—Summons, non-service of—Ex parte decree set aside—Application for transfer before the date fixed for re-hearing.*

This was an application under sec. 39 of the Presidency Small Cause Court Act for the transfer to the High Court of a suit instituted in the Small Cause Court, Calcutta. The suit was filed in the Small Cause Court on the 12th December 1900. The date fixed by the summons for the appearance of the Defendant was 11th January 1901. The case came on for hearing on the 12th January, and on the Defendant not appearing an *ex parte* decree was passed in favour of the Plaintiff. On the 9th March the Defendant applied that the decree might be set aside and a new trial granted. On the 10th April the Defendant's application was granted, and it was directed that the case should come on for hearing on the 24th April. The Defendant on the 19th April applied as stated above.

*Mr. M. L. Dutt* for the applicant.—The summons had never been served on me; I am entitled to make the application because it is not made more than eight days after the service of summons, no summons having in fact been served. The order of the 10th April was equivalent to the service of summons fixing the 24th April as the time for my appearance. I am therefore within time.

*Held.*—That an application for transfer must be made within 8 days of the service of summons and not at any time not later than 8 days after the service of summons.

That the order of the 10th April cannot be taken as equivalent to the service of summons. Even if the summons was not served, sec. 39 does not enable the Defendant to make this application within the time fixed not by the summons for the appearance of the Defendant but by the Judge for re-hearing the case.

*Messrs. Manuel and Agarwala*, Attorney for the Applicant.

S. R. D.

*Application refused.*

[DINARY ORIGINAL CIVIL JURISDICTION.]

HARINGTON, J. } NILMONEY PAL  
1901. }  
13, May. } OMIRTO LAL PAL and others.

*Infant—Application by next friend after attainment of majority by infant.*

This was an application on behalf of the Plaintiff by his next friend Mr. Peacock, Receiver of this Court, for an order that the case should be set down for settlement of issues.

*Mr. Sinha* appeared for the Plaintiff.—There were about thirty Defendants of which thirteen appeared through different attorneys and supported the Plaintiff's application.

*Babu Charu Chunder Bose* appeared for the Defendant Charu Chunder Pal and opposed the application on the ground that the infant Plaintiff is now of age and the next friend is *functus officio* and he has no right to take any step whatever in the suit whether of a formal nature or otherwise and referred to secs. 450, 451 and 452 of the C. C. P., Rule 632 of Belchambers' Rules; Simpson on Infants, p. 481; Hare's Reports, Vol. IV, p. 122.

*Mr. Sinha* in reply referred to I. L. R. 22 Cal. 270; it is a mere irregularity and the Plaintiff is now willing to adopt the application and should be allowed to go on with the suit and make the application on his own account.

The Court held that the application was irregular and should be dismissed.

*Messrs. Swinhoe & Co.*, Attorney for the Plaintiff.

S. R. D.

**ORDINARY ORIGINAL CIVIL JURISDICTION**

SUIT NO. 23 OF 1899.

HARINGTON, J. } UPENDRA NATH MITTER  
1901. } v.  
26, February. } RAKHAL DAS and ors.

*Partition—Commission of partition, return of—Exceptions—Time for filing, extension of—Civil Procedure Code (Act XIV of 1885), sec. 396—Belchambers' Rules and Orders (2nd Ed.), Rule 615.*

This was an application by two of the Defendants in the above suit for three weeks' further time to file their exceptions to the return of the commissioner of partition. This was a suit for partition in which the usual partition decree was made on the 30th July 1900. The commissioner of partition made his return and filed the same on the 12th February, 1901. Two of the Defendants were desirous of filing exceptions to the report, but as they could not get their affidavits ready within the 14 days allowed by the rules to file exceptions, they now applied for three weeks' further time.

Babu Pramath Chandra Kar for the applicants pointed out that there was no express provision for filing exceptions to the return of a commission, but that the Civil Procedure Code and the Rules of Court did not make any distinction between the return of a commission and certificates and reports of officers, though in practice there was some difference in the procedure in getting a return of commission and a certificate or report of an officer confirmed. See *Norotum v. Harichand* (L. R. 13 Bom. 368). He therefore made this application within the time allowed by Rule 615 of Belchambers' Rules and Orders.

THE COURT granted the application.

K. K. D.

**[CRIMINAL REVISIONAL JURISDICTION.]**

REV. NO. 101 OF 1901.

GHOSE, J. } BASANTA BAISTABI and others,  
TAYLOR, J. } Petitioners,  
1901. } v.  
4, May. } THE EMPEROR, Opposite Party.

*Criminal Procedure Code (Act V of 1898), secs. 133, 139—Public nuisance—Prostitutes, trade and occupation of—Removal of houses from road side, order for—"Physical comfort" of the public—Jury, opinion of.*

This was a reference made by B. R. Mullick, Esq., Sessions Judge of Tippera, on the 20th April 1901, under sec. 438, Cr. P. Code, against the order of J. Vas, Esq., Assistant Magistrate of Chandpore, dated the 28th February 1901.

The facts of the case appear from the letter of reference which was as follows:—

"By an order, dated the 17th of January, the Sub-divisional Magistrate of Chandpore, in consequence

of a police-report, directed a number of prostitutes to remove their 'trade and occupation' from the slopes and neighbourhood of the Bagadi Road, which, I understand, is within Chandpur town. At the request of the prostitutes a jury was appointed, three members being nominated by the Sub-divisional Magistrate and two by the prostitutes themselves. On the 28th of February the jury submitted their report and on the same day the Sub-divisional Magistrate made his order of the 17th of January absolute under sec. 139, Cr. P. Code. Against this order the prostitutes, the Petitioners, invoke the revisional powers of the Hon'ble High Court."

"It is recommended that the whole order be set aside, being bad in law."

"The Sub-divisional officer says that the houses of the prostitutes on the road side, interfere with the 'physical comfort' of the public. Three members of the jury report, as the result of their enquiries, that the prostitutes sometimes quarrel in their houses under the influence of liquor and sometimes sit on the road, and suggest that they should be directed to mend their habits; the other two members deny that there is any cause for removing them at all. The report of the majority on which the Sub-divisional Magistrate has based his final order does not recommend that the Petitioners should remove their houses and I think the order of the Magistrate was neither reasonable nor proper nor legal. If the prostitutes commit affrays on the public road or disturb people at night by their songs they can be dealt with under the Penal Code. Ordering them to remove their houses does not appear to me to be a reasonable or legal remedy."

The Court in upholding the reference observed that the mere existence of houses of prostitutes by the road side and the fact that they ply their trade in those houses cannot affect the "physical comfort" of the passers-by.

That the jury, not having recommended the removal of the houses the Magistrate could not, acting upon the report of the jury, reasonably and legally make his "conditional order" for removal of the houses, absolute.

No one appeared on this reference.

H. P. C.

Order set aside.

**[CIVIL REVISIONAL JURISDICTION.]**

CIVIL RULES NOS. 263, 264 AND 292 OF 1901.

AMEER ALI, J. } HARA PROSAD DAS and 14 ors.,  
PRATT, J. } Petitioners,  
1901. } v.  
14, May. } KING-EMPEROR.

*Legal Practitioners Act (XVII of 1879, as amended by Act XI of 1896), sec. 36—Proof of being touts.*

One Mohesh Chandra Maiti and others alleging themselves to be clerks of pleaders practising in the Munsif's Court at Contai in the district or Midnapur

applied to the 2nd Munsif of Contai for declaring 33 persons including the Petitioners, as touts within the meaning of the Legal Practitioners Act. The Munsif referred the matter to the District Judge. Thereupon the learned District Judge asked the Munsif to enquire into and report on the matter to him, desiring at the same time, that the report should embody the opinion of all the Munsifs. Accordingly the learned Munsif, without giving any notice to the parties concerned and in the absence of all but two of the persons against whom proceedings were initiated, took down the statements of several pleaders practising there not, however, on oath or solemn affirmation, and submitted the same to the District Judge along with a report signed by all the three Munsifs in which they recommended 26 persons including the Petitioners to be declared as touts. Thereupon these 26 persons were called upon by the District Judge to show cause before him why their names should not be included in the list of touts under sec. 36 of the Legal Practitioners Act. In showing cause they submitted that they were not touts within the meaning of the Act, that they were pleaders' clerks and that there was no legal evidence before the Judge on which he could be satisfied that they were touts. The learned District Judge, however, overruled these objections and relying on the Munsif's report and the statements on which it was based, declared 16 persons, of whom 15 are the present Petitioners, to be touts, and directed their names to be included in the list of touts and published as such.

Against this order of the District Judge the Petitioners moved this Court and obtained these rules calling upon the District Judge to shew cause why the order should not be set aside, on the ground, *inter alia*, that there was no legal evidence before the learned Judge on which he could act under sec. 36 of the Legal Practitioners Act. On the rule coming on for hearing, no cause was shewn and it was

*Held*—That although the enquiry was made by a judicial officer, still he was not an officer having jurisdiction in the matter under sec. 36 nor was he appointed by the District Judge to take evidence on that behalf.

*Held also*—Under the facts and circumstances set forth above, that there was no legal evidence before the learned District Judge on which he could act, that before taking action under sec. 36 of the Legal Practitioners Act, the Judge must be satisfied on legal evidence, that the persons are touts and the order of the District Judge based on the Munsif's report and the statements taken by them are bad in law and ought to be set aside, *in re Siddeshwar Boral* (4 C. W. N. 36) followed.

*Dr. Asutosh Mookerjee and Babu Jnanendra Nath Bose* for the Petitioners.

*Rules made absolute : Order set aside.*  
S. C. S.

# [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 355 OF 1900.

RAMPINI, J.	} MANOO LAL, Decree-holder, Appellant,	
GUPTA, J.		
1901.		
16, May.		
	v.	DURGA PERSHAD SINGH, Judgment-debtor, Respondent.

*Mortgage decree, construction of—Interest—Date of payment, meaning of.*

This appeal arose out of an application for execution of a mortgage decree. The question was what was the meaning of the words 'date of payment,' as to whether they mean 'the date of actual payment,' or 'the last day fixed for the payment' in the decree. The portion of the decree material to this report was in the following words:—". . . . It is ordered and decreed that this suit be decreed with costs, the Plaintiff do recover the sum of Rs. 1,118 principal with interest at the rate mentioned in the bond at Rs. 2 per cent. per mensem from the date of the suit, till the date of payment and the interest claimed by him, and costs with interest at Rs. 6 per cent. per annum; and it is further ordered and decreed that if all the Defendants or any one of them pay the said amount of decretal money and interest and costs within six months from this date, then the Plaintiff shall give back to the Defendant or Defendants the mortgage bond. . . . . " The decree was passed on the 16th July 1896.

The first Court held that the words 'date of payment' meant the 'date of realisation,' and therefore interest should run up to the date of realisation.

The District Judge, on appeal, took a contrary view and held that interest should run up to the date of the order making the decree absolute up to the 16th January 1897.

On second appeal by the decree-holder it was

*Held*—That there is nothing in the law to prevent interest at the rate stipulated on the bond being decreed up to the date of actual payment and that the 'date of payment' meant the date of actual payment and not the last day fixed for payment in the decree.

*Rameswar Koer v. Syed Mahomed Mehdi Hossein* (2 C. W. N. 633 : s. c. I. L. R. 26 Cal. 39); *Bakar Sajjad v. Udit Narain Singh* (I. L. R. 21 All. 316) referred to.

*Babu Mahendra Nath Roy* for the Appellant.

*Babu Saligram Singh* for the Respondent.

*Appeal allowed.*

S. C. S.

# THE Calcutta Weekly Notes.

Vol. V.]

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### NOTES.

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### REPORTS (See Index.)

THE BIRTHDAY OF HER LATE MAJESTY THE QUEEN-Empress was declared a public holiday under the Negotiable Instruments Act and all Law Courts and public offices remained closed on the 24th of May last, under orders from the Government of India.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, which resumed its sittings on the 1st of May last, had only fifteen cases on the list, out of them nine were from India, and five from the Colonies and one from a consular Court. Of these, three were from Bengal, two from Rangoon, two from Oudh, one from Bombay, none from Madras, one from Allahabad; two from New South Wales, and one each from Ceylon, Constantinople, Malta and Victoria.

THERE WERE ONLY THREE CASES WHICH CAME UP for judgment which had been reserved. Two of these were Indian appeals, one having been heard in February last and another in March. We cannot certainly complain of delay on this count. But New Zealand was less fortunate, from where came the third case and in which judgment had been reserved for a year.

THE HOUSE OF LORDS AS A COURT OF FINAL APPEAL does not compare favourably with the Judicial Committee, so far at least as progress is concerned. Of the 26 appeals in the present list, 17 came over

from the last session. Before Easter, the Law Lords seem to have done little business as of the 21 cases then on the list, only four were disposed of.

THE QUESTION OF THE SUPPRESSION OF NAMES IN the course of judicial proceedings seems to be giving rise to conflicting views amongst His Majesty's judges in England. In the Divorce Court a doctor's wife petitioned for judicial separation from her husband on the ground of his misconduct with "a young lady of good family." The allegations were proved without naming the young lady in open Court and the President allowed the hearing to proceed without mentioning names. This departure from the ordinary practice has been objected to in the public press. This may be very considerate to the lady concerned, but the worst of it is that persons not at all connected with the proceedings may sometimes be suspected of being concerned in them. The Master of Rolls, however, does not seem to approve of the practice. On the 26th of April, counsel applied before the Master of the Rolls for leave to appeal from an order by Mr. Justice Day in Chambers dismissing an appeal as frivolous and vexatious. The action was for libel conveyed in a letter written by solicitors on behalf of their client and the counsel for the Plaintiff in making the application handed up the letter to the Bench saying that he would not mention the names. The Master of the Rolls observed "I strongly object to that. It seems to be getting rather common. This is a public Court of Justice, and I entirely disapprove of names being suppressed."

## INSANITY AS AN EXCUSE FOR CRIME.

The provision in the Penal Code with regard to insanity as an excuse for crime was evidently adopted from the opinion recorded by English judges at the instance of the House of Lords and as a sequel to *M'Naghten's case* (see *infra*). Under sec. 84 of the Indian Penal Code, insanity is a defence, if only it is proved that a person at the time of committing an offence was "incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law." This section has from time to time come up for interpretation in the different High Courts in India, and they have

interpreted it strictly, and it seems to us somewhat rigorously. We shall take the leading cases of the principal High Courts and notice them in their chronological order. In the case of *Queen-Empress v. Lakshman* (I. L. R. 10 Bom. 512) it was found that the accused was suffering from fever, that he was *bhramist* अतिभ्रम (bewildered or literally subject to delusion) and even at times unconscious. The fever had made him irritable and sensitive to sound and at a time when he was ill with ague, the children began to cry and this vexed him and he killed two of his young children with a hatchet and after killing them went to bed and fell asleep. He surrendered himself to the Police, made a confession before a Magistrate, showed no sign of sorrow or remorse, made no attempt at concealment and his manners were quiet when he was questioned. He had no motive in killing his own children and was said to be very fond of them. But Birdwood and Jardine, JJ., held that "there was not sufficient evidence to warrant their Lordships holding that he was not conscious of the nature of the act. If he was conscious of the nature of the act he must be presumed to be conscious of its criminality." Accordingly the judges convicted the accused of culpable homicide and sentenced him to transportation for life, but submitted the case to the Governor-General in Council for any reduction of sentence at their discretion. It is hardly possible to furnish a more striking instance of such an act having been committed under an "insane impulse." But we cannot take any exception to the decision in this case, since nothing but an incapacity to comprehend the nature of the act or to judge between right and wrong is an excuse under the Indian Penal Code. This interpretation of the law was followed by the Madras High Court in the case of *Queen-Empress v. Vankatu* (I. L. R. 12 Mad. 459). In this case the accused killed a child (his sister-in-law) with a sword. He was suffering from fever with enlargement of spleen and want of food, general weakness of his body and irritability of mind. He had been in the habit of treating the child kindly and affectionately, and there was no motive for his attack on her. The attack was made before other persons and he persisted in it in their presence. The medical evidence was that "the act was committed under a sudden attack of homicidal mania." Sir Arthur Collins, C. J., and Muttusami Ayyar, J., however, held, agreeing with the Bombay High Court, that as there was no positive evidence that the act was committed in a fit of delirium or that the accused was unconscious of the nature of the act, they could not judicially find that the Appellant did not know that what he was doing was wrong within the meaning of sec. 84 of the Indian Penal Code. They commuted the sentence of death to one for transportation for life and as for any further reduction referred the case to the Viceroy in Council. There can hardly be any difference of opinion that this was as hard

a case as the one in Bombay, and that the standard of mental aberration required by the Penal Code to disprove criminal responsibility is cruel, antiquated and unreasonable. But still so long as it is the law of the land the judges can but conform to it. It is because of this that O'Kinealy and Banerjee, JJ., upheld the conviction for murder in the case of *Queen-Empress v. Kader* (I. L. R. 23 Cal. 604). In this case the accused had been suffering from mental derangement for some months previous to the occurrence and since the destruction of his house and property by fire. He used to neglect his house and field work, play with children much more than was expected of a man of his age, complain of pain in the head which was occasionally severe and then he would not answer questions or speak and on one occasion he was seen eating potsherds. One day he suddenly killed a child of eight who was left alone in his company by its father, tried to conceal the corpse in a deserted house not far off and hid himself in a jungle close by. He had no enmity with the father, was fond of the child and had no sane motive in killing the boy. The learned judges held that even if the accused had acted under an insane impulse, since he seems to have been aware of the nature of the act and that it was wrong or contrary to law, he was responsible for the act under sec. 84 of the Indian Penal Code. If this be the law is it not time that the law should be altered? In this connection, however, the case of *Private Sullivan* tried at the Calcutta Sessions, which has just closed, is hardly worthy of consideration. The issue it raises is not so much the criminal responsibility of the accused as it is the moral responsibility of those who may be responsible for the verdict. But with this we are not here concerned. It will be evident from the cases mentioned above that the mere fact of the accused having shot the master-tailor dead and his telling the Provost Sergeant and others of what he had done and his surrendering himself on that account would put out of Court any plea of unsoundness of mind under sec. 84 of the Indian Penal Code. Even looking at it from the point of view, not of what the law is but what it should be, we do not think it would come within the class of cases on account of which we say that the law should be amended. In this case the prisoner had a grudge against the deceased who had once complained against him and had got him fourteen days' hard labour. Although this was some months before the act yet it was in evidence that he had mentioned to a comrade that the master-tailor would never again complain and immediately after the act he gave as his reason that the tailor had got him fourteen days' cells. The Major of his regiment who is in the habit of daily inspecting his men said that he never noticed any peculiarity about the prisoner and that he was intelligent and would not give any trouble for months and then when he gave



any it was drink, the resisting of an escort or the like. The plea of "insane impulse" does not apply to such cases.

Those who have not given much thought to the question of criminal responsibility are apt to confuse between "insanity," "insane impulse" and "criminal nature" and in coming to talk of them mix up the three. The question of "insane impulse" and "criminal nature" have, however, a common foundation in the modern theory of crime.

The observation and study of criminals tend to shew that crime is, perhaps, the result of diseased or defective nature. A normal mind has all the ordinary human passions, but it has also a control over them all. Irritation, anger, wrath, hatred, jealousy, a desire to possess or to deprive others, greed, lust, etc., are very common passions of the inferior order. But a normal man in a well-ordered society can hold them all in check. But there are individuals who lack the control over one on more of these passions and commit acts offensive or dangerous to their neighbours and then such acts are characterised as crime and such individuals, as criminals. But the distinction between a criminal and an insane person is this, that the former is in possession of his faculties and preserves ordinarily a balance of mind, while the latter, neither. A criminal knows the nature of the act and can discriminate between right and wrong and that is, perhaps, why the Penal Code has made this the test of criminal culpability. But consistently with such knowledge or discrimination it is possible, as in the first three cases cited above, that a person in a state of physical or mental weakness or distress, brought on by disease or calamity may, through an insignificant cause, lose his mental balance altogether and may be subject to a momentary impulse which for the time gets the upper hand over all his faculties and makes him lose all control over his actions. A crime committed under such circumstances would be attributed to "insane impulse." But from what we have said it is clear that an individual who ordinarily allows his passions to get the better of him, although it may be from a defective nature, is yet a criminal and every civilized community considers it a part of its duty to keep him in check for the sake of safety to society and also for his personal reclamation. There can therefore be no mistake between a "criminal nature" and an "insane impulse." To make one criminally responsible for acts committed under such irresponsible impulse seems somewhat inhuman. Such ideas of criminal culpability are already obsolete in the United States and we are glad to notice that the more humane doctrine is also gaining ground in the British Colonies. The Queensland Criminal Code of 1899 (63 Vic. IX) sec. 29 provides that "a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such

a state of mental disease or natural mental infirmity as to deprive him . . . of capacity to control his action." It is remarkable that even if the law were as it should be, it is only the first three cases that would be covered by it but not *Sullivan's* case. The English law on the subject is summed up in *M'Naghten's* case (10 C. & F. 200). But as a report of it is not accessible to many in this country we reproduce the material portion of it below.

#### DANIEL M'NAGHTEN'S CASE.

(10 Cl. & F. 200.)

In this case the prisoner was indicted for having on the 20th day of January 1843, in the parish of St. Martin in the county of Middlesex and within the jurisdiction of the Central Criminal Court, shot with a pistol Edward Drummond on his back inflicting a mortal wound from the effects of which he died. The prisoner was charged with murder but pleaded not guilty. The report after stating the above facts proceeds as follows:—

Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner, to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance this: That persons of otherwise sound mind, might be affected by morbid delusions: that the prisoner was in that condition, that a person so labouring under a morbid delusion, might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connexion with his delusion: that it was of the nature of the disease with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity: that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms.

Some of the witnesses who gave this evidence, had previously examined the prisoner: others had never seen him till he appeared in Court, and they formed their opinions on hearing the evidence given by the other witnesses.

Lord Chief Justice Tindal (in his charge):—The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

Verdict, Not guilty, on the ground of insanity.

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords (The 6th

and 13th March 1843; see *Hansard's Debates*, vol. 67, pp. 288, 714) it was determined to take the opinion of the Judges on the law governing such cases. Accordingly, on the 26th of May, all the Judges attended their Lordships, but no questions were then put.

On the 19th of June, the Judges again attended the House of Lords; when (no argument having been had) the following questions of law were propounded to them:—

1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2nd. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

3rd. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

4th. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

5th. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

LORD CHIEF JUSTICE TINDAL:—The first question proposed by your Lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Your Lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime

(murder, for example), and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this:—"If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is:—"Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether

the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?" In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

MR. JUSTICE MAULE expressed similar opinion in a separate judgment, and LORD BROUGHAM, LORD CAMPBELL, LORD COTTENHAM, LORD WYNFORD and the LORD CHANCELLOR LYNDHURST, all concurred as to the right of the House to have the opinion of the Judges recorded on such abstract questions of existing law.

THE CODE OF CRIMINAL PROCEDURE, BEING ACT V OF 1898, AS AMENDED BY ACTS X OF 1899 AND VI OF 1900. By C. H. Sohoni, Pleader, District Court, Poona, and Political Agent's Court, S. M. C. Fifth Edition, revised and enlarged. Price, Rs. 14. Printed by Messrs. Addison and Co., 1901.

This is a new and improved edition of Mr. Sohoni's Code. The author has, in the present work, generally adhered to the arrangement of the notes in the previous edition of his work. The notes are methodically arranged under each section with numbered paragraphs. The subject dealt with in each paragraph is printed in bold type which brings it prominently to the notice of the reader and affords facility for ready reference. In the present edition the notes have been brought up to date. A new feature of this edition is that the corresponding sections of the old Codes (Acts X of 1872 and XXV of 1861) have been given below the marginal notes. This increases the bulk of the volume by nearly 300 pages and, no doubt, adds to its usefulness. Evidently the author has spared no pains to make the notes exhaustive and accurate. Still in a work of this nature it is not possible to avoid omissions. We may point out that some of the latest decisions have been missed out and that in some instances cases noted under one sections have not been mentioned under another although, perhaps, more appropriately they come under the latter. For instance, we find the author has, in noticing the cases under sec. 436, referred to *Opoorba Kumar v. Probodh Kumari* (1 C. W. N. 49, 1897), but has omitted to refer to the other cases on the point under that section. It may be too much to expect of the author to incorporate in the present edition the latest Full Bench ruling on the subject, but not

so *Dolegobind Das* (5 C. W. N. 169). Then again the author has referred to the case of *Opoorba Kumar v. Probodh Kumari* under sec. 436, but he omits to refer to it as also those mentioned above under sec. 437, although he mentions two other cases, viz., of *Charoobala Debi* (3 C. W. N. 601) and *Colville v. Kristo Kishore* (3 C. W. N. 598) thereunder. We may also mention that the notes under sec. 403 in Ch. XXX relating to previous acquittals or convictions might have been a little more comprehensive. The notes under other important sections of the Code, such as secs. 133, 144, 145, 195, 234, 423, 435, 439, etc., have been very carefully compiled and placed under appropriate head-notes. But the annotations throughout are more in the style of a classified digest than in that of an analytical treatise on the law of Criminal Procedure. The author has taken care to correct inaccuracies which crept into his previous edition in indicating the alterations in the new Code and further he has added to their value by indicating what cases such alterations have had the effect of superseding. The table of cases cited and the index are both exhaustive. The addition of a supplement giving such Acts as require frequent reference, such as those relating to Evidence, Reformatory Schools, Cattle-trespass, Breaches of Contract, Whipping, Oaths, Bankers' Books, Police and Gambling, adds to the usefulness of the work. The get-up of the work is also commendable.

### English Notes.

COURT OF APPEAL.—*DOWLING v. DODDS*. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and STIRLING. 6th November 1900.

*Libel—Privileged occasion—Onus—Express malice—Verdict.*

This was an appeal by Dr. Ferdinand Dodds, the Defendant, seeking to have judgment for £100 awarded by jury to Plaintiff set aside.

Dr. Dodds had written to the Relieving officer of the Paddington District intimating that Plaintiff was suffering from hallucinations and was not a fit person to dispense medicine in the district. Plaintiff was a professional nurse residing in the district. The action was based on that letter as a libel. Investigation by the local authorities was made as to Plaintiff's state of mind, but the matter ended with the enquiry. Mr. Justice Darling had found the occasion privileged, but he allowed the matter to go to the jury, who found that Defendant had not acted with an honest motive, in writing the letter, but maliciously.

The COURT OF APPEAL unanimously held that the finding, that the occasion was privileged, was sound, that being so the onus was on Plaintiff to prove that Defendant had acted *malà fide*, with a sinister motive, but there was no evidence of express malice. There was no evidence at all on which the jury

could find that the justification was not made out. The Plaintiff's mind was unhunged. Judgment must therefore be entered for Defendant with costs of both Courts.

*Mr. Firminger* in support of the appeal.

*Mr. Stuart Bevan* for the Plaintiff.

C. W. A.

*Appeal allowed.*

CHANCERY COURT.—*DEVERGES v. SANDEMAN CLARKE & Co.* Before MR. JUSTICE FARWELL. 15th November 1900.

*Mortgages of stock—Power of sale—Reasonable time—Implied power.*

*TUCKER v. WILSON* (1 P. W. 261) *followed.*

This action was commenced by the Plaintiff against Messrs. Sandeman Clarke & Co., stock and share broker, under the following circumstances:—The Defendants bought at the stock exchange in July 1897, 700 shares in the Central Boulder Gold Mines of Australia at Plaintiff's desire. Only a portion of the purchase-money was paid by Plaintiff; the balance of £538 were paid by Defendants on Plaintiff's behalf. On Plaintiff's verbal request the Defendants, at the following, stock exchange settlement day had the shares transferred into the names of two members of their firm to be held by them for and on behalf of Plaintiff. In August 1897, Defendants wrote Plaintiff asking him to remit the balance due together with interest on the accommodation they had made and notifying to him that, if amount was not remitted before next settlement, they reserved to themselves the right to sell the shares at the then market quotation. No answer was received to such letter, during the next month the company went into liquidation for the purpose of reconstruction, which was carried out on the basis of each shareholder paying 3/ per share. Plaintiff was informed of that; he took no steps whatever to secure shares in the new company. Defendants paid the 3/ per share, and the allotment of the new shares was made to them. In July 1899 Plaintiff applied to Defendants for an account which Defendants rendered showing due to them £595, at the same time communicating to Plaintiff the fact that he had forfeited all right to any interest in the company by his failure to comply with the terms of the reconstruction scheme. Plaintiff replied that the sale was an improper one, without notice to him, whereby he was a loser owing to the shares having appreciated in value. Defendants, although claiming the shares, submitted an account showing £55 due to Plaintiff which they brought into Court in full satisfaction of the claim.

The question was whether Plaintiff's contention that the sale was altogether wrong was sound.

The learned Judge held that it was not, he quoted with approval the following passage from *Coots on Mortgages* (by Robbins, p. 275) which was based on the above quoted case:—"Express powers

were not formerly necessary in mortgages of stock or in instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale. If stock itself is made the security for money, and the day for payment is passed, the mortgagee may at once proceed to sell the stock and repay himself principal and interest without any authority from the mortgagor and without commencing an action for foreclosure." The Court said a reasonable time had elapsed. The letter of August 1897 was sufficient to give Defendants power of sale, indeed the agreement between the parties gave Defendants an implied power of sale. The action consequently failed.

*Mr. Wallace, Q. C., and Mr. Studfield* for the Plaintiff.

*Mr. Upjohn, Q. C., and Mr. S. Smith* for the Defendants.

C. W. A.

*Judgment for Defendants.*

CHANCERY DIVISION.—*FOSTER v. NEW TRINIDAD LAKE ASPHALTE COMPANY, LIMITED.* Before MR. JUSTICE BYRNE. 27th November 1900.

*Company law—Unexpected appreciation of profits—Dividends—Divisibility among shareholders—What is capital.*

*VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST* (1894, 2 Ch., see p. 265) *followed.*

The facts were these:—The old Trinidad Asphalt Company (an American concern) in 1894 secured among other things a debt of 100,000 dollars due from the New York and Bermudez Company secured by promissory notes. In 1897 the abovenamed Defendant Company, an English Company, purchased the property and assets of the old Trinidad Asphalt Company including the said debt due, and thereupon in December 1899 obtained from the New York and Bermudez Company new promissory notes for 127,000 dollars, the 27,000 being accrued interest. This debt of 127,000 dollars has recently been paid off. The directors of the abovenamed Defendant Company proposed distributing that amount among its shareholders. There is no dispute as to the 27,000 interest, but the debenture-holders of the Defendant Company objected to the distribution of the principal amount of 100,000 dollars or somewhat over £26,000 and by this application sought to restrain that being done. The question for determination was whether or not that amount may be distributed as profit with regard to the present value of the total capital assets, and whatever the result of the year's trading may be. The learned Judge in his judgment says that the amount of this debt is a distinct item of the property purchased which has since been realized by payment, it is *prima facie* capital, and there is nothing to show that it had changed its character, because it has turned out to be of greater value than had been expected. An injunction would be granted until

judgment or further order restraining the directors from distributing the 100,000 dollars as dividend without reference to the other business or assets of the Defendant Company. In doing so, the Court was not deciding that such sum may not properly be brought into profit and loss account, or be taken into account in ascertaining the amount available for dividend. That would depend upon the result of the whole account for the year. It was clear that an appreciation in total value of capital assets if duly realized by sale or getting in of some portion of such assets may in a proper case be treated as available for purposes of dividend. "Capital" in the case above referred to is said to be "money subscribed" pursuant to the memorandum of association or what is represented by that money." That decision would show that what is capital available for dividend depends upon the result of the whole accounts fairly taken for the whole year, capital, as well as profit and loss.

*Mr. Lovett, Q. C., and Mr. Cassell for the Plaintiff.*

*Mr. Malligan, Q. C., and Mr. Stirling for the Defendants.*

C. W. A.

*Injunction granted.*

### Notes of Cases.

(The important ones to be fully reported hereafter.)

**PRIVY COUNCIL.**—Appeal from Bengal. **TOKHAN SINGH AND OTHERS v. UDWANT SINGH AND OTHERS.** 2nd May 1901.

The Appellants not appearing, this appeal was dismissed with costs for non-prosecution.

*Mr. Branson* appeared for the Respondents.

C. W. A.

### PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

**RAJHA RAMAN SHAHA** (Defendant No. 3), **KISHORI LAL SHAHA** (Defendant No. 4), **PUNCHANAN SHAHA** (Defendant No. 5), and **NAWADIP CHUNDER PAL** (Defendant No. 6), Appellants,

**LORD HOBHOUSE.**  
**LORD MACNAGHTEN**  
**LORD ROBERTSON.**  
**SIR R. COUCH.**  
**SIR F. NORTH.**

1901.  
2, May.

**PRAN NATH ROY** (Plaintiff),  
**RAM KRISHNA SIRCAR** (Defendant No. 7), **AKHIL CHUNDER MOITRO** and **LALAN CHUNDER MOITRO** (Defendants Nos. 1 & 2), Respondents.

*Suit to set aside sale in execution—Fraud—Ex parte decree, refusal to set aside—Civil Procedure Code (Act XIV of 1882), sec. 108.*

This was an appeal from a decision of the Calcutta High Court (Macpherson and Ameer Ali, JJ.), reversing the decree of the Sub-Judge of Pubna.

The object of the suit brought by the Respondent,

**Pran Nath Roy**, as Plaintiff, was to set aside an *ex parte* decree for rent obtained by the 1st and 2nd Defendants against the 7th Defendant **Ram Krishna Sircar**, and the Plaintiff, and to recover from Defendants 3rd, 4th, and 5th (i.e., the Appellants) possession of a property (village Dogachi) belonging to Plaintiff which was sold in execution of that decree, and purchased by them in the name of Defendant No. 6, Nawadip.

The Plaintiff's case was that the suit culminating in that sale was from first to last a fraud in which the Defendants who purchased were concerned.

The Appellants filed written statements in which besides objecting on the merits, it was pleaded that the Plaintiff having attempted unsuccessfully to set aside the *ex parte* decree under sec. 108, C. P. C., and the execution under sec. 311 and not having appealed therefrom could not bring the present suit.

The Sub-Judge summarily dismissed the suit as not maintainable in consequence of the proceedings under sec. 108.

On appeal the High Court held that the suit was maintainable, and they remanded the cause for decision on the merits. In their judgment reference is made to *Abdool Moosomdar's* case (I. L. R. 21 Cal. 605) as an authority that a suit will lie to set aside an *ex parte* fraudulent decree although no endeavour has been made to set it aside under sec. 108, C. P. C. They also refer to *Raj Kishore Mookerjee's* case (17 W. R. 413) as cited by the Appellants before them. They say the ground on which the Court decided that case was not clear, the judgment did not allude to fraud as the foundation of the suit, any how it was no authority for the proposition that a person failing to obtain relief under sec. 108 is debarred from bringing a suit based on fraud and that case apparently conflicted with the one in 21 Calcutta Series.

*Mr. Mayne* for Appellants relied on sec. 108 and the proceedings that took place on that application.

Respondent was not represented.

**LORD HOBHOUSE** at the conclusion of *Mr. Mayne's* argument decided that the High Court had taken the right view of the case and dismissed the appeal advising His Majesty to that effect.

C. W. A.

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1645 of 1899.

<b>RAMPINI, J.</b>	}	<b>SHINARAIN THAKUR</b> and ors.,
<b>GUPTA, J.</b>		Opposite Party, Appellants,
1901.		v.
17, May.		<b>MAHARAJA RAMESWAR SINGH,</b> Applicant, Respondent.

*Bengal Tenancy Act (VIII of 1885), sec. 158, cl. (d)—Application to determine incidents of tenancy*

*Scope of section—Assessment of additional rent for excess land held by tenant—Jurisdiction.*

The Respondent, who was the landlord, made an application to the Munsif of Madhubani under sec. 158 of the Bengal Tenancy Act for determining the incidents of the tenancy of the present Appellants and, *inter alia*, prayed for determining the actual quantity of lands held by the tenants and the rents payable by them at the time of the application. It was an admitted fact that the holding was recorded in the landlord's *seristha* as consisting of 40 bighas 15 cottahs of land held at an annual rental of Rs. 109-8-4 and it was contended by the tenants that the lands comprised in their holding could not be measured, and that, at any rate, the rent payable by them, could not be altered; their objections were, however, overruled, and it was found on measurement that the holding consisted of 70 bighas 14 cottahs of lands, and the learned Munsif assessed additional rent for the excess lands thus found, at the original rate and found that the rent payable by the opposite party was Rs. 190-0-1. On appeal, the Subordinate Judge of Durbhanga affirmed the decision of the Munsif, and the opposite party, tenants, preferred this appeal to the High Court, and it was contended on their behalf (1) that the Courts below had no jurisdiction in a proceeding under sec. 158, Bengal Tenancy Act, to assess additional rent for excess lands, the scope of the section being limited to finding the actual existing rent payable, and (2) that the additional rent has been assessed upon a wrong principle which should, if at all, be fixed according to the provisions of sec. 52 of the Act.

*Held*—That in a proceeding under sec. 158 of the Bengal Tenancy Act, the Court has no jurisdiction to assess additional rent for excess lands found to be in the occupation of the tenants, its function being limited to record the existing rent payable by the tenant at the time of the application.

That in the present case, the assessment of additional rent for excess lands is *ultra vires* and should be set aside, and Rs. 109-8-4 should be recorded as the rent payable at the time of the application.

*Debendro Kumar Bandopadhyaya v. Bhupendra Narain Dutt* (I. L. R. 19 Cal. 182, F. B.) and *Rajeswar Prasad v. Barta Koer* (I. L. R. 21 Cal. 807) referred to.

*Babu Jnanendra Nath Bose* (for Dr. Asutosh Mukherjee) for the Appellants.

*Babu Ram Charan Mitter* for the Respondent.

J. B.

*Decree modified.*

## List of Business for the Judicial Committee of the Privy Council.

APRIL AND MAY 1901.

(The sittings was to commence on Tuesday, the 30th April 1901, at half-past 10 a. m.)

### INDIAN APPEALS.

CAUSE.	Record received & Set down for hearing	SUBJECT.	SOLICITORS.
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Karim Nansay v. Ictinricks and another.	26-5-00 — 30-1 01	Construction of an agreement by Respondents to pay an allowance to Appellant.	Payne and Lattey. (A.) Cameron, Kemm and Co. (R.)
<b>Rangoon.</b>			
Mbung Tha Hyeen v. Mah Khin and others	5-5-00 — 11-2 01	Whether a partnership existed between Appellant and his deceased brother, now represented by Respondents, and, if so, in respect of which business or businesses of Appellant.	A. H. Arnould and Son. (A.) Richardson and Co. (R.)
<b>Kong Yee Lone and Company v. Lowjee Nanjee.</b>			
	20-10 00 — 18-4-01	Whether Respondent is entitled to succeed in an action against Appellants upon two promissory notes.	Hopgoods and Dawson. (A.) Bramall, White and Sanders. (R.)
<b>Oudh.</b>			
Sukhdai v. Kedar Nath. Sukhdai v. Ram Churn. Sukhdai v. Bisheswar Parshad. (Consolidated Appeals.)	18-4-00 — 15-2 01	Validity of a Will.	T. L. Wilson and Co. (A.) Lawford, Waterhouse and Lawford Young, Jackson, Beard and King. (R.)
<b>Raja Mohammad Mumtaz Ali Khan v. Sukhwat Ali Khan. Raja Mohammad Mumtaz Ali Khan v. Farbat Ali Khan. (Consolidated Appeals.)</b>			
	15 11-00 — 20-8-01	Title of Respondents to certain villages under an order of the Court of Wards.	T. L. Wilson and Co. (A.) <i>Ex parte</i> .
<b>N.-W. P. Allahabad.</b>			
Shankar Saup and ora. v. Mojo Mal and ora. (representatives of Phil Chaud, deceased).	28-5-00 — 9-8-01	Claim to proceeds of a sale of land under a mortgage deed; priority of incumbrances; limitation.	T. L. Wilson and Co. (A.) Barrow, Rogers and Nevill. (R.)
<b>Bengal.</b>			
Harris and anr. v. Brown and ora.	27-8-00 — 14-8-01	Construction of a Will; alleged fraud.	Edwards, Heron and Co. (A.) <i>Ex parte</i> .
Tokhan Singh and ora. v. Udwan Singh and ora.	19-2-05 — 20-8-01	Suit by Respondents as one branch of a Hindu family against the other branch (Appellants) to recover share of property alleged to be joint property of the whole family.	T. L. Willson and Co. (A.) Watkins and Lamprere. (R.)
<b>Radha Raman Shaha and ora. v. Pran Nath Roy and ora.</b>			
	15-4-00 — 10-4-01	Suit to set aside an <i>ex parte</i> decree for rent and to recover property sold in execution thereof; alleged fraud.	W. R. Box. (A.) <i>Ex parte</i> .

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[ No. 28.

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Ind. Corp. and Co. v.  
Hamblin. Vendor and  
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"adjoining" Plaintiffs'  
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Chessum and Co. v. Gordon. Taxation of costs—Jurisdiction to amend

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## REPORTS (See Index.)

JUDGE EMDEN HAS CONTRIBUTED AN ARTICLE IN THE May number of the *Nineteenth Century* under the suggestive title "Is law for the People or the Lawyers." He opens his article by quoting from Carlyle that it is "difficult to sweep the intricate foul Chimneys of law" and soon follows it up by the valuable advice of Lord Justice Willes "Whatever you do, never go to law; submit rather to almost any imposition, bear any oppression rather than exhaust your spirits and your pocket in what is called a court of justice." To this the writer adds, 'matters have improved; but the advice is just as useful now. . . . There is little real justice done if the party in whose favour judgment is given finds that he has really unplumed himself that others may be decorated with his feathers.' According to him the complexity and technicality of legal procedure are responsible for the ruinous effects of legal remedies and that lawyers are as a class much to blame for it. They spend all their ingenuity in increasing the complexity of procedure and also resist all attempts at reform. We may be prepared to concede that Judge Emden's charges against the legal profession may not be unfounded, but yet we are unable to discover in his article anything very original or practical. We doubt whether depriving suits of "the fascinating frames" which lawyers call "pleadings" would really result in any saving of time at the hearing. Simplicity and not total abolition of pleadings is what would enable a judge to direct evidence to the true issue, clear, unobscured and unadorned. The writer's other remedies such as a fixed rate of remuneration of legal practitioners and codified laws, we already possess in

India. But codified laws are often as difficult to administer and interpret as perhaps the unwritten laws of England. The Hindu and Mahomedan laws are uncodified, but their leading principles are not difficult to grasp and are ordinarily administered by even English judges with greater ease than the Succession and other cognate Acts. Although we are in sympathy with some of Judge Emden's views we are unable to accept many of his conclusions.

**NOTES OF CASES.**  
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(CIVIL APPELLATE.)

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THE MOST MARKED EFFECT THAT THE MODERN THEORY of crime has had over the administration of law is as to the infliction of punishment. The primitive idea of punishment was retaliation, and it is not surprising that it proceeded on the principle of tooth for a tooth, eye for an eye or life for a life. But if the object of punishment really be to afford protection to society and to reclaim the criminal, it must be admitted that capital punishment is but a barbaric relic of the past and should no longer find any place in any civilized system of laws. It has been abolished in many of the continental states in Europe and in the result no increase in violent offences against person has followed. This deprives those, who are in its favour, of the pet argument that it should be retained as a deterrent against taking life. It is also a significant fact that this form of punishment is most unpopular amongst the Hindus and yet, criminal statistics show that they are a people who display the greatest respect for life. We shall urge upon the Humanitarian League, who have done singular service in humanising public feeling and in effecting prison reforms, to take up this question in right earnest.

THE COUNCIL OF THE HUMANITARIAN LEAGUE UNANIMOUSLY adopted the following resolution moved recently by Dr. Morrison :—

That the Humanitarian League notes with much pleasure the progress made during the past year in the humanising of public feeling with regard to the prison system, as shown, on the one hand, in the practical disuse of the treadmill, the modification of prison punishments, and other reforms for which the league has contended, and, on the other hand, in the defeat of all attempts to extend the use of the lash either for adult or for juvenile offenders.

THE REACTIONARY MOVEMENT FOR THE REVIVAL OF  
the lash which was set on foot in England, now

so very long ago, has been successfully quelled by the opposition of the press and the pressure of public opinion (4 C. W. N. cxc). They have all through the struggle been staunch supporters of those who advocate humanitarian measures as a more effective means of reclaiming criminals. It was through their efforts that the Legislature had to abandon the proposed amendments of the Whipping Act pressed upon them by certain reactionists with the support of some judges. The English Bill which met with a qualified approval in the House of Lords (4 C. W. N. 137-8n.) was opposed in the House of Commons by the leaders of both parties and was rejected by a large majority in the lower House (4 C. W. N. 153n.). The Indian Bill had, however, before that become law (4 C. W. N. 78 9n., 85 86 n.). As for the history of the earlier Act, our articles in Vol. III, pp. 318n. and 326n., may be referred to. It must be mentioned, however, that some of the more objectionable features of the Bill of 1900 were at the time abandoned by the Legislature and what remained, are now being smoothed over by judicial decisions. Having regard to the sympathetic administration of the law in our superior Courts we may yet hope to win over the Legislature and the mofussil magistracy to our views.

IT IS WITH PLEASURE, THEREFOR, THAT WE NOTE THE announcement by our English contemporary the *Law Times* of the promised omission of the whipping clauses from the new Youthful Offenders Bill, and hope that the Indian Legislature will follow the lead. Our mofussil magistrates being cut off from the outside world are not unoften found to be in favour of primitive methods of punishment. "In a very recent instance a sub-divisional officer sentenced a student of 15 years, belonging to a respectable family, to a sentence of whipping. The accused moved the High Court, and Ghose and Taylor, JJ., found that the evidence was not even sufficient to warrant a conviction. The comment, made by one of our daily contemporaries that "whipping is a most barbarous punishment which should never be resorted to with a light heart," reflects only the common feeling of the people of this country. We must say that our High Courts do not countenance such methods of punishment and seldom miss an opportunity of putting a very wholesome check upon the acts of indiscretion of mofussil magistrate. (See *Empress v. Hamed Hossain* per Rampul and Pratt, JJ., 3 C. W. N. 330n.; 4 C. W. N. 86n.). Mr. justice Prinsep has also, repeatedly, drawn the attention of the subordinate judiciary to the new provisions of law as embodied in the Code of Criminal Procedure (sec. 562) and in the Reformatory Schools Act (sec. 31) and has suggested that they should largely avail themselves of these humane principles in dealing with "first" and "juvenile" offenders.

THE FOLLOWING NOTE FROM THE *ENGLISH LAW Journal* will well illustrate how the ideas with regard to the method of treatment of youthful offenders have undergone a change within recent times.

A 'juvenile offender' of an unusually enterprising type—Harry Johnson, or Thompson, by way of alias—was dealt with at Southwark Police Court last week. Johnson, who is sixteen years of age, had induced a Mr. Day to give him employment by representing himself as an orphan and homeless. He adopted, however, a peculiar method of evincing his gratitude to his benefactor. Mr. Day had brought with him to his place of business a bag containing about 45*l.* to pay a bill. When his back was turned, Johnson decamped with it. He proceeded to expend his treasure with lavish freehandedness. First of all he took four other boys to a music-hall, and gave them excellent seats and ample refreshment. Then he engaged rooms for a month at Southsea, and led a life for some little time which Jack Sheppard might have envied. He went to all sorts of public entertainments, hired horses and traps, had himself photographed on horse back, and had just arranged to drive to the local races when the arm of the law intervened. His festivities at the music-hall had attracted the critical notice of the police. The Portsmouth police kept a watch on his movements, and he was arrested in the midst of his triumphal progress. Mr. Day, his employer, with a charitable-mindedness that did him credit, recommended Johnson to mercy, and the magistrate committed him to the training ship *Cornwall*, off Purfleet, for three years. It is not a little matter that there are institutions of the kind to which precocious offenders like Johnson can be sent. Ordinary prison life would merely make them habitual criminals. To let them loose again upon society after a few months' detention is no true clemency. What they need is the combined influence of strict discipline and an outlet, in hard work and regular exercise and amusement, for their superabundant vitality.

## English Notes.

HOUSE OF LORDS—*BULLIVANT AND OTHERS v. THE ATTORNEY-GENERAL FOR VICTORIA* Before the LORD CHANCELLOR, LORDS SHAND, DAVEY, BRAMPTON and LINDLEY. 2nd May 1901.

*Solicitor and client—Confidential communications—Privilege from production.*

This was an appeal of the Defendants against a decision of the Court of Appeal (Justices Collins and Romer) affirming a decision of Mr. Justice Mathew at Chamber. The case arose under 22 Vict., Ch. 20, which confers auxiliary jurisdiction to the tribunals in this country under a commission issued from a Colony to enforce the attendance of witnesses in aid of colonial proceedings. The complaint (for the revenue authorities of Victoria) of the Attorney-General of Victoria who filed the information was in substance that certain voluntary deeds had been executed to evade certain death duties. The Plaintiff desired to have an order directing the Appellant Stanley Austin to produce certain documents before a commission appointed by the Supreme Court of the Colony for the purpose of taking evidence of witnesses in England. The Appellants denied the intent charged; nevertheless the order sought was granted.

Of the Appellants two were executors in Victoria of James Austin who died in March 1896 having



by his Will made in the previous year appointed the said Stanley Austin and another executors of his Will of his English property. The Appellant Bullivant and one Grey were appointed executors of his Australian property. Stanley Austin and his co-executor Bath were solicitors of Glastonbury in Somerset. The firm was known as Bath and Austin. Stanley Austin survived his partner. That firm had been employed by the testator James Austin in preparing the settlements, conveyances and assignments and it was the conveyances which they prepared that were involved in the proceedings. The question was whether the books and other records kept by that firm of solicitors with reference to the instructions given by the testator James Austin as to and concerning such settlements were or were not privileged from production in this action in which the Attorney-General of Victoria claimed £20,000 duty alleged to be due under the Administration and Probate Act of 1890 in respect to the property alleged to form part of the said testator's estate.

The LORD CHANCELLOR in allowing the appeal said that the law intended to protect confidential communications which passed between a man and his legal adviser. It was a well-established principle of public policy that such confidences should not be disclosed; there were limitations of that principle, communications which were part of criminal or illegal proceedings were outside that principle. But to displace the privilege there must be some definite charge or allegation of improper or illegal conduct. Mere conjecture of intent to commit such act fell far short of what was necessary. In this case there was no definite charge of fraud. In the recent case of *Simms v. Registrar of Probates* (1900, A. C. 323) before the Privy Council, it was held that it was no fraud for a man to make a voluntary conveyance unless there was some secret arrangement whereby the deed was one thing and the fact was really different.

LORD DAVEY said the fallacy of the Court of Appeal's decision seemed to be that it treated the statute as if it made the execution of voluntary deeds illegal which it did not do.

The other Lords concurred and the appeal was allowed with costs.

*Sir Robert Reed, K. C., Mr. Upjohn, K. C., and Mr. Pollock* for the Appellants.

*Mr. Haldane, K. C., and Mr. Rowlatt* for the Respondent.

C. W. A.

*Appeal allowed.*

COURT OF APPEAL.—IND. COOPE and Co. v. HAMBLIN. Before LORD ALVERSTON, LORDS JUSTICES RIGBY and WILLIAMS. 7th December 1900.

*Vendor and purchaser—Restrictive covenant—Meaning of "adjoining" Plaintiff's property.*

By conveyance bearing date 24th June 1897 Plaintiffs sold land in Worcestershire to Defendant.

The purchaser covenanted that he would not, "in the erection of buildings adjoining the hereditaments of the vendors," construct any windows overlooking such premises. At the rear of Plaintiffs' hotel the Plaintiffs had ground which they used as a bowling green and which adjoined the property sold to the Defendant, and the object with which such covenant was inserted in the conveyance was to protect the privacy of the bowling green and of the hotel premises. The Defendant built a number of workman's cottages on the lands, the subject-matter of the sale to him, the backs whereof were some 20 feet from the fence which separated the properties of the two litigants. Windows were made which overlooked the bowling green.

MR JUSTICE BUCKLEY had held that there had been a breach of the covenant by Defendant and although refusing to Plaintiffs the injunction they sought directed an enquiry as to damages. On the Defendant's appeal the Court as above constituted held that the new erections did not "adjoin" Plaintiffs' property within the meaning of the covenant. The word did not mean "near" but its ordinary interpretation must prevail.

*Mr. Terrell, Q. C., and Mr. Clayton* in support of the Appeal.

*Mr. Astbury, Q. C., and Mr. Stewart Smith* for the Respondents.

C. W. A.

*Appeal allowed.*

COURT OF APPEAL.—CHESSUM and Co. v. GORDON. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and ROMER. 11th February 1901.

*Taxation of costs—Accidental omission—Jurisdiction to amend—Order XXVIII, Rule XI.*

In an action between the parties Plaintiff had secured judgment for an amount to be ascertained by a special referee. Plaintiff was to have costs. Plaintiffs paid the referee's fees £160 and judgment was entered for Plaintiff for £3,863 with costs to be taxed. The £160 were paid to the referee by cheque drawn by Plaintiff himself, so that such payment was not entered in Plaintiff's solicitor's ledger, and in drawing up a bill the taxation of costs, such amount was inadvertently omitted from it. Plaintiff's costs were taxed and certified by the taxing master and paid by Defendant. A month or two after such settlement, the omission was discovered; and on Defendant refusing to pay that sum, application was made at Chambers, and Mr. Justice Dey made an order that the referee's fees be brought before the taxing master for taxation, and that his certificate be amended, if necessary, on the ground of the omission, by mistake.

On this appeal by Defendant from such decision, the Court of Appeal held that the taxing master's certificate was not conclusive, the Judge had jurisdiction to make the order for the purpose of rectifying a mere omission. They referred to the above

order and decided that the learned Judge's order was correct.

*Mr. E. Hill* for the Appellant.

*Mr. Ackland* for the Respondent.

C. W. A.

*Appeal dismissed with costs.*

QUEEN'S BENCH DIVISION.—*GRESWOLDE WILLIAMS v. BARNEY*. Before MR. JUSTICE WILLS. 3rd December 1900.

*Warranty in particulars of property to be sold by auction—Preliminary contract superseded by conveyance.*

Plaintiff bought at the auction mart an estate for £30,000 in July 1898.

The particulars of sale stated "sanitary arrangements throughout in first class order thoroughly overhauled in 1894. Not the slightest outlay being needed before occupation. Everything was as perfect as possible."

After the purchase on such announcement, a conveyance followed in December 1898.

Later on Plaintiff found that the drainage was very defective. That all that had been done in 1894 was an expenditure of £63 to render drainage fit for the occupation of the house for a 12 months let. Plaintiff had to spend a large sum of money in thoroughly overhauling and putting sound new drainage and he now sued to be recouped a portion of the outlay. The claim was based on the warranty contained in the particulars of sale.

The learned Judge, after considering a number of authorities cited before him and following *Leggott v. Barrett* (15 Ch. D. 306, see pages 309-10) held that the preliminary contract was superseded by the conveyance. The latter contained no warranty. The particulars of sale (which was of a preliminary character) therefore could not now be relied on so as to form the basis of this action. If it was meant that the warranty was to survive, it could have been inserted in the conveyance. The action must therefore fail.

*Mr. Danckwerts, Q. C., and Mr. Chitty* for the Plaintiff.

*Sir Edward Clark, Q. C., and Mr. Tindal Atkinson* for the Defendant.

C. W. A.

*Action dismissed.*

QUEEN'S BENCH DIVISION.—*MACAN v. MACAN*. Before MR. JUSTICE BIGHAM. 8th December 1900.

*Husband and wife—Separation deed—Arrears due—Cohabitation—Accord and satisfaction.*

*ROWELL v. ROWELL* (1900, 1 Q. B. 9) distinguished. The husband and wife had separated; the deed of 13th May 1898 given by husband had provided for payment in advance of 7s. 6d. a week during their joint lives as long as the wife remained chaste. Some payments were regularly made but from 10th February 1900 to 10th August 1900 for 26 weeks it fell into arrears. Subsequent to the last-mentioned date cohabitation was resumed.

The question was whether the resumption of cohabitation discharged the Defendant, the husband from his liability to pay the arrears of 26 weeks for which the claim was made. The learned Judge held that it did not, the money having become due before the cohabitation that made the difference between this case and *Rowell v. Rowell* where the money had fallen due subsequent to the resumed cohabitation.

*Mr. Stepton Lynch* for the Plaintiff.

*Mr. Ellis Hill* for the Defendant.

C. W. A.

*Judgment for Plaintiff.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

## CALCUTTA HIGH COURT.

### [CIVIL APPELLATE JURISDICTION.]

#### APPEAL FROM ORDER

No. 147 of 1900.

BAJI NATH LOHRA, Judgment-debtor, Appellant,

*HILL, J.*

*BRETT, J.*

1901.

20, May.

BINOYENDARA NATH PALIT, decree-holder, and SHOSHI MOHUN DEB, Auction-purchaser, Respondent.

*Civil Procedure Code (Act XIV of 1882), secs. 273, 298, 311—Mortgage decree, whether immovable property—Sale, setting aside of.*

This appeal arose out of an application made by the Appellant under sec. 311, C. P. C., to the Court below to set aside a sale held in execution of a decree; the subject-matter of the sale was a decree held by the judgment-debtor upon a mortgage of certain immovable property. The principal question was whether the decree was moveable or immovable property as entitling the purchaser, at all events, to a claim to bring immovable property to sale, and whether sec. 311, C. P. C., applied to such a case. The other contention of law on behalf of the Appellant was that the mode of attachment adopted by the lower Court was not in accordance with the provisions of sec. 273, C. P. C.

*Held*—That having regard to the definition of "immovable property," as given in the General Clauses Act, a decree upon a mortgage is incapable of being described or regarded as immovable property and that the application under sec. 311, C. P. C., was incompetent, that section being confined in its operation to sales of immovable property. *Gous Mahomed v. Khewas Ali Khan* (1 L. R. 23 Cal. 450) relied upon.

That a decree upon a mortgage is not a money decree within the provisions of sec. 273, C. P. C. *Surji Prasad Misser v. E. R. Macnaghten* (4 C. W. N. xxxv) followed.

*Babu Jogendra Nath Chatterjee* for the Appellant.

*Babus Tara Kiore Chowdry and Jadu Nath Kanjilal* for the Respondent.

S. C. S.

*Appeal dismissed.*

# THE Calcutta Weekly Notes.

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#### REPORTS (See Index.)

QUESTIONS HAVE SOMETIMES BEEN RAISED AS TO whether the High Court has powers under the Code of Criminal Procedure, to stay the execution of sentences of whipping. Evidently the Court has such powers under sec 439 of the Code which provides that the High Court may, in its discretion, exercise any of the powers, conferred on a Court of Appeal, and among others, those under sec. 426. This section provides that an Appellate Court may order that the execution of the sentence or order be suspended pending appeal. It is always safer to order the stay of the execution of such sentences pending revision, especially as inexperienced magistrates are sometimes very precipitous in carrying them out. We call attention to the case of *Empress v. Hamid Hossein per Rampini and Pratt, JJ.*, 3 C. W. N. cccxxx.

LORD BACON, TO WHOM WE ARE INDEBTED FOR SO much wise counsel, while addressing, as Lord Keeper, a newly-appointed Judge of the Common Pleas, gave him some advice which has ever since been followed as a golden rule of conduct on the Bench. The attributes of a judge, according to Bacon, are:—

He was to draw learning out of his books, not out of his brain; he was to mix well the freedom of his own opinion with reverence of the opinion of his fellows; he was to continue the studying of his books, and not to spend upon the old stock; he was to fear no man's face, and yet not turn

stoutness into bravery; he was to be truly impartial, and not so as men might see affection through a fine carriage; he was to be a light to jurors to open their eyes, but not a guide to lead them by the nose; he was not to affect an opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the Bar; his speech was to be with gravity as one of the sages of the law, and not talkative, nor with impertinent flying out to show learning; he was to carry such a hand over his ministers and clerks that they might rather be in awe of him than presume upon him.

AT THE ANNUAL DINNER OF THE LAW STUDENTS Debating Society, Dr. W. Blake Odgers made the following observations with regard to the growth of the profession of barristers during the course of the last century.

He had had occasion to look into the figures in order to find out how many barristers there were at present. He was sorry to say there were 9463 who had been called to the Bar. That was a portentously large number. He had looked at the number at the beginning of the last century. In 1800 there were only 556 barristers. It was a serious thing that the numbers had increased so largely in a hundred years. Where was the work for all these people to come from? They would remember what Curran said that a man might be bred to the Bar, but it did not follow that the Bar might be bread to him.

IT IS, HOWEVER, GRATIFYING TO NOTE THAT NOTWITH- standing the growth in numbers, the ideas of professional honour stands much higher to-day than it did a century ago. The Lord Chief Justice in proposing the toast at the above dinner observed in the course of his speech:—

He was old enough to remember when it was supposed to be the right thing at the Bar in the conduct of cases for rival advocates to quarrel always with one another. And they had only to read the description of members of the Legal Profession in the novels of fifty or sixty years ago to recognise the fact that the idea of all barristers who were opposed to each other in conducting cases was to try and trick one another. Honourable and straightforward conduct was, at that time, quite unknown to those who thought they understood the Legal Profession.

THE QUESTION OF CURTAILMENT OF THE RIGHT OF appeal has been a moot subject for discussion in India for years past. The consensus of both public and professional opinion is against it. The chance of an appeal to a superior court serves always as a very salutary check and as a sufficient guarantee for a due discharge of duties by the subordinate judiciary.

Every one in the mofussil knows in what perfunctory manner suits of a Small Cause Court nature are disposed of, simply because there is no appeal from them. Our views with regard to the matter find support from the recent review of "British and European Criminal Law" by Sir John Scott. His reasonings are general and are applied to all cases as well. Sir John Scott maintains that there should always be an appeal to a higher court on a question of law. But as regards findings of facts the view of the lower court may be regarded final provided a judge of first instance be an able lawyer and is well-paid.

The one-judge system requires, in my opinion, some kind of appeal on points of law in order to maintain the consistency of jurisprudence. In Egypt and in India an appeal even on the facts in criminal cases is allowed where the jury system does not obtain. But I have a strong opinion that the judge, if he is a capable man who sees the witnesses, especially if he is aided by assessors, is much more to be trusted on any decision of fact than a Court of Appeal, however ably constituted, who only read the record of the proceedings. Questions of law should be submitted to a higher court as a matter of course. Questions of fact, I think, on the whole are better left to the court of first instance. But it is of capital importance that the judge of first instance should be an able lawyer and very well paid; and, if that is the case, I would prefer his opinion to that of any other court which has not seen and heard the witnesses and observed their demeanour. Yet in my dealings with various nations I have found that most people are very much inclined in favour of a general appeal even in criminal cases. I speak with great submission, because most people would take the other view, but I think there should be no appeal whatever in criminal cases on questions of fact, and that the appeal should be strictly limited to points of law. I would make that appeal as speedy as possible, and I would present it to the strongest court that could be constituted.

## RENT AND REVENUE CASES, 1900.

(4 C. W. N. and I. L. R. 27 Cal.)

### THE BENGAL TENANCY ACT.

The Bengal Tenancy Act applies to lands situated outside the limits of the Town of Calcutta, but within its municipal boundaries, as defined by Bengal Act II of 1888. Maclean, C. J., in *Biraj Mohini v. Gopewar*, says:—"The term 'Town of Calcutta' is one well recognised? and at the time of the passing of the Bengal Tenancy Act, its boundaries were well known and well defined, and that expression, as used in the Tenancy Act, can, in my opinion, only relate to the Town as it existed at the time of the passing of the Act." *Biraj Mohini Dassi v. Gopewar Mullick* (27 Cal. 202, Maclean, C. J., and Banerjee, J.).

It has been now settled by a Full Bench that a suit brought by an assignee for recovery of arrears of rent assigned after they fell due is a suit for recovery of rent and is excepted from the cognisance of the Court of Small Causes. (Maclean, C. J., Macpherson, Hill, and Stevens, JJ.,—Banerjee, J., dissenting)

*Srish Chunder Bose v. Nachim Kazi* (4 C. W. N. 357: s. c. 27 Cal. 827) following and approving *Sheikh Mansur v. Loke Nath Roy* (4 C. W. N. 10) which was a case under Act VIII of 1869, B. C. (Macpherson and Wilkins, JJ.).

The Full Bench only decided as to whether the suit would lie in the Small Causes Court or in the ordinary Civil Court. The question whether a decree in such a suit would be considered a rent decree for all purposes is still open. The question whether the special limitation prescribed in the third schedule to the Bengal Tenancy Act would apply to a suit for rent by an assignee came up for decision before *Rampini and Wilkins, JJ.*, in the case of *Mahendra Nath Kalamoree v. Kailash Chandra Dogra* (4 C. W. N. 605) and the question was answered in the negative, and it was held that a suit for rent by an assignee is not a suit by a landlord and such a suit is not a suit between a landlord and a tenant and therefore the Limitation Act XV of 1877 applied. The decision would seem to conflict with the principle of the Full Bench case, *Srish v. Nachim*. There Maclean, C. J., puts the matter very clearly in the following terms: "The money was due as rent at the time of assignment, and the assignment did not deprive it of that character, so far as all events as the tenant was concerned . . . ."

A departure from this principle may lead to anomalous results. For instance, a suit for rent on a registered *kabuliyat* is governed by 3 years' limitation, but if the landlord assigns his rent, the assignee would, according to the above decision, get the longer period of 6 years under the Limitation Act, the agreement being registered.

The definition of "tenure holder" seems to be Definition of defective. It does not say whether the persons in immediate occupation of the lands comprised in a tenure may be agricultural tenants. But it has been held in the case of *Umrao Bibi v. Syed Mahomed Rajan* (4 C. W. N. 76: s. c. 27 Cal. 205, per Banerjee, J.) that a tenure holder within the meaning of the Act is a person who holds land which is used for agricultural or horticultural purposes. Sec. 7 of the Act was referred to.

A purchaser of a tenure is not personally liable for its rent which fell due before the date of purchase, although the tenure may be liable for such rent. *Jogemaya Dassi v. Girindra Nath Mukerjee* (4 C. W. N. 590, Banerjee and Stevens, JJ.).

Sec. 16 of the Bengal Tenancy Act is a penal provision and it has been held in *Sheriff v. Jogemaya Dassi* (27 Cal. 535, by Banerjee and Stevens, JJ.) that it should be strictly construed. It was also held that in a case where the Plaintiffs brought a suit as reversionary heirs to their father's estate after their mother's

death, the suit was maintainable so far as it related to the claim during their mother's lifetime, although their mother had not complied with the provisions of sec. 15 of the Act.

Sec. 18 of the Bengal Tenancy Act does not make all the incidents of a permanent tenure applicable to a raiyati holding at fixed rates, but makes only the provisions with respect to transfer and succession applicable. *Nilmani v. Mathura* (4 C. W. N. clix).

Sec. 22 does not apply to a non-transferable occupancy holding, and it has been rightly held that in the case of a non-transferable occupancy holding, the holding cannot be sold without the right of occupancy so as to give the transferee a right to retain possession of it. *Girish Chandra Chaudhury v. Kedar Chandra Roy* (4 C. W. N. 569; s. c. 27 Cal. 473).

Sec. 26 declares the right of an occupancy raiyat heritable, so when a rent-suit is brought by a landlord against some of the several heirs, ignoring the others, the decree cannot be considered as a rent decree and the sale in execution of such a decree cannot affect the interest of those who are not parties to the decree. *Anoda Kumar Naskar v. Hari Das Haldar* (4 C. W. N. 608; s. c. 27 Cal. 545).

Sec. 46, cl. 9 says: "In determining what rent is fair and equitable, the Court shall have regard to the rents generally paid by raiyats for land of a similar description and with like advantages in the same village." It has been held that this clause is not exhaustive and that other evidence may be taken: *Hossain Ali Khan v. Ulati Charan Shaw* (4 C. W. N. 321; s. c. 27 Cal. 376, Rampini and Wilkins, JJ.). Their Lordships, however, left it open as to what would amount to fair and equitable rent, nor did they give any definite direction as to how it is to be determined. It would not be desirable to put hard and fast limitations in this connection.

A tenant cannot get the presumption as to the fixity of rent unless the rent is shown to have been paid at the same rate from the time of the Permanent Settlement. Permanent Settlement is defined in sec. 3, cl. 12, as being the Permanent Settlement of Bengal, Behar and Orissa, made in the year 1793. But in the case of *Tamasa Bibi v. Ashutosh Dhur* (4 C. W. N. 513) it was held by Maclean, C. J., and Banerjee, J., that when a question arises as to whether a tenant is entitled to the presumption, the fact that the estate within which the tenure is held was permanently settled subsequent to 1793 did not make any difference. One of several tenants sued separately is not com-

petent to claim reduction under sec. 52, but his remedy lies in bringing a suit against all the landlords and the other tenants: *Bhoopendra Narain Dutt v. Raman Krishna Dutt* (4 C. W. N. 107; s. c. 27 Cal. 417). Sec. 52 is not also applicable to a case of encroachment to the original holding: *Khondakar Abdul Hamid v. Mohini Kant Shaha* (4 C. W. N. 508, Banerjee and Stevens, JJ.). The presumption as provided in sec. 50, sub-sec. (2) can be made only in a suit or proceeding under the Bengal Tenancy Act and the section does not apply to a suit for damages under the Small Cause Court Act. *Nilmani v. Mathura Nath* (4 C. W. N. clix).

Sec. 60 of the Act debars a tenant from pleading that rent is due to a third person registered proprietor when the suit is brought by a registered proprietor, but the case of *Durga Das Hazra v. Samosh Akon* (4 C. W. N. 606, Norris and Gordon, JJ., 10th July 1895) shews that there may be circumstances to take a case out of this rule. Their Lordships decided in this case that sec. 60 did not estop the Defendant from pleading that rent was due to a third person "where the Defendant in good faith and under the reasonable belief that the land held by him was included in the estate of a third person attorned to him some four years prior to the suit brought for rent by the registered proprietor." The reason for this decision seems to be that the lower Court found that Plaintiff was out of possession inasmuch as the Defendant attorned to a third person, and their Lordships accepted that view. It may be questioned how far this is in accordance with sec. 60 and whether attorning by a tenant to a third person would amount to dispossession of the landlord.

In the case of *Fakir Lal Goswami v. W. C. Bonnerjee* (4 C. W. N. 324, Hill and Rampini, JJ.) it was held that a tenant's liability to pay rent remains in the absence of any controlling agreement and notwithstanding the fact that the landlord may not have any village office and may not have appointed a convenient place for payment under sec. 54, sub-sec. (2), and that the tenant should take the rent to his landlord and failing, the arrears so falling due will carry interest under sec. 67. This seems hard, especially as the law does not permit of any deposit being made under such circumstances. This matter seems to require reconsideration either on the Bench or by the Legislature.

Where a raiyat surrenders his holding, the landlord is entitled to re-enter by effecting the under-raiyat, if he is not protected by sec. 85 or sec. 86, cl. (b). In such a case no notice to quit is necessary. *Nilkant Chaki v. Ghatoo Sheikh* (4 C. W. N. 667, Macpherson and Stevens, JJ.).

The case of *Samujan Roy v. Munshi Mahton*

(4 C. W. N. 493, Rampini and Wilkins, JJ.) approves of the earlier cases: *Lal Mamud v. Arbulah* (1 C. W. N. 128), *Bhagwan v. Biswasari* (3 C. W. N. 48), and holds that the provisions of sec. 87 are not exhaustive.

(To be continued.)

## English Notes.

**CHANCERY DIVISION.**—*WARREN v. WARREN.* Before MR. JUSTICE FARWELL. 11th January 1901.

*Injunction by married woman against her husband—Covenant not to molest.*

*HUNT v. HUNT* (1897, 2 Q. B. 304) followed.

The Defendant (a butcher) the husband had covenanted in a separation deed not to molest his wife, not to enter any premises whether of business or residential where his wife was, or interfere with her customers. For so doing the wife sought for and obtained an injunction against him. The facts stated disclosed that there had been frequent Police proceedings between the parties.

The Plaintiff, the wife, was on this motion represented by *Mr. W. L. Richards.*

C. W. A.

*Injunction granted.*

**CHANCERY DIVISION.**—*MUSPRATT WILLIAMS v. HOWE.* Before MR. JUSTICE COZENS HARDY. 17th January 1901.

*Marriage settlement—Husband's domicile—Lex loci contractu.*

A Miss Kerr of Glasgow married in December 1857 in Scotland a Mr. Robert Bullen, and the question raised in these proceedings was what law governed the ante-nuptial settlement made by Mr. Robert Bullen who was a Scotchman, but was domiciled at Mauritius where he was a merchant and owned property there.

An ante-nuptial settlement was made by the lady in Scotch form in 1857 at Edinburgh. The lawyer who then acted for her in his affidavit disclosed that the husband's settlement (of property in Mauritius and 2 several policies on his life in the Standard Assurance Company) was made in London by a London barrister in the English form, because that barrister had special knowledge of the law of Mauritius. In both the wife's and husband's settlement it was stated in terms that the application of the law of Mauritius in so far as it was at variance with the Scotch contract would be excluded. Miss Kerr's settlement also recited the settlement made by the husband.

The question was which law governed the husband's settlement which was also executed in Scotland. The learned Judge in his judgment states that there was nothing on the fact of the husband's deed to denote by what law it should be governed. The general rule that a marriage settlement is governed

by the law of the husband's domicile was not applicable, that law being in express terms excluded; that being so the *lex loci contractu* must govern this matter which was in Scotland. It was only for the purpose of convenience and with a view to registration in Mauritius that the settlement made by the husband was not comprised in the Scotch contract. The English form of the husband's settlement was explained by the affidavit and the deed was not executed in England and contained no English property.

*Held*—That the Scotch law governed the construction of the Bullen settlement.

*Mr. Mecklern, Q. C., and Mr. Rolt, Mr. W. H. Cozens Hardy and others* appeared for the various parties interested.

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

**PRIVY COUNCIL.**—Appeal from the Punjab. *AHMAD YAR KHAN AND OTHERS v. THE SECRETARY OF STATE FOR INDIA AND ANOTHER.* 11th May 1901.

LORD MACNAGHTEN delivered their Lordships' reserved judgment which concludes as follows:—In the result "the Appellants were entitled to a declaration that subject and without prejudice to the privilege conferred upon the Government by cl. 8 of the *sanad* of 20th March 1886, they are entitled to a proprietary right in three-fourths share of the Haji-wah Canal. In other respects the suit failed. Their Lordships were of opinion that there ought to be no costs of the first hearing, but that the Secretary of State ought to pay the costs of the appeal to the Chief Court of the Punjab and the costs of this appeal, and their Lordships would advise His Majesty accordingly."

*Mr. Mayne, Mr. C. W. Arathoon, Mr. Degruyther and Mr. A. K. Khan* for the Appellants.

*Mr. Cohen, K. C., and Mr. Branson* for the Respondents.

C. W. A.

*Appeal allowed with costs.*

## PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.

LORD DAVEY.

LORD LINDLEY.

SIR R. COUCE.

SIR FORD NORTH.

1901.

11, May.

*Appeal to His Majesty in Council—Deposit of security—Death of Appellant—Application by Respondents to be declared entitled to the security.*

This was a petition of the Respondents Phul Chand and another to His Majesty in Council. Phul Chand and the other Respondent were the reversionary heirs

of one Kant Das who had died without leaving issue in 1883. They had instituted a suit against his widow, the Appellant Mandil Koer, and her adopted son in the Bankipore Sub-Judge's Court praying for a declaration that the alleged adoption never took place.

Pending the suit the adopted son died, and his widow, the abovenamed Kishmish Koer, was substituted as Defendant and continues as party to the suit.

Both the said Sub-Judge and a Division Bench of the Calcutta High Court decided against the adoption, and the reversioners, the Petitioners, were successful in both Courts in the suit.

Thereupon both Mandil Koer and Kishmish Koer obtained leave from the said High Court to appeal to Her Majesty in Council, and the appeal was finally admitted on 1st June 1898, by an order which stated that the Appellants had lodged the proper security and the record was in due course transmitted to the Registrar of the Privy Council.

Musst. Mandil Koer died on the 29th May 1900, and no steps had been taken to substitute any person as her representative on the record.

On the 30th November 1900 Petitioners presented a petition to the said High Court in which they stated that the security in deposit for the appeal was exclusively the money of Musst. Mandil Koer and as such now belonged to the Respondents in this Privy Council appeal, they being not only the heirs to Kant Das but to the deceased Appellant Musst. Mandil Koer.

Affidavits were put in in support of such allegation, and a counter-affidavit of the father of the Kishmish Koer was put in stating that the money deposited was his (her father, Lal Babu's) money.

The High Court on the petition coming on for hearing stated that they could not interfere in the matter, and the application must be made to the Privy Council.

The petition prayed that the matter may be referred to the High Court to enquire and report whose money it was that was deposited, or for their Lordships to declare the deposit made in the appeal belonged to Petitioners.

*Mr. Mayne* in support of the application.

*Mr. C. W. Arathoon* opposing.

Their Lordships refused the application and ordered Petitioners to pay the costs of it.

C. W. A.

*Application refused.*

### PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.

LORD DAVEY.

LORD LINDLEY.

SIR R. COUCH.

SIR FORD NORTH.

1901.

11, May.

*Special leave to appeal.*

This was a petition of the abovenamed Maharaja

MAHARAJA JAGADINDRA NATH

BAHADUR, Appellant,

v.

RANI HEMANTA KUMARI

and others, Respondents.

of Nattore for special leave to appeal to His Majesty in Council in suit No. 14 of 1893, which he had instituted against the Respondents in the Mymensingh Sub-Judge's Court.

The suit was for the establishment of title and recovery of possession of certain lands included in and appertaining to a Mouzah Gabsara.

The Sub-Judge had decreed the suit.

The Defendants-Respondents thereupon had appealed to the District Judge, but subsequently on the Respondents' application the appeal was transferred for determination to the High Court by an order of that Court.

On that appeal being heard, the High Court agreed with the Sub-Judge on the merits, but decided that the suit was barred by limitation and dismissed it.

That on the same day and in the same Sub-Judge's Court the Petitioner had instituted another suit against the Respondent Rani Hemanta Kumari alone for possession of another parcel of land in the same Mouzah Gabsara, a much larger plot of land. The claim to both plots were based on one and the same title.

This suit was valued at Rs. 11,250, while the other was valued at Rs. 3,700.

That both suits were tried together with the same result, the Sub-Judge decreeing the suits and the High Court deciding against the Petitioner.

Thereupon the Petitioner made separate applications praying for leave to appeal to His Majesty in Council in both suits.

The High Court granted leave to appeal in the suit valued at Rs. 11,250, but refused it in the suit valued at Rs. 3,700.

Petitioner now prayed that leave to appeal should be granted in the smaller suit as well, so that complete justice might be done in the causes which were heard together and wherein the lands claimed were in the same village.

*Sir W. H. Rattigan, K. C., and Mr. C. W. Arathoon* in support of the petition.

*Leave to appeal was granted.*

C. W. A.

### [PRIVY COUNCIL.]

[APPEAL FROM THE ALLAHABAD HIGH COURT.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR R. COUCH.

SIR FORD NORTH.

1901.

Heard, 30, April.

Judgment, 16, May.)

*Mortgage—Priorities.*

This was an appeal from a decision of the Allahabad High Court which reversed the decision of the Sub-Judge of Meerut. The suit was brought by

MUNSHI SHANKAR SARUP & ORS.,

v.

LALA PHUL CHAND.

the Appellants to establish their priority over the Respondent in respect of a debt due under a deed of hypothecation, dated 4th May 1883.

The facts are:—Ghulam Gaus Khan died leaving a large quantity of land of which 12 biswas were inherited by his daughters and 8 biswas by his son, Ismail Khan.

On 20th January 1882 the daughters sold to Appellants their said interest in Mouzahs Chachora, Aminabad and Chauki which are now in dispute. Other mouzahs were also sold, but no further reference need be made to them. On 24th January 1883 Ismail Khan filed a suit (1 of 1883) against the Appellants and their vendors to enforce his right of pre-emption in respect of the whole property sold.

On the 4th May Ismail Khan made an arrangement with the Appellants whereby he re-purchased from them for Rs. 15,500 the villages sold by the daughters and hypothecated the 12 biswas share in each of them as security for payment of the sum with 9 per cent. interest.

On 5th May a consent decree was passed in said suit (1 of 1883) which embodied such arrangement.

On 3rd November Ismail Khan executed a further document in favour of the Appellants and of one Sakla Mal in which after reciting that Rs. 16,197 were due under said bond of 4th May 1883 and further advances made, that Rs. 20,000 were due in all, he granted a 2nd hypothecation on the said three daughters' interest and gave a new hypothecation on his own 8 biswas.

The Appellants' case was that by this transaction all priorities created by the bond of 4th May 1883 were preserved.

The Respondents' case was that that bond was extinct and it was abandoned.

On 10th February 1885 Appellants obtained a decree No. 219 enforcing their lien against half the property mortgaged in the said bond of 3rd November 1883, and on 20th June 1885 their father, Luchman Sarup, who on 15th April 1885 had purchased the interest of Sakla Mal in the bond of the 3rd November, obtained a similar decree No. 106 in the same Court.

On 30th June 1883 Ismail Khan executed a bond in favour of the Respondent Phul Chand for Rs. 7,000 and as security, *inter alia*, hypothecated the said 3 villages Chachora, Aminabad and Chauki. Phul Chand sued Ismail Khan on that bond, and on 6th March 1884 obtained a decree against him declaring his lien over those villages. In execution of that decree and of decrees 219 and 106 and others the 3 villages were sold and also other villages, all on 20th October 1887.

As to the distribution of the sale-proceeds, the Sub-Judge, on 7th February 1888, ordered certain amounts realized by the sale of each of those villages should be paid to the Respondent.

That order, Appellants contended, was wrong by their plaint in the present suit.

They urged that the monies paid to Phul Chand in respect of his mortgage of 30th June 1883 ought to have been paid to them under their hypothecation of the 4th May 1883 which had priority. They prayed for a decree directing the Respondent to repay to them the sums he had so received with interest.

The Sub-Judge dismissed the suit as time-barred under Art. 13, Limitation Act, relying on the case of *Gauri Prosad Kundu* (I. L. R. 13 Cal. 159).

On appeal the High Court reversed that order and remanded the cause for trial on its merits.

On the merits the Sub-Judge was of opinion that the bond of 4th May 1883 was "renovated" by the bond of 3rd November 1883, and the prior charge was expressly kept subsisting; Phul Chand's bond was of a later date and created only a puisne incumbrance. He decreed the suit.

The High Court on Defendant-Respondent's appeal decided as follows:—

"The present suit is for the recovery of the assets which were paid over to Phul Chand on the ground that, although the decree of the Respondent was based on a bond subsequent in point of time to that upon which the Appellants' decree was based, the incumbrance of the subsequent bond was in reality an incumbrance created by a bond of May 1883, and therefore prior, in point of time, to the incumbrance in favour of the Appellants and the decree which followed from that incumbrance. There can be no doubt whatever, indeed it is admitted, that the Court, which executed the decrees and paid over the assets to Phul Chand, had no jurisdiction to act otherwise than it did; but we go further. We have not in the case before us any evidence which established the alleged connection between the bond of November 1883 and the bond of May 1883. We were asked to hold that two of the villages, Aminabad and Chauki, had been sold in execution of the decree held by the Respondent. This we cannot do and for this reason that Phul Chand under the decree which he held was entitled to bring to sale and could have sold each and every scrap of the property hypothecated in his bond until enough had been realized to satisfy the whole claim covered by his decree. No Court could direct that some of that property should only be sold in that decree, and that the rest or any portion of it should be sold in satisfaction of any other decree. For these reasons we allow this appeal, set aside the decree of the Court below, and dismiss the Respondent's suit with costs in all Courts."

*Mr. Mayne* for Appellants contended that the Sub-Judge was right. The 1st bond was recited in the second and incorporated in it. The bond of November 1883 was supplementary to that of 4th May.

*Mr. Mayne* read sec. 295, C. P. C., cl. (b), and said he was unable to understand the judgment of the High Court on this matter.



**LORD HOBHOUSE.**—They don't go into the question whether the bond is standing of its own force. I see nothing to destroy it.

**Mr. Ross**, who was called on for the Respondent to explain on what ground it is said that the bond of 4th May was destroyed, urged that it was destroyed by the litigation which followed. That litigation was based on the later bond and was evidence of abandonment of the former bond. He referred to sec. 85, Transfer of Property Act.

He referred to Art. 13 of the Limitation Act, and argued that the suit was barred by limitation: see I. L. R. 13 Cal. 159 and 17 W. R. 237. •

**Mr. Mayne** referred to and relied on the case of *Vishnu Bhikaji* (I. L. R. 15 Bom. 438 at p. 440). Sec. 295, C. P. C., expressly permitted a suit of this kind. It was not a suit to set aside an order of a Civil Court. It was a suit by one person who has got too little against another who has got too much to refund; Art. 13 is not applicable.

**LORD MACNAGHTEN.**—Which article do you say it falls under?

**Mr. Mayne.**—Article 62 or 120.

He also referred to 8 I. A. 123, noticed in the decision in the 15th Bombay Series.

For setting aside a sale there is sec. 211, C. P. C., a completely different section.

THEIR LORDSHIPS' reserved judgment was delivered to-day advising His Majesty to allow the appeal with costs. •

**Mr. Mayne** for the Appellants.

**Mr. Ross** for the Respondent

*Appeal allowed with costs.*

C. W. A.

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 683 of 1900.

HARINGTON, J. } NEEL KAMAL MUKERJEE and ORS.,  
1901. } v.  
3, June. } BIPRODAS MUKERJEE and another.

*Bond—Continuing guarantee—Introduction of partners—Indian Contract Act (IX of 1872), sec. 260.*

In this case the Plaintiffs sued the Defendants upon a bond for the sum of Rs. 5,000 executed by the Defendants in favour of the Plaintiff, Neel Kamal Mukerjee, in December 1895. The bond, after reciting that the said Biprodas Mukerjee is employed by the said Neel Kamal Mukerjee as a cash-keeper, stated, as the condition, that, "if the said Biprodas Mukerjee shall and will at all times hereafter, so long as he, the said Biprodas Mukerjee, shall continue to be employed as such cash-keeper as aforesaid by the said Neel Kamal Mukerjee well and truly and faithfully discharge his duties of such office, and shall and will and truly and faithfully perform all other business that he may from time

to time be directed, enjoined or requested by the said Neel Kamal Mukerjee to do and perform, without refusing or neglecting to do the same and without consuming, wasting, embezzling, losing, mispending or unlawfully making away with any of the property, money, or effects whatsoever of the said Neel Kamal Mukerjee or of any person or persons whomsoever, for which he, the said Neel Kamal Mukerjee, his heirs, executors, representatives or administrators shall or may by law be in any wise answerable or responsible or which shall or may come into the hands of the said Biprodas Mukerjee as such cash-keeper as aforesaid and if the said Biprodas Mukerjee at all times shall and will duly and regularly account for and pay or make over to the said Neel Kamal Mukerjee or such person or persons as he may in that behalf appoint, all monies or other property which shall come to his hands either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Kamal Mukerjee, and if the said Rakhal Dass Mukerjee shall and will, from time to time and at all times hereafter, save, defend, keep harmless and indemnify the said Neel Kamal Mukerjee, his heirs, executors, representatives and administrators of, from, and against all claims, demands, actions, suits, troubles, costs, charges, damages and expenses, which shall or may at any time hereafter happen or he may sustain or be put to for, or by reason, or in consequence of any negligence, refusal of duty or of any act, permission wilful or otherwise, or omission or commission, mismanagement or otherwise howsoever of the said Biprodas Mukerjee in the discharge of his duties as such cash-keeper as aforesaid, or if the said Biprodas Mukerjee and Rakhal Dass Mukerjee or either of them, their or his heirs, executors, administrators and representatives shall and will on demand pay to the said Neel Kamal Mukerjee, his heirs, etc., all such sums of money as he or they shall or may have to pay to any person or persons by reason of such negligence, omission, default or misconduct of the said Biprodas Mukerjee as aforesaid, then the above written bond or obligation shall be void and of no effect." In 1896 the two other Plaintiffs Naranath Mukerjee and Golab Roy Poddar joined Neel Kamal Mukerjee as partners and the Defendant Biprodas Mukerji was employed as cash-keeper to the firm. All the three partners brought this suit against the Defendants upon the bond, alleging that the Defendant Biprodas Mukerjee defalcated the moneys of the firm to the extent of Rs. 19,000 between 1897 and 1900.

**Messrs. Sinha, Zorab and A. C. Bannerjee** for the Plaintiffs. •

**Messrs. Mehta and K. Chaudhuri** for the Defendants.

**Mr. Mehta** raised a preliminary objection that there was no cause of action inasmuch as the bond was executed in favour of Neel Kamal Mukerjee only and not of the firm which was constituted after.

wards, for the faithful discharge of the duties of the Defendant Bipradas Mukerjee as cash-keeper to Neel Kamul Mukerjee and not as cash-keeper to the firm.

Death or introduction of a partner clearly revoked the bond, see the cases of *Chapman v. Beckington* (3 Q. B. 703); *Cambridge University v. Baldwin* (5 M. & W. 580); *Billairs v. Ebbaworth* (13 R. R. 750); *Montiflore v. Lloyd* (15 C. B. N. S. 203); and sec. 260 of the Contract Act was clearly to this effect.

Mr. Sinha for the Plaintiffs contended that the bond was wide enough to include defalcations of the firm, that if the new partners of the firm could not sue they could be struck off, but the suit could not fail on the ground of misjoinder of parties, that clearly Neel Kamal Mukerjee could sue as he was defrauded and that Bipradas Mukerjee could not be heard to say that he was not liable on the bond for his own frauds and misappropriations. Mr. Sinha further argued that sec. 260 of the Contract Act applied to a guarantee given to a firm and not to an individual, and in this case the guarantee was given to an individual.

*Held*—That the Defendants' contention must prevail by virtue of sec. 260 of the Contract Act, and that the suit will be dismissed with costs, but as there is a criminal suit against one of the Defendants for embezzlements the execution of the costs will be stayed.

*Messrs. Mitter & Sarbadhicary*, Attorneys for the Plaintiffs.

*Babu K. N. Gangooly*, Attorney for the Defendants.

#### [CIVIL APPELLATE JURISDICTION.]

##### APPEAL FROM APPELLATE DECREE

No. 1000 of 1889.

RAMPINI, J.  
GUPTA, J.

1901.

22, May.

SHEIKH KARBAN ALI and another,  
Plaintiffs, Appellants,

SHEIKH JAFAR ALI and others,  
Defendants, Respondents.

*Bengal Tenancy Act (VIII of 1885), secs. 105, 106, 107, 108—Dispute in regard to record-of-rights between landlord and tenant—Distinction between secs. 105 and 106—Summary disposal of dispute—Hearing and decision of dispute under the procedure laid down in the Civil Procedure—Res judicata—Civil Procedure Code (Act XIV of 1882), sec. 13.*

This was an appeal preferred on the 22nd May 1895, against the decree of A. E. Staley, Esq, Special Judge of Mozufferpore, dated the 22nd February 1891, reversing the decree of Babu Charu Chandra Kumar, Assistant Settlement Officer of Mozufferpore, dated the 4th November 1898.

The facts of the case material to this report were as follows:—On the application of certain raiyats, the Settlement Officer held that their rents should be entered as Rs. 13-4-6 instead of Rs. 29-4-6 as alleged

by their landlord. It was not clear whether the order was made under sec. 105 or 106, of the Bengal Tenancy Act, but the Revenue Officer, in disposing of the case, did not adopt "the procedure laid down in the Code of Civil Procedure for the trial of suits."

On appeal to the District Judge, he held on the authority of the case of *Durga Kazi v. Nobin Krishna Chowdhraïn*, (I. L. R. 24. Cal. 462), that the matter was *res judicata*, as there had previously been a dispute between the parties in the course of which, viz., on the 16th December 1896, the rent had been found to be as alleged by the landlords Respondents in the present appeal.

It was not clear from the previous order itself whether it was passed in a case under sec. 105, or one under sec. 106 of the Act. The District Judge, however, described it as having been passed in a case under sec. 105, but on the authority of the case of *Durga Kazi v. Nobin Krishna Chowdhraïn* (I. L. R. 24 Cal. 462), seemed to think it must be regarded as having been passed in a case under sec. 106; and so, having the force of a decree, must bar the present suit.

The raiyats Appellants preferred this second appeal and contended that the matter was not *res judicata* as the previous decision of the Settlement Officer was passed in a case under sec. 105 of the Bengal Tenancy Act and was not passed between the same parties as the parties to the present suit.

*Held*—That sec. 105 of the Bengal Tenancy Act means to lay down that during the pendency of the draft publication any person affected by an entry in the record may raise an "objection" with regard to it, which the Revenue Officer to "receive" and "consider"; and dispose of in a summary manner.

That from an order disposing of such an objection there is no appeal (the Revenue Officer's order not being a decision, within the meaning of sec. 108, sub-sec. (2) and no second appeal, and the order cannot have the effect of *res judicata*).

That a "dispute" under sec. 106 is to be "heard" and "decided" by the Revenue Officer under the procedure laid down in the Code of Civil Procedure for the trial of suits and is subject to appeal, and second appeal, and it will have the effect of *res judicata*.

That the Revenue Officer in the present case not having adopted the "procedure laid down in the Code of Civil Procedure for the trial of suits," in disposing of the dispute his order must be taken to have been made under sec. 105 of the Bengal Tenancy Act, and it cannot have the effect of *res judicata*.

*Durga Kazi v. Nobin Krishna Chowdhraïn* (I. L. R. 24. Cal. 462) explained and distinguished.

*Babu Joy Gopal Ghosha* for the Appellant.  
*Babu Nalini Ranjan Chatterjee* for the Respondent.

*Appeal allowed; case remanded.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

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### REPORTS (See Index.)

WE HAD GIVEN UP IN DESPAIR THE QUESTION OF reform and re-organization of the Original Side Offices. It is, therefore, encouraging to find that the Bengal Chamber of Commerce have taken up the subject in right earnest. No substantial good will be done except by a thorough overhauling of the offices and their re-organization on the lines we have already suggested. As a preliminary step a Committee of enquiry may be appointed composed of nominees of both sections of the profession and presided over, we would suggest, by Mr. Justice Stanley. The Committee may be asked to draw up a report and submit a scheme for the re-distribution of work and the re-organization of the offices on the Original Side.

THE RESOLUTION OF THE PUNJAB GOVERNMENT ON the management of the jails in the Punjab states: “It appears to the Lieutenant-Governor unquestionable that if 30 stripes are laid on consecutively on one spot, as is believed to be the case at present, the result must be disastrous.” It is said that in 34 cases prisoners had to be treated in hospitals for recovering from the effects of flogging. We cannot imagine anything more cruel and barbarous than the shocking manner in which this punishment is inflicted by expert warders in the prisons. It is too ghastly a sight to be described here in realistic

terms. But the fact that after the operation the victim has often to be carried to the hospital and treated there till his wounds heal, is sufficiently suggestive. The sight of it or its effect is sure to convince any but those who are born with brutal instincts that it is a barbarity that ought not to be tolerated by any civilized Government. It is a fit problem for the psychologist to solve why the Legislature while not tolerating even the treatment of a horse in any similar manner for being cured of its vice, oppose vehemently any attempt to put limitations on the absolute powers conferred by law on raw magistrates for the maltreatment of human beings. Very little faith is put now-a-days on the curative effect of the lash even in jails. It has been discontinued in the army and navy with excellent results. As to its deterrent effect on boys, Lord Kimberley mentioned in the course of a debate in the House of Lords that “at the school where he was, a boy, not unconnected with that assembly, though not a member of it, came back 18 times.”

WE SOMETIMES HEAR IT SAID IN DISPARAGEMENT ON our jurymen and judges that they are reluctant to hang men. On one occasion this sentiment formed the subject of adverse comment in the Council Chambers of the Government of India. But after all it does not seem to be a very reprehensible sentiment as will appear from the following editorial note in the columns of the *Law Times*:—

The *Westminster Gazette* mentions the curious fact, for which the writer of this paragraph can vouch, that the late Hon. Francis Fitzgerald, who was for nearly twenty years a Baron of the Exchequer in Ireland, never even once pronounced the death sentence, and that the present Lord Morris, who was on the Irish Judicial Bench from 1867 till 1889, never hanged a criminal. In the cases in which—and they were few—he pronounced sentence of death the prisoner was relieved. An intense dislike to try capital cases is not at all uncommon. The Right Hon. William Saurin, who, early in the nineteenth century, was for no fewer than fourteen years Attorney General for Ireland, refused the great office of Chief Justice of Ireland, with a peerage of the United Kingdom, on the ground that he had a horror of trying a capital case. It is believed, too, that a similar aversion accounted for the resignation of the Attorney-Generalship of England by Sir Wm. Horne in consequence of a disagreement with Lord Brougham and his refusal of a puisne judgeship.

It is also a fact worth noticing that counsel who may be said to have grown old in the practice of criminal law seldom take calmly to the responsi-

lity of even defending prisoners in capital sentence

THE LESSON RECENTLY GIVEN BY MR. JUSTICE Darling to an inattentive jurymen would awaken in others the dreams of school-day discipline. We have no exception to take to Mr. Justice Darling's remedy except, perhaps, this that it seems somewhat invidious to confine it to jurymen alone.

Mr. Justice Darling, in the rival nursery gardeners' case this week, gave a sharp and not unneeded lesson to jurymen on the duty which they owe alike to the Court and to litigants of attending to the evidence, by ordering (with the assent of counsel on both sides) an inattentive jurymen to withdraw from the box. The task of acting as a jurymen is an irksome one, but the law imposes it, and it must be properly discharged. A juror who fails to follow a case that he is engaged in trying to the utmost of his ability displays a lack of civic spirit to put the matter mildly—which is most reprehensible. At the same time a great deal might be done to make the position of jurymen more tolerable. They ought to be provided with better accommodation. England has much to learn in this respect, as the late Baron Huddleston so often pointed out, from her Continental neighbours.

We are always in sympathy with the hard fate of a jurymen, but still we have considerable doubt as to whether an improvement in the accommodation of the jury-box will be more conducive to attention than sleep. Sleep is a judicial failing not confined to jurymen alone. When it proves overpowering or grows into a habit, retirement from judicial work is undoubtedly the safest remedy.

IT IS SO REASONABLE THAT A JUDGE SHOULD NOT IN the course of examination of witnesses make any observations or suggestions impeaching the credibility or otherwise of witnesses in a trial before jury that we do not wonder that an indiscretion of this kind by Mr. Justice Ridley recently met with a prompt rebuff from the Bar and we are at one with our contemporary of the *English Law Journal* that the judge was more to blame than the counsel in the following instance:—

Conflicts between the Bench and the Bar are, happily, very rare in England, but they would inevitably become common if judges grew accustomed to 'indulge in irrelevant comments upon the evidence while cases were proceeding. With the merits of the case in which Mr. Justice Ridley recently came into collision with the counsel for the defendant we are not concerned. What we desire to point out is a strange departure from the traditions of the Bench. One of the defendant's witnesses while under examination volunteered a statement as brief as it was legitimate, whereupon Mr. Justice Ridley said, 'It is very kind of you to make a statement which you were not asked for.' The defendant's counsel at once made a protest against this interruption, which was calculated to prejudice his client's case. It was, in our opinion, a very proper protest for him to make. The credibility of the witness was a matter entirely for the jury, and Mr. Justice Ridley's statement was even more gratuitous than that which he rebuked.

WE NOTICED IN OUR ISSUE OF MAY 13, (p. 181n.) the announcement made by the Lord Chief Justice of England as to the rule the judges proposed to

follow in respect of applications for postponements of cases. He said that on good cause being shewn a case will be placed at the bottom of the list. Mr. Justice Buckley, however, took occasion lately to explain the principle on which postponements should be granted in original suits which may be already on the list. In his opinion the expenses of applications for postponement to the parties, the effect of their grant on other suitors whose cases may be on the same list, as also whether it is for the purposes of a fair trial, have all to be considered before allowing a case to stand over.

The applications to the court for actions to stand over (applications made in general for the convenience of the parties) are so numerous that I desire to state the principles upon which I deal with them. The expense of these applications must be considerable, and, if the rules which I observe are known, expense may in many cases be saved. In dealing with the business I desire as far as possible so to conduct it as to put all parties concerned to the least inconvenience. That result is, I think, best attained by ensuring as far as possible the continuity of the list. This continuity may be broken by causes beyond the control of the court and sometimes of the parties. Actions may become abated by death or other cause; actions may be settled; actions may for good reasons be directed to stand over, as, for instance, that a commission to take evidence is issued and until it is executed the action cannot be tried. Against these contingencies it is impossible to provide. But where the parties to an action ask that it may stand over for their convenience, or for any reason which is not one which affects the fair trial of the action, the application, if acceded to, is one which interferes unfairly with the continuity of the list, for the convenience or benefit of one suitor to the inconvenience or detriment of others. In witness actions a large number of parties, witnesses, and others have of necessity to hold themselves at the disposal of the court when the action shall happen to be reached, and, to render the uncertainty which thus necessarily exists as small as possible, it is desirable that there should be as far as possible certainty as to the number of actions which stand before them for trial. I do not, therefore, allow actions to stand over simply because all parties agree, or for any reason not addressed to the fair trial of the action. I reserve to myself full liberty to deal with any particular case as I think the circumstances justify. If an action were a long way down the list and could not be reached, say, for six weeks, I should accept a less reason than would be required if it were within a short distance of being heard. But, in any case, I require a reason sufficient to justify an interference with what would otherwise be the order of the list. I make this statement with a view to discouraging applications, which I think it my duty to discourage, because they are applications which invite me to consider the convenience of one suitor at the expense of the inconvenience of others. I hope that applications for actions to stand over will not be made unless there exists a reason bringing the case within the principles which I have indicated.

## RENT AND REVENUE CASES, 1900.

(4 C. W. N. and I. L. R. 27 Cal.)

### THE BENGAL TENANCY ACT.

#### II.

Where a raiyat surrenders his holding, the land-lord is entitled to re-enter by ejecting the under-raiyat, if he is not protected by sec. 85 or sec. 86, cl. (d), i.e., by raiyati lease by a registered

instrument for 9 years. *Nilkant Chakt v. Ghatoo Sheikh* (4 C. W. N. 667, Macpherson and Stevens, JJ.).

A common manager, appointed under the provisions of the Bengal Tenancy Act, has power to mortgage property with the permission of the District Judge; and while the common management exists, the powers of the co-owners must be regarded as in abeyance, and therefore a mortgage created by a co-owner during the existence of the common management cannot in any way interfere with, or derogate from, the rights created under any transaction by the manager in respect of the joint property. *Amar Chandra Kundu v. Roy Goloke Chandra Chowdhuri* (4 C. W. N. 769, Amcer Ali and Brett, JJ.). Their Lordships have relied upon Rule 3 of the rules of the High Court made under sec. 100 which is to the effect that—"No manager shall have power to sell or mortgage any property, nor shall he grant or renew a lease for any period exceeding three years without the express sanction of the District Judge." Sec. 98, cl. (3), however, provides that the manager "shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners." It may be questioned whether the limitations, for the purposes of management, would include the right to sell or a mortgage.

Sec. 144 has no bearing upon the question of the nature of the suit; it determines the jurisdiction within which suits are to be instituted, and a suit by a tenant against a landlord under sec. 75 for the recovery of a sum which he claims in respect of excess payments made by him in respect of rent is cognizable by a Small Cause Court. *Rango Roy v. Frederick Holloway* (4 C. W. N. 95, Rampini and Hill, JJ.).

Under sec. 102, cl. (4), the special conditions and incidents, if any, of the tenancy are to be recorded in a settlement proceeding. A right of way by one tenant over the land of another is not a condition or incident within the meaning of this section and therefore need not be recorded. *Hara Mohan Roy v. Pran Nath Mitter* (4 C. W. N. 127: 27 Cal. 364, Rampini and Wilkins, JJ.).

A trustee to whom by a trust deed certain properties including a decree for rent is assigned is not an assignee within the meaning of sec. 148, cl. (4), and is therefore competent to apply for execution. *Chhatraput Singh v. Gopi Chand Bothra* (4 C. W. N. 446, Macpherson and Amcer Ali, JJ.).

Sec. 153 of the Act relates to appeals. No appeal or second appeal is provided for from certain decrees or orders in suits for rent. It has been decided that the term

'order' used in sec. 153 not only includes such an order. *Gagan Chand v. Casperz* (4 C. W. N. 44, Banerjee and Wilkins, JJ.), but also one made in an execution proceeding—as the term 'suit' in the section includes proceedings in execution of the decree made in the suit. *Syama Charan v. Debendra Nath* (4 C. W. N. 269, Banerjee and Stevens, JJ.).

Sec. 167 lays down the procedure for annulling encumbrances when a tenure or holding is sold for arrears of rent. From the wording of the section it is not clear whether any notice is necessary when the encumbrancer and purchaser are one and the same. A conflict of opinion has arisen on this question. Amcer Ali and Brett, JJ., in the case of *Mastullah Mandal v. Gyan Mamud Sah* (4 C. W. N. 735) dissenting from *Golak Chunder Das v. Ram Sunker Dutt* (4 C. W. N. 268, Macpherson and Stevens, JJ.) have held that the purchaser contemplated by sec. 167 is a purchaser independently of the encumbrancer, and where the encumbrancer himself purchases the property encumbered to him, in execution of a decree for arrears of rent, it is not necessary for him to give notice of annulment of his encumbrance under sec. 167 of the Bengal Tenancy Act. In a notice to annul an encumbrance it is not necessary to give the particulars as to area and rent of the land. *Jagabandhu Majumdar v. Rashed Manjan Dassya* (4 C. W. N. 261, Rampini and Pratt, JJ.).

There was a conflict of opinion with regard to a question as to whether a claim to a property attached in execution of a decree for arrears of rent would lie if the claim is adverse to the tenure. Rampini and Pratt, JJ., dissenting from Petham, C. J., and Cunningham, J., in *Jagabandhu v. Dinu* (4 C. W. N. 734) held that such claim was not maintainable whether the claim was adverse to the tenure or not. *Makbul Ahmed v. Rakhal Das Hazra* (4 C. W. N. 732). But the question was referred to a Full Bench by Maclean, C. J., and Banerjee, J., in *Anwita Lal Bose v. Nemai Chand* (4 C. W. N. cclx), and it was finally settled by a majority of the Full Bench that no such claim was maintainable.

Sec. 188 of the Bengal Tenancy Act provides that when two or more persons are joint landlords anything which the landlord is required or authorised to do must be done by all the persons jointly. It has been settled that this section does not apply to a suit for rent as a landlord is not required or authorised to sue for rent under the Bengal Tenancy Act. But when a landlord is to apply for appraisalment under sec. 69 all the landlords must join, *Nukheda v. Ripu Mardan* (4 C. W. N. 239, Ghose and Rampini, JJ.). Sec. 188 has, however, no application when the principal Defendant was

the tenant of two joint landlords and there being a partition between them, each of the joint landlords brought a separate suit for his share of the rent against the principal Defendant by making the co-sharer landlord a party. *Raj Narain Mitter v. Ekadasi Bag* (4 C. W. N. 494: 27 Cal. 479, Rampini and Wilkins, JJ.).

The Local Government has framed rules as regards the service of notices. In a suit for ejectment requiring a notice to quit, a service of notice by post was held to be bad as being not in accordance with the rules prescribed by Government. (Rule 3, Chap. I of the Rules).

The two years' limitation applicable to a suit to recover possession of land claimed by the Plaintiff as an occupancy raiyat is applicable where a fractional or co-sharer landlord dispossess the raiyat. *Parameswar v. Kali Mohun* (4 C. W. N. 801, Rampini and Pratt, JJ.).

When the dispossession is not by the landlord but under his authority, this article would apply; *Chintamani v. Upendra* (4 C. W. N. 326, Rampini and Wilkins, JJ.); this article would also apply when the dispossession is not by the landlord primarily but by a third person and who subsequently takes a settlement from the landlord. *Harakumar v. Sheikh Nasaruddin* (4 C. W. N. 665, Amser Ali and Brett, JJ.).

(To be continued.)

## English Notes.

CHANCERY DIVISION.—*Re MEGRET, TWEEDIE v. MAUNDER*. Before MR. JUSTICE COZENS HARDY. 21st January 1901.

*Settlement on marriage by English woman with a Frenchman—Conflict of law—Locus contractus.*

In *re HERNANDO* (27 Ch. D. 284) followed.

One Louis Megret married in 1862 a domiciled English woman, named Rachel Davis. He had a French domicile. In contemplation of marriage the only property settled was by the lady. It was placed on trust, the lady having power of appointment for such person or persons as she whether sole or covert should by deed or Will appoint and in default for her sole use. She died in 1876 leaving three daughters and one son. By Will she gave a certain sum to her son and one-third of the residue of her property to each of her daughters.

The question was whether the French or the English law applied, for by French law the husband would be entitled to a certain share of the trust property.

The learned Judge states in his judgment that the wife by her Will purported to exercise the power in a manner which would not be permissible by the law of France if she were dealing with her own property. The settlement would be nugatory unless the

English law applied. The case of *re Hernando* had decided both points raised (1) whether the Will was a good exercise of the power, and (2) a good disposition of the property given for the wife's separate use and he must decide in accordance with that ruling and pronounce in favour of the English law.

*Mr. Vernon Smith, Q. C.*, and *Mr. Wood* for the husband.

*Mr. Theobald, Q. C.*, and *Mr. Martin* for the son.

C. W. A. • *Decision in favour of the son.*

## • Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD HOBHOUSE.	JOSEPHINE ROSE HARRISS
LORD MACNAGHTEN.	and anr., Plaintiffs,
LORD ROBERTSON.	Appellants,
SIR R. COUCH.	v.
SIR FORD NORTH.	EDWARD BROWN and ors.,
1901.	Defendants, Respondents.
1, May.	

*Will, construction of—"Eldest son," meaning of—Appeal heard ex parte—Application for re hearing by Respondent.*

This was an appeal against a decision of the Calcutta High Court reversing that of the Sub-Judge of Barisal.

The suit was brought by A. E. Harriess (now represented by the Appellants) as assignee of the interests of Flora Williams and her husband George Williams, against the executor of the Will of one Thomas Paul D'Silva, to have the Will construed and for a declaration that he as assignee was entitled to a moiety of the estate left by the testator.

The Will is dated 5th January 1857. The testator died on the following month unmarried and childless. Cecilia the wife of F. M. Proby, and the said Flora were two daughters of his brother J. Manuel D'Silva. Flora married George Williams in 1878. She had an infant son born in August 1883 who lived only a few hours. The husband and wife subsequently lived apart. On 31st March 1882 Flora sold half of her interests to three Mahomedan gentlemen who were the 3rd, 4th and 5th Defendants to the suit. The 5th Defendant transferred his interests to Amal Chand Pal, the 6th Defendant.

On 12th August 1892 Flora executed a deed to Amrita Lal Banerji by which after reciting her previous assignment she assigned to him for Rs. 3,000 the residue of her interest in the moiety of the testator's estate, and also her allowance of Rs. 50 per month.

On the same date George Williams assigned to the same individual any right he had as sole heir to his son to receive the moiety of the testator's estate, the consideration was Rs. 4,000.

Amrita Lal on same day sold to Plaintiffs for Rs. 9,000 what he had acquired under the two last-mentioned deeds.

George Williams died soon after the assignments, and no further issue was born to them.

Cecilia Proby had a son born on 17th May 1858, who lived to reach 21 years and to whom on his attaining majority one moiety of the estate was handed over by the executor.

The principal question was the right construction of the 11th clause of the Will.

The Plaintiff's case was that, on the birth of the infant son of Flora Williams, the moiety of the testator's estate vested in him and on his death passed to his father. The Defendants said there was an intestacy as to this moiety which passed equally to Flora and Cecilia.

The 11th clause is as follows:—

"After carrying out all the directions and paying the legacies specified in the abovementioned paragraphs, all my ancestral and self-acquired moveable and immoveable properties that shall remain, as also the moveable and immoveable properties left by Domingo Manuel Anthony D'Silva and which I have inherited, shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother Janni Manuel D'Silva (namely) Mrs. Cecilia Proby and Miss Flora D'Silva who are now alive. The sons of those daughters (of my brother) shall, after their birth, remain under the control and guardianship of the executor Saheb until they attain majority at the expiry of 21 (twenty-one) years, and whenever the eldest son of any of the ladies shall attain majority, the executor will make over his share to him to his satisfaction. Of my two brother's daughters I give to the elder (namely) Cecilia Proby the Bbarpasha Tofelbari dwelling-house inherited by me, and to the younger (namely) Miss Flora the house at Shibpore. But if, for the purposes of management of my properties, it should be necessary for the executor to stay in any one of the said two houses, there shall be raised no objection to his doing so. And as regards the ornaments and tables and almirahs and other articles that I have in my custody and under my control, I give the same to the said daughters (of my brother) in equal shares. The elder of them is married. Immediately upon my death, she will get her half share of the same from the executor. The younger one has not been married yet. She is under age. When she arrives at marriageable age, she will be given in marriage to a suitable person with the consent and according to the views of the executor. At the time of her marriage, the executor will give her the half share she is entitled to, and as regards the sum of Rs. 50 (fifty) a month which has been fixed for the maintenance of each of the said two daughters (of my brother), the elder of them will be paid her monthly allowance month after month. The younger shall be sent to school and her necessary

expenses at the school will be met from her fixed monthly allowance. Finis."

The Courts in India in effect held that nothing vested in the infant son of Flora and George Williams because he had not lived till he was 21.

There was also a question whether the said transfer by Flora Williams to Amrita Lal Banerji was ineffectual to convey any interest to him.

*Mr. Asquith, K. C.*, and *Mr. Mayne* for the Appellant.

*Mr. Asquith* argued, that the "eldest son" took a vested interest, there was no gift over. The gift was not made contingent. There cannot be two eldest sons. The High Court was wrong in coming to the conclusion that it meant the eldest son living and not the first-born son; whether the correct translation was "shall descend" or "shall devolve" or "shall go to" the vesting was on the birth of the eldest son. It was an erroneous construction to say that only when the two eldest sons of his nieces should attain majority were their respective shares to vest. On the other point *Mr. Mayne* was to follow, but their Lordships intimated that they did not consider it necessary to hear *Mr. Mayne*.

The Respondents were not represented by counsel.

Their Lordships reserved their judgment.

On the 11th May, before Lords Macnaghten, Davey, Lindley and Sir Richard Couch and Sir Ford North, an application was made on behalf of one of the Respondents for the re-hearing of the appeal.

In the petition of the Respondent Cecilia Proby to the Right Hon'ble the Lords of the Judicial Committee it was stated that the record in the above appeal arrived in London in August 1890.

That Appellants' solicitors entered appearance at the Privy Council Office on 6th November 1900. That by the mail which left Calcutta on 7th March last the Calcutta agents of Petitioner's London solicitors Messrs. T. L. Wilson & Co. wrote them stating that Petitioner's mukhtear had called on them and had promised to remit funds to enable Messrs. T. L. Wilson & Co. to appear by counsel on her behalf at the hearing of the appeal.

That on receipt of such letter Messrs. T. L. Wilson & Co. wrote to Appellants' London solicitors on 26th March asking them to consent to the appeal standing out of the list for May into the June list.

That Appellants' solicitors declined to give the consent.

That Petitioners' solicitors then on 1st April cabled to their Calcutta agents Messrs. Wilson and Chatterjee & Hearing 3rd May."

That the appeal was heard *ex parte* by their Lordships on the 1st May, and judgment was reserved. That on the 2nd May Messrs. T. L. Wilson & Co. received the following cable from Calcutta: "appear for Respondent Cecilia." That thereupon Messrs. T. L. Wilson & Co. wired back that appeal had been argued and judgment reserved.

That on 3rd May the said Calcutta agents cabled back instructions to make an application for a hearing, and Petitioner prayed their Lordships to permit counsel to be heard on her behalf in support of the judgment of the High Court.

**Mr. C. W. Arathoon** who appeared on behalf of the Petitioner pointed out that this appeal had come on for hearing within 9 months of the arrival of the record and referred to the facts mentioned in the petition.

**SIR RICHARD COUCH.**—If the application is granted, you will have to pay the costs of the re-hearing in any event. Are you agreeable to its standing over for you to consider that?

**Mr. Arathoon.**—Yes, that order will suit me very well. **Mr. Mayne** appears to oppose.

**Mr. Mayne** urged that it will establish a bad precedent, if Respondents were allowed after they find out that an appeal is going against them to make such applications, it was likely that they would frequently act in this manner. He further pointed out that leave to appeal was granted so far back as February 1899, and there was no reason shown for any indulgence in this case. Any way if the application is granted then costs must be paid of the re-hearing.

**LORD MACNAGHTEN.**—Their Lordships always regret having to hear an appeal *ex parte*.

After consideration Lord Macnaghten said the prayer will be refused with costs.

C. W. A.

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

Suit No. 864 of 1900.

STANLEY, J.	}	GURMUK ROY and ors.,
1901.		"
3, June.		TUBARAM and others.

*Practice—Inspection of documents—Sealing up—Civil Procedure Code (Act XIV of 1882), secs. 129, 130.*

This was an application upon a summons taken out by the Defendants for an order that the Plaintiffs do produce and leave at the office of their attorneys such portions of the documents sealed by them as may be found by the Court to relate to the matter in question in this suit, and that the Defendants, their attorneys and agents, be at liberty to inspect and peruse the same and to take copies and abstracts thereof and extracts therefrom as the Defendants may be advised.

This was a suit instituted by the Plaintiffs for the recovery of a sum of money alleged to be due by the Defendants for principal and interest in respect of a certain commission agency business. The Plaintiffs alleged that they had acted as the commission agents in Calcutta of the Defendants

and in the course of such business had purchased on their behalf and sent to them various goods ordered by them, that they had submitted yearly true and faithful accounts of such dealings to the Defendants who had from time to time acknowledged the correctness of such accounts; that on the 17th of October 1899 the Defendants adjusted the Plaintiffs' accounts and signed the same and a sum of Rs. 6,052-3-9 was found due, that the Plaintiffs subsequently discovered that by some mistake they had omitted to charge the Defendants in the said account with a sum of Rs. 500 for principal and Rs. 98-15-3 for interest, that they had brought this omission to the notice of the Defendants who had admitted those sums to be due in addition to Rs. 6,052-3-9. That subsequently they had further dealings with the Defendants, a true and faithful account of which they submitted to the Defendants.

The Defendants by their written statement alleged, *inter alia*, that the Plaintiffs had charged higher prices for goods than what had been actually paid for by them although it had been agreed that the Plaintiffs were to charge the Defendants only the cost price of the goods and they sought to re-open the whole account. On the 1st February an order was made upon the Plaintiffs to file their affidavit of documents, and on the 20th of March they filed their affidavit by which they claimed "the right of sealing up such portions of documents mentioned in Nos. 1 to 27 of Part II of the schedule as do not relate to the matter in question in this suit."

The Defendants now applied for the order set out above upon an affidavit of one of the Defendants in which he stated, *inter alia*, that so far as he had been able to ascertain particulars, the Plaintiffs had fraudulently overcharged the Defendants with regard to certain items which were set out in the affidavit and "that there are entries in the account books of the Plaintiffs which would shew the price at which, the time when, and the person from whom, the goods supplied to my said firm were purchased. That such entries the Plaintiffs have wrongfully sealed up and did not allow me to inspect them although asked."

The Plaintiffs opposed the application, and in their affidavit in opposition they set out certain entries which, they said, were the only entries in the Plaintiffs' books relating to the matters in question in this suit. They submitted that the Defendants had no right to inspect any entries in the Plaintiffs' books prior to the settlement of accounts on the 17th October 1899, and they denied that they had in any way overcharged or wrongly charged the Defendants.

**Mr. Jackson** for the Defendants referred to the Annual Practice for 1900, p. 376, Order 3, R. 1.

**Mr. Garth** for the Plaintiff.—They are bound by our statement that there are no other entries relating to the matters in question in this suit. We have given inspection of all entries which are relevant and we are entitled to seal up the rest. See *Nritto*—



*moysé Dasse v. Soohul Chunder Law* (I. L. R. 23 Cal. 117) and *Amarendra Nath Chatterjee v. Kally Kissen Tagore* (2 C. W. N. 17).

*Mr. Jackson.*—These cases are not in point. The question whether those entries are relevant or not is not for the Plaintiffs to determine but for the Court. The usual practice is to appoint an officer to look into the entries. See *Heeralall Rukhit v. Ram Surin Lall* (I. L. R. 4 Cal. 835) and *Mughee Bibee v. Heeralal* (Unreported, Sale, J., 2nd May).

*STANLEY, J.*—Let the books be produced before me on Saturday next for the purposes of inspection under sec. 130, Civ. P. C.

*Messrs. Leslie and Hinds*, Attorneys for the Plaintiffs.

*Babu Kally Mohan Rukhit* for the Defendants.

S. R. D.

### [ORDINARY ORIGINAL CIVIL JURISDICTION]

In the matter of the BOARD OF  
EXAMINERS FOR PLEADERSHIP  
AND MUKHTERSHIP  
and

In the matter of ACT XVIII OF  
1879 OF THE GOVERNOR-  
GENERAL OF INDIA IN  
COUNCIL  
and

In the matter of the SPECIFIC  
RELIEF ACT (I OF 1877) OF THE  
GOVERNOR-GENERAL OF INDIA  
IN COUNCIL.

*Specific Relief Act (I of 1877), sec. 45—Board of Examiner for Pleadship and Mukhtership—Legal Practitioners Act (XVIII of 1879), sec. 6—Power of the Board to debar a man for ever from appearing at an examination.*

This was a rule obtained by one Rudra Narain Roy on the 2nd February 1901 calling on the Board of Examiners for the Pleadship and Mukhtership to show cause "why the said Board should not allow the said Rudra Narain Roy to appear at the ensuing examination for Mukhtership and to appear at any other similar future examination to be held by the said Board upon the said Rudra Narain Roy fulfilling the conditions necessary under the law to qualify him to appear at such examinations." It appeared that the Petitioner passed the Entrance Examination of the Calcutta University in 1885. In 1891 he was tried before the Presidency Magistrate on a charge of having personated one Hemango Chandra Kiula at the Entrance Examination of that year; the charge was heard and after hearing the evidence the Magistrate was not satisfied with the identity of the Petitioner with the person said to have personated and he was discharged. In November 1892 he sent in the necessary certificates

to the Board of Examiners and offered himself as a candidate for Mukhtership at the then next examination to be held in 1893. That Board investigated his case and in the exercise of their discretion came to the conclusion that he was not a fit and proper person to be admitted to the examination. In 1895 the Petitioner again applied to the Board to have his case reconsidered, but the Board saw no sufficient grounds for altering the decision which had already been passed in the matter.

In 1899 he again applied for permission to appear at the examination held in 1900 and was, through a mistake, allowed to appear but failed to pass.

In November 1900 he again applied for such permission and sent in the necessary certificates of moral character but such permission was refused. It appeared that the Board were of opinion that they would not be justified in investigating a matter which had already been disposed of and consequently they refused to entertain the application or to examine the certificates of character presented to them and refused to allow him to be examined. The Petitioner thereupon applied for and obtained this rule under sec. 45 of the Specific Relief Act.

*Mr. O'Kienly* shewed cause for the Board.—This application does not come within sec. 45 of the Specific Relief Act. As the rule is framed the Court has no jurisdiction. The rules for the examination are made under sec. 6 of the Legal Practitioners Act and under those rules it is for the Board to be satisfied that a candidate is a fit and proper person to be admitted. This Court cannot interfere with the decision of the Board, it can only direct them to do what the law declares they should do. But if they have done that and gone fully into the matter, this Court has no jurisdiction to order them to go over it again. In 1893 they went very fully into the matter, and they came to the conclusion that the applicant was not a fit and proper person. [Court.—The Board is entitled to say that a particular candidate is not a fit and proper person for a particular examination, but are they entitled to say that he shall never be entitled to appear at any examination?]

*Mr. Sinha* (for *Mr. A. Chaudhuri*) and *Mr. K. Chaudhuri* in support of the rule.—The mistake the Board has made is in thinking that they are bound to follow the decision of their predecessors. They are not bound by that decision. They are bound to consider each case on its merits, and their refusing to do so is a complete refusal to exercise jurisdiction.

*Held*—It is for the Board and not for the Court to determine the fitness of a candidate, but before the Board can debar him from presenting himself as a candidate, they must examine his fitness at the present time. It is not consonant with justice to debar a man, once debarred, for ever as a man not fit and proper.

The application under the circumstances is sustainable.

*Ordered*—That the applicant be at liberty to present to the Board the certificates required by the rules and regulations. The Board is to consider those certificates and if satisfied that the candidate possesses the qualifications prescribed by the rules, they are to allow him to present himself for examination.

*Mr. J. C. Dutt*, Attorney for the Applicant.

*The Government Solicitor*, Attorney for the Board.

*Rule made absolute without costs.*

S. R. D.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE.

No. 2320 OF 1898.

BANERJEE, J.	RAM TARAN CHATTERJEE,
BRETT, J.	Defendant No. 1, Appellant,
1900.	"
Heard, 11, December.	ASMATULLAH SHEIKH, Plain-
1901.	tiff, and EFAZULLAH SHEIKH
Judgment, 12, June.	and others, Defendants,
	Respondents.

*Kabuliyat by one of several tenants for the whole of the share, effect of.*

This was an appeal against the decision of Babu Syam Chand Roy, Sub-Judge of Khulna, dated the 24th August 1898, modifying the decree of Babu Upendra Nath Bhanja, Munsif of Khulna, dated the 16th March 1898.

The facts of the case material to this report are shortly as follows:—Plaintiff alleged that he and the *pro forma* Defendants held possession of their ancestral *jumma* under Defendant No. 1, their landlord, that Plaintiff's share was 4 ans. and the remaining share belonged to Defendants Nos. 2, 3 and 4; that the Defendant No. 1 threatened the Plaintiff with oppression and further threatened him saying that he would resume *khas* possession of the *jumma* and settle the land held by the Plaintiff with someone else, if the Plaintiff did not execute and register a bond and a *kabuliyat* for the entire *jumma* at an enhanced rate of rent; that the Defendant No. 1 compelled him to execute such a *kabuliyat* as well as a separate bond for Rs. 652 on account of bonus mentioned in the *kabuliyat*; that the Defendant No. 1 had no right or authority to settle the entire quantity of land with the Plaintiff, and therefore the present suit was brought for the cancellation of the *kabuliyat* and the bond.

This suit which was suit No. 51 of 1897 in the Court of the Munsif of Khulna was tried with another suit No. 151 of 1897 in the same Court, which was brought by Defendants Nos. 2 to 4 in the first

mentioned suit against the Plaintiff and Defendant No. 1 of suit No. 51 to obtain a declaration that they were entitled to a 12 ans. share in the lands to which the *kabuliyat* and the bond related and that those documents were not binding on them. The first Court dismissed the first-mentioned suit, but decreed the second declaring that the Plaintiffs in that suit, i.e., Defendants Nos. 2, 3 and 4 in the present suit were entitled to 12 ans. share in the land in question and that they were not bound by the bond and the *kabuliyat*. The decree in the second suit was not appealed against, but there was an appeal from the decree in the suit out of which the present appeal arose. The lower Appellate Court while affirming the finding of the first Court that the case of fraud and coercion set up by the Plaintiff was not made out, modified its decree by limiting the operation of the *kabuliyat* and the bond to a 4 ans. share and declaring them binding, as against the Plaintiff only to the extent of one-fourth share.

Defendant No. 1 preferred this second appeal, and it was contended on his behalf that the Court of Appeal below was wrong in law in modifying the decree of the first Court and declaring the documents operative only as regards a fourth share which was the interest of the Plaintiff. It was argued that as the suit was based on the ground of fraud, and that that ground was not made out, the suit ought to have been dismissed altogether, and it was further argued that even if it was open to the Plaintiff to raise the question of the extent of his share, he should still have been held bound by his contract to pay the increased rent mentioned in the *kabuliyat* in its entirety and in support of this contention the case of *Burhamuddin Howladar v. Mohan Chandra Guha* (8 C. L. R. 511) was relied upon.

Their LORDSHIPS in dismissing the appeal observed:—

The Appellant's contention was not sound. The suit was based mainly, no doubt, on the ground of fraud; but the Plaintiff also alleged in his plaint that his share in the tenure in question was only one-fourth, and that the remaining three-fourths belonged to the Defendants Nos. 2 to 4; and that allegation having been found satisfied, the Court of Appeal below was right in holding that the Plaintiff could not be made liable for rent or bonus in respect of any share exceeding his own one-fourth share.

*Burhamuddin Howladar v. Mohan Chandra Guha* (8 C. L. R. 511) distinguished.

*Dr. Rash Behary Ghosh, Babus Benode Behary Mukerjee and Kritanta Kumar Bose* for the Appellant.

*Babu Surendra Chandra Sen* for the Respondent.

*Appeal dismissed.*

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, JUNE 24, 1901.

[No. 31

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### REPORTS (See Index.)

THE THIRD QUARTERLY SITTINGS OF THE CALCUTTA Court of Criminal Sessions will commence in the High Court on and from the first of July next and will be presided over by Mr. Justice Pratt.

AS WE WERE GOING TO PRESS LAST WEEK WE HAD only time to take a passing notice of the letter from the Chamber of Commerce to the Government of India on the question of some much-needed reforms in the distribution and disposal of work on the Original Side of the High Court. The suggestions of the Chamber of Commerce are almost precisely the same as those that have been put forward by us in these columns in consultation with the leading members of both branches of the profession. The judges on the Original Side have for years felt that the abolition of the important offices of Master and Taxing Officer has been a great hardship to suitors and to those who have to look after their interest. As we have already in our previous issues (Vol. III Notes, pp. 129, 181—3, 190, 225 and Vol. IV, pp. 2, 13—15, 25) gone into the history of those offices and explained why they should be revived, it is unnecessary for us now to go over the same ground once again. But since the

Chamber of Commerce is now moving in the matter it may serve some useful purpose to consider the stage at which the question stands at the present moment. Since the retirement of the late Registrar, his Lordship the Chief Justice has consulted the learned judges and has had considerable opportunities of ascertaining the views of the profession with regard to the matter and fortified with such opinion has but lost little time in representing to the Government of India as to how matters, as they at present stand on the Original Side, may be adequately remedied.

THE QUESTION HAS BEEN PROMINENTLY BEFORE THE public for nearly two years and during this time the leading organs of public opinion have been untiring in their endeavour to draw the attention of the Government as to the urgency of the reforms. We have often wondered why no response has been received yet from the Government of India with regard to such an important matter. The only explanation that suggests itself to us is that it may be due to financial considerations which, as we all know, is often allowed to block the way to many urgent reforms. When the Government feels disposed to postpone a question from such considerations it is often a hopeless task to cause other considerations to prevail. We had almost begun to despair because of such reasons when the representation of the Chamber of Commerce, representing as it does the opinion of a body of practical business-men, has roused in us the hope that the Government may at last be induced to recognise that the question cannot any longer be postponed without a break down in the offices and without bringing business on the Original Side to a dead-lock.

THE URGENCY HAS BECOME MORE PRONOUNCED SINCE his Lordship the Chief Justice has very considerably placed the services of a third judge on the Original Side and by a very judicious redistribution of the work has succeeded in relieving to some extent the congested state of the cause lists. For instance, by such arrangements, very simple liquidated claim-matters which were hanging fire for years are now being rapidly disposed of. Still the general list is in such a congested condition that

even three judges, with all their untiring devotion to their work, are unable to make any impression on it. The recent run on the list we may leave out of consideration for the present. Cases struck off cannot be regarded as disposed of and it yet remains to be seen how many of these may hereafter be restored. But still there can be no question that but for a timely third Court, business on the Original Side would have come to a stand-still, especially, having regard to the heavy suits that recently came up for hearing before same of the benches. If one more Court, on the Original Side has been a source of great relief, it has also meant an increased amount of ministerial work and that has necessarily brought into prominence the question of strengthening the ministerial staff and the expansion and the reorganisation of the Original Side offices.

IF WITH TWO COURTS AND NO MASTER OR OFFICIAL Referee to dispose of the References, many suits on the Original Side had reached the notoriety of *Jarndyce v. Jarndyce*, it may easily be imagined how many more of these are likely to accumulate when there are three courts sitting. Similarly when there is no Taxing Officer to tax the costs in suits disposed of by two courts how are the officers, who are charged with these duties, to get on with the work from three Courts? We welcome, therefore, the timely representation made by the Chamber of Commerce and also the prompt support that it has received from the public press. As for the rest, his Lordship the Chief Justice has, we understand, already taken considerable trouble to ascertain the needs on the Original Side of the Court and we are very thankful to him for the improvements he has already effected and also for those that he intends to introduce, if the Government place him in a position to do so. We therefore think that no further time should be lost over the matter by the Government of India and that the only question that now remains for them to consider is merely one of "ways and means" and as regards that there need be no difficulty, as the Chamber of Commerce very pertinently points out, that the administration of justice in Bengal is a large source of profit and the Government has only got to yield up a portion of that gain, to none of which they can legitimately lay any claim for other purpose.

BARRISTERS' CLERKS ARE VERY DIFFERENT BEINGS IN England from what they are here. They have various accomplishments, amongst which short-hand is not the least, which come of great assistance to their masters. They are also a thinking, feeling and intelligent lot who have founded societies for their mutual benefit and culture which, we might say, would do credit even to the legal practitioners in this country to emulate. It is no wonder therefore

that individual members of such a body of men should at times be fired with ambition and succeed in working up their way to the very first rank of the legal profession and deserve the highest honours that the practice of law can confer. As an instance of this kind, Sir Francis Jeune, speaking at the annual dinner of the Law Clerk's Society, pointed to the remarkable career of Lord Justice Rolt. The President of the Probate Division said:—

He could not think of the society without remembering his own legal godfather, the late Mr. Justice Rolt, who, rose from a very humble position in the law to almost its highest honours. He began life as a junior clerk to a barrister, and he had, as he himself often told him, two pieces of good fortune. The first was that his master was a man of very great ability, and the second that he was also an incorrigible and irreclaimable drunkard. The result was that before very long Mr. Rolt had not only learned how to do the work as well as the master, but he very soon found he could do the work in place of the master, with the result that the clients discovered his ability, and in due course of time he became Attorney-General and became Lord Justice, and he represented his country for a period of something like twenty-five years.

THE LORD CHIEF JUSTICE SPEAKING AT THE SAME dinner gave some humorous account of how barristers' clerks, not unlike their brethren in this country, are apt to identify themselves with their masters. He said:—

He could keep them there half the night telling them stories of barristers' clerks. He would only tell them one. A very distinguished man, who was afterwards Lord Chancellor, came back at the end of the Long Vacation and said to his clerk, a well-known character—some of those present no doubt knew whom he meant and might remember him (there was a vacancy in the old Court of Common Pleas): "Is there any news?" "No, sir; not much," was the answer. "Isn't there any news at all?" "No. They have been asking me if we are going to take the puisne judgeship." "Well," said the barrister, "what did you say?" "I said, 'Thank God, we have not fallen so low as that!'" That was a literal fact without a word of exaggeration or invention.

This, of course, referred to, Lord Cairns and his clerk.

TO MATCH THE HUMOUR OF THE ABOVE WE COULD mention an incident which happened nearer home when two barristers on being appointed to officiate as puisne judges their clerks gave a dinner to their brethren of the same calling and everything was going on merrily till an after-dinner controversy arose as to whether the clerk whose master had taken seat on the Appellate Side was to take precedence over his rival whose master was deputed to do work on the Original Side. The former, however, being a younger and a more powerful man was about to resort to *argumentum baculinum* when the latter very logically conceded to him the precedence.

THE FOLLOWING STORY NARRATED BY THE LORD CHIEF Justice, on the same occasion, will surely be appreciated by those for whom it is meant:—

A leading solicitor, some years ago, was met by some fashionable client, who did not know much about the business, and

he said: "Oh, Mr. So-and-so, what an anxious life you must have! What a responsible life! How can you go about with all this great responsibility on you?" "Oh!" said the solicitor, "I am the most irresponsible being in the whole world. I leave all the law to my counsel and all the practice to my clerk."

## Review.

**THE GAVEL AND THE MACE, or Parliamentary Law in Easy Chapters.** By Frank Warren Hackett. Published by Messrs. Sweet and Maxwell, Ltd., 3 Chancery Lane, Law Publishers. 1901.

This is a very pleasant addition to one's Law Library and affords much interesting reading even for those who have no love for legal literature. It deals with the practice of various English representative bodies and gives a short and entertaining account of Parliamentary Procedure. There is a great deal of humour in its pages, and the style is free and easy and is nowhere marred by legal technicalities. The book is full of pretty anecdotes and conveys some very sound advice, though it be in the lighter vein. Here is a short quotation:—

"A fundamental principle governing debate at every stage is, that the speaker must confine his remarks to the question at issue. He must not ramble. This requirement is kept before the mind of the legislator usually by means of a clock, with a large dial, fixed at some conspicuous point in the chamber. . . . If you, my young friend, in your efforts at speech-making discover yourself as it were 'floundering around' do not be discouraged. Remember Father Taylor, who in a burst of inspiration once cried out from his pulpit, at the Sailor's Bethel, '*I have lost my nominative case, dear brethren, but I am going to glory just the same.*'" The book is beautifully got up in every respect. The paper, printing and binding display an artistic finish which should be seen to be appreciated and as for its contents, we have no hesitation in saying that it is an eminently readable book.

## English Notes.

**HOUSE OF LORDS.**—KEIGHLEY MAXTED AND CO. v. DURANT. Before the LORD CHANCELLOR, LORDS MACNAGHTEN, SHAND, DAVEY, LORD JAMES OF HEREFORD, LORD BRAMPTON, LORD ROBERTSON and LORD LINDLEY. 20th May 1900.

*A contract made by one on his own behalf, though intending to buy on behalf of a third person, is not capable of ratification by that third person.*

The Appellants were corn merchants at Hull, and a Mr. Wright was their manager and agent. The Respondent, Durant, is a corn merchant at Wakefield trading as Bryant Durant & Co. On the morning of the 11th May 1898 one Roberts received from Durant's brokers a telegram containing an

offer from him of certain wheat at a certain price. Later on the same day Roberts had an interview with the said Wright and upon hearing of Durant's offer the two agreed that if Roberts could get the wheat at a certain price they would purchase on joint account, (i.e., of Roberts and the Appellants). Roberts could not get the wheat at the agreed price. Later the same day Roberts, without further communication with the Appellants and apparently purely on his own separate account by an interchange of telegraphic communications with Durant's brokers, concluded a contract for the purchase by him in his own name from Durant of the whole of the wheat at a slightly increased price to that on which the offer was made on the said joint account. At a casual meeting the next day between Wright and Roberts the latter informed Wright of the contract upon which Wright told him to take it, because the wheat was good, though the price was rather high. Roberts did so, but failed to fulfil his contract.

The action was commenced by the Respondent Durant against Roberts and the Appellants for breach of contract in failing to take delivery of the wheat. At the trial Mr Justice Day held that there had been no ratification of the contract by the Appellants and entered judgment for them with costs.

The COURT OF APPEAL, Lord Justices Collins and Romer, (Lord Justice A. L. Smith dissenting) held that there was evidence to go to the jury that Roberts intended to make the contract on behalf of the Appellants, and that the Appellants did in fact ratify the contracts. A new trial was ordered.

The Defendants appealed.

The LORD CHANCELLOR in his judgments stated that the facts were admitted; Roberts had made a contract on his own behalf and without the authority of anyone else. It was a completed contract with ascertained parties and, in his Lordship's opinion, by no principle known to the law, could the present Appellants be made parties to the contract. "I confess I do not see the relevancy of the argument that a contract might be made in the name of an unknown principal and that such a principal may sue and be sued, though the name was not given at the time the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterwards and make it a different contract. If it is said that it is an anomaly, it certainly is not the only one in our law, and if it was sought to make our laws harmonize by deciding that any proposition which our laws establish involves as a necessary consequence the establishment of every thing that is analogous to it, the result would be very perplexing indeed. I agree with the Master of the Rolls that a long line of decisions has settled the question in favour of the view which he maintains. . . . These are parts of the Roman law which undoubtedly

we have made parts of our own and they are binding on us not because they are parts of the Roman law but because they are parts of our own. In this country we have never adopted the Roman law in a wholesale fashion . . . . Our law differs in most important respects from the Roman law.

The appeal must be allowed with costs both here and below." ●

LORD DAVEY in his judgment referred to the authorities and agreed in deciding that a contract made by one on his own behalf, though intending to buy on behalf of a third person was incapable of ratification by that third person.

The other noble Lords concurred.

Mr. Carver, K. C., Mr. Danckwerts, K. C., and Mr. Lush for the Appellants.

Mr. Robson, K. C., and Mr. Scrutton, K. C., for the Respondents.

*Appeal allowed with costs.*

C. W. A.

ADMIRALTY COURT.—HORTON v. WARD (The Heather Bell). Before the PRESIDENT. 25th March 1901.

*Right of mortgagee in wrongful possession of ship—Wages of master and crew.*

The Defendant had sold the ship to a Company. To secure the payment of certain instalments of the consideration-money the Company had mortgaged it to Defendant. The next instalment of the consideration-money was to be paid to Defendant in September 4th. The Company had chartered the ship to Plaintiff for passenger service, Plaintiff paying all the expenses of the service. The Company having defaulted in paying the said instalment of 4th September, the Defendant, purporting to act under powers contained in his mortgage, seized the ship and paid off the master and crew their wages, on their threatening to arrest the ship for wages due to them. In Plaintiff's action for damages the learned President had held that Defendant was not entitled to seize the vessel because his security was not impaired by the Company's charter to Plaintiff. On this counter-claim by Defendant for the amount he had paid as wages, the learned President decided in favour of the counter-claim being of opinion that the decision in *Johnson v. The Royal Mail Steam Packet Company* (L. R. 3 C. P. 38) was equally applicable where the mortgagee had been wrong in seizing the ship as when he was right.

Mr. Pollock supported the counter-claim.

Mr. Carver, K. C., for the Plaintiff.

Counter-claim allowed with such costs as were properly attributable to same.

COURT OF APPEAL (THE LORD CHIEF JUSTICE, THE MASTER OF THE RULLS and LORD JUSTICE ROMER), 23rd May 1901.—The Defendants appealed from the above decision of the President and there

was also a cross-appeal by Plaintiff. The Court of Appeal as regards the cross-appeal held that without deciding whether under the circumstances the Defendant as mortgagee could recover the amount of the wages paid to the crew, the correspondence proved that there was an implied request on the part of Defendant to Plaintiff to pay the wages to the crew, therefore the cross-appeal failed. The appeal also failed, because on the whole evidence it could not be said that in the circumstances an agreement to run the vessel on half profits impaired the security. In the course of his judgment the Lord Chief Justice referred to *Collins v. Lamport* (34 L. J. Ch. 196) and *Keith v. Burrows* (2 App. Cas. 636).

*Appeal and cross-appeal dismissed.*

C. W. A.

PROBATE AND DIVORCE COURT.—IN THE MATTER OF CHARLES J. PANTON, a law stationer. Before the PRESIDENT. 20th May 1901.

*Privileges of a solicitor—Law stationer acting as a solicitor—Mistake, writ of attachment.*

THE LAW SOCIETY v. WATERLOO BROTHERS (8 App. Cas. 407) followed.

The Incorporated Law Society in this matter asked for a writ of attachment against Mr. Panton for contempt under 23 and 24 Vict., Cap. 127, sec. 26. The offence stated was that he did acting for a firm of country solicitors call at Somerset House and there not only lodged a form of caveat in a certain pending action, but on the requisition of an official at that office, desiring a London address to be left, he there and then wrote his own name and address. Mr. Panton having done so, informed the country solicitors of what he had done, and next at their suggestion withdrew the caveat. The defence was that Mr. Panton had made a mistake and had acted in ignorance, that upon discovering it, he had expressed deep regret, and stated that nothing was farther from his thoughts than to commit any act the least disrespectful to the Court or to encroach in any way on the privileges of a solicitor, and he complained that before these proceedings were taken he had been given no opportunity of explaining matters. On this hearing it was said that the Law Society did not now press for attachment, but wanted an order for costs.

The learned President was satisfied that a mistake had been made. Mr. Panton was quite within his rights in lodging the caveat, and the error he had fallen into of giving his own name and address, was owing to an error on the part of the Somerset House official asking for a London address, because the name of the country solicitor was quite sufficient. The question had been discussed by Lord Selborne in the above case and there was no ground for the present motion having regard to the observations

in that case. It would be dismissed and there would be no order for costs.

*Mr. Hollans* for the Society.

*Mr. Poulles* represented Mr. Panton.

C. W. A.

*Motion refused.*

CHANCERY DIVISION.—*BEVAN v. WEBB*. Before Mr. JUSTICE JOYCE: 9th March 1901.

*Inspection of partnership books.*

The Defendant was the managing partner of a brewery business in Monmouthshire. The Plaintiff was his partner. Art. 16 of the partnership, dated 4th July 1893, provided that partnership books of account, etc., shall be kept by the managing partner in which all transactions relating to the partnership shall be duly entered, and those books and all letters and other writings shall be kept at the counting house, to which each of the partners should have free access with liberty to examine and make extracts.

The Plaintiff having entertained proposals for the disposal of his interest in the concern, desired to have a report on the value thereof made by a professional valuer, by an examination of the said books and writings. Defendants objected to this, conceding the right of the partners only or of the partnership auditors acting for that purpose.

The learned Judge held that no such right as was contended for by the Plaintiff existed under the general law and by the articles the right of inspection was limited to free access and examination by the partners. No doubt where litigation was pending a greater right of inspection existed, and *Brown v. Perkins* (2 Hare 540) referred to inspection under that circumstance. If he were to accede to Plaintiff's request, where was the limitation that should be placed to such a right, why should not a solicitor or other delegate be sent to inspect partnership books. Plaintiff's motion therefore asking that by injunction Defendant be restrained from interfering with the inspection by Plaintiff's accountant was refused with costs.

*Mr. Younger, K. C.*, and *Mr. Chubb* for the Plaintiff.

*Mr. Hughes, K. C.*, and *Mr. Cave* opposing.

*Decision in favour of Defendant.*

COURT OF APPEAL (LORDS JUSTICES COLLINS and STERLING) 26th April 1901.—In the above case reversed the decision of Mr. Justice Joyce. The Court said that cl. 16 of the articles of partnership was in substance equivalent to sec. 24, subsec. 9 of the Partnership Act of 1890. What was the object with which the right of inspection was given to a partner? It was to enable a partner to ascertain the condition of the business. The general rule was whatever a person *sui juris* could do personally he could do by an agent. There was nothing in the nature of this case to narrow

down that right. Suppose a partner to have become quite infirm or become otherwise incapacitated from availing himself of his right to examine the books of the partnership (which were as much his own as that of the other partners) he would not be on equal terms with his co-partners if he could not avail himself of the help of an agent to examine the books for him. No objection was taken to the particular individual nominated to make the examination. Nothing was shown to denote that the examination was desired for what was not a proper purpose or otherwise shown that the examination by the individual named would be to the detriment of the other partners.

Mr. Justice Joyce's decision was erroneous. The case of *Dadswell v. Jacobs* (34 Ch. D. 278) favoured the contention of the Plaintiff-Appellant. See also *Brown v. Perkins* (2 Hare 541).

C. W. A.

*Appeal allowed.*

CHANCERY DIVISION.—*HERDMAN v. FEWSTER*. Before Mr. JUSTICE JOYCE. 19th January 1901.

*Debtors Act, 1869, sec. 4, third exception—Writ of attachment against person of Defendants for contempt—Trustees ordered to pay money into Court—Non-compliance—Constructive receipt of money.*

The Defendants in this case were two brothers in humble circumstances in life, they were executors and trustees under their father's Will, and the Plaintiff Herdman was their sister. Plaintiff had complained that her portion under the father's Will had not been paid by Defendants. The Master's certificate on such claim had found £479 due from Defendants to Plaintiff, and he had directed by order of 26th October 1900 that Defendants should pay that sum into Court. Such order was not complied with, hence this application for leave to issue writs of attachment against Defendants.

The learned Judge refused to grant the permission; in committing people to prison the Court should very carefully consider its discretionary power. If this was a proper case for attachment, it must be brought within the third exception of the 4th section of the Debtors Act, 1869. The learned Judge was not satisfied that it fell within that section because "possession" in it meant "actual possession;" constructive possession of the funds or money will not do, such as the receipt of the money for the trustee by an agent or a solicitor; such evidence as had been produced did not satisfy the learned Judge that either of the Defendants actually received the money. Even if the Court had been satisfied of the actual receipt, it would still have to consider whether this was a fit and proper case for the exercise of the discretion vested in the Court under the Debtors Act, 1869.

*Mr. Chubb* for the Plaintiff.

*Mr. Dare* for one of the two brother Defendants.

C. W. A.

*Order refused.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

## CALCUTTA HIGH COURT.

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 4 OF 1901.

STANLEY, J.  
1901.

J. BOISAGOMOFF

v.

14, June.

THE NAHAPIET JUTE COMPANY, LIMITED.

*Evidence Act, sec. 33—Civil Procedure Code, sec. 389—Evidence taken on commission without full opportunity for effectual cross-examination, if admissible—Evidence taken on commission though not read over and signed by witness, if admissible.*

In this case *Mr. Knight* (with him *Mr. Sinha*) for the Plaintiff tendered the evidence taken on commission of *Mr. Batchelor*, a witness for 'the Plaintiff, who had left for England before trial.

*Mr. Garth* (with him *Mr. J. G. Woodroffe*) for the Defendant Company objected to the admission of the commission on the ground that he as the Defendants' counsel had not had an opportunity of cross-examination. The Defendants were willing to have attended on the Saturday preceding the Monday on which the witness was examined but the witness would or could not attend. On Monday the commission was held from 5 to 7 o'clock at which time the cross-examination was not concluded. The witness said he could give half-an-hour more, but could not attend on the following day Tuesday, nor on Wednesday on which day he was going to England, but he (*Mr. Garth*) had stated that he could not finish in half-an-hour. The meeting then broke up, and the commission was returned without the witness having been fully cross-examined.—*Evidence Act, sec. 33; Civil Procedure Code, sec. 389.*

*Mr. Knight* in reply.—"Duly executed" in sec. 389 of the Code refers to the duties of the commissioner. There is no difficulty so far as the Code is concerned. Though the evidence was not read over and signed, that is not necessary. *Barker v. Chapman* cited in *Hume Williams on Evidence* by Commission 129. It was the duty of the Defendants to have sat on. The proper length of time for a commission is four hours though by custom two hours is considered as sufficient. In a case of this kind full time should have been given.

*Mr. Garth*.—The witness himself said that he could not sit for more than half-an-hour.

*Mr. Knight*.—It is not sufficient that counsel says he cannot finish cross-examination within a particular time.

THE COURT.—As to this such case must depend on its own circumstances. Do you suggest that counsel was merely obstructive?

*Mr. Knight*.—No.

THE COURT.—Then I must accept counsel's statement that he could not finish within half-an-hour.

*Mr. Knight*.—He should have gone on and the commissioner should have compelled the witness to sit out the full time of the commission.

THE COURT.—I have heard counsel at considerable length upon the question whether the evidence taken upon commission of a witness for the Plaintiff, *Mr. Batchelor*, is admissible or not. *Mr. Batchelor* appeared before the commissioner for examination at 5 o'clock on Monday, 15th April. He was examined-in-chief, and cross-examination commenced and was proceeding at 7 o'clock which appears to be the usual time for a commission to rise. Witness said that he could not attend on next day and was going abroad the day following. He said he was willing to remain half-an-hour. *Mr. Garth* said he could not finish in half-an-hour thereupon the commissioner rose. There is no allegation that cross-examination could have been finished in half-an-hour or any want of reason or *bona fides* in statement of counsel. The deposition was not read and signed in the usual course but I am not disposed to think that this alone would prevent the reception of the evidence. There is nothing in the Code requiring this, and in England where there is such requirement it has been held to be directory only and failure to give effect to it does not invalidate the commission. The other objection is one of substance. Sec. 33 of the Evidence Act which empowers the Court to read evidence taken on commission provides that the adverse party in the first proceeding must have had the right and opportunity to cross-examine. It appears to me that this provision means an effectual cross-examination complete and not partial. If that was not so, witness might, after a few preliminary questions, decline to appear upon a subsequent date. There is no suggestion but that the desire of counsel to cross examine was *bona fide*, and under these circumstances I am satisfied that the evidence tendered should not be admitted. I am bound to add that the question raised is one of some difficulty, and so far as counsel can discover there is no case dealing with the exact question which is before me.

*Messrs. Leslie and Hinds*, Attorneys for the Plaintiff.

*Messrs. Morgan & Co.*, Attorneys for the Defendant Company.

## [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SALE, J. 1901. 17, June.	}	In the matter of the GUARDIANS AND
		WARDS ACT
		and
		In the matter of PRAKASH CHUNDEB
		MITTER, an infant.

*Guardians and Wards Act (VIII of 1890), secs. 7 and 17—Appointment of guardian of a minor as adopted son of another—Adoption challenged—Title to property claimed on behalf of infant, suit pending as to.*



This was an application under the Guardians and Wards Act for the appointment of a guardian of the property and person of the abovenamed infant under the following circumstances:—It was alleged that on the 17th February 1901 the infant was duly adopted by one Sreemutty Kherode Mohiney Dassee, widow of Suresh Chunder Mitter, as the adopted son of her deceased husband. Kherode Mohiney died on the day following the adoption. Suresh Chunder Mitter left considerable property in Calcutta and elsewhere, and a suit had been instituted by Kherode Mohiney against her husband's mother, Prosonnomoye, to have it declared that two of the properties alleged to have been left by her husband belonged to his estate, the defence in that suit being that the properties did not belong to the estate of Suresh Chunder, but formed the *stridhan* of the Defendant. That suit was pending at the time of this application. Notice of this application was given to Prosonnomoye as one of the near relatives of the infant. She appeared and objected to the appointment of a guardian on the ground that the adoption was not valid in law, and that there was no adoption in fact.

*Mr. Sinha* and *Mr. B. C. Mitter* for the Applicant.

*Mr. Garth* and *Mr. Chakravarti* for Prosonnomoye.

*Mr. B. C. Mitter* in opening the case submitted that Prosonnomoye cannot have any *locus standi*, if she does not admit Prokash Chunder Mitter to be an adopted son and that the question of validity of the adoption cannot be discussed in this application. He cited *Nankar Singh v Prandhone Singh* (12 W. R. 356).

*Mr. Chakravarti* submitted that the proper course for the infant was to institute a suit for the declaration of the validity of the adoption. Instead of that the parties have chosen this by-way to gain their object. He submitted that when the question of right to some properties belonging to late Suresh Chunder is in dispute the proper thing that the Court ought to do is to appoint a Receiver to the properties and appoint a guardian of the person of the infant. He cited *Sham Kuar v. Mohanundo Sahoy* (I. L. R. 19 Cal. 301) and *In the matter of Bittan*, an infant (I. L. R. 2 Cal. 357).

*Mr. Sinha* in reply said that Prosonnomoye received notice simply because of her relationship to me on the ground of adoption and if she denies the validity or the fact of adoption, out must she go of this application. Besides there are other properties than the property in dispute and that if the adoption is to be questioned it must be done in a separate suit. Further there is a suit pending between Prosonnomoye and the representative of Suresh's estate which suit requires looking after and submitted that guardian should be appointed as prayed for.

*Held*—That under secs. 7 and 17 of the Guardians and Wards Act the only matter to be considered by the Court in appointing a guardian is the welfare of the infant.

That an application for the appointment of a guardian is analogous to an application for letters of administration, and the question of title to the property claimed by the infant and the question of adoption cannot be gone into in such an application.

That the circumstances that the adoption is challenged and that a suit at present exists in which the title to certain properties claimed on behalf of the infant is raised, are such as would *prima facie* suggest that the interests of the infant require protection and a guardian should be appointed, taking care at the same time not to prejudice any question of title which may have been or may hereafter be raised as to the status of the infant.

That it having been brought to the Court's notice that the validity of the adoption is questioned, precaution should be taken to safeguard any property the guardian may get possession of.

*Ordered*—That the applicant be appointed guardian, and that he do give a bond with two sureties to the satisfaction of the Registrar for the proper management of any estate that may come into his hands as such guardian limited to the moveable properties and the rents and issues of the immoveable properties of such estate and that he do render accounts every six months to this Court.

*Mr. N. C. Bose*, Attorney for the Applicant.

*Messrs. Kallynath Mitter* and *Sarbadhicary*, Attorneys for the Objector.

*Application granted.*

S. R. D.

#### [CIVIL REVISIONAL JURISDICTION.]

RULE No. 679 OF 1901.

AMBER ALI, J.	{	SARUP GANJAN SINGH BHUYAN,
PRATT, J.		Judgment-debtor, Petitioner,
1901.		v.
18, June.	{	ROBERT WATSON & Co., LD., Decree-holders, Opposite Party.

*Limitation*—Continuation of previous application—*Fresh start*—Landlord and Tenant Procedure Act (X of 1859), sec. 92—Decree for rent—Suit, whether interrupts or keeps execution in abeyance—*Limitation*—Execution of rent decree below Rs. 500.

This was a rule issued on the 11th of March 1901 by Ghose and Stevens, JJ., against the order of Babu Ram Nirranjan Pershad, Deputy Collector of Bara Bazar, in the District of Manbhum, dated the 29th of December 1900, and the execution proceedings in miscellaneous case No. 148 of 1900-1901.

The facts of the case material to this report were as follows:—

Messrs. Robert Watson & Co. obtained, on the 12th January 1892, a decree for arrears of rent against the Petitioner, Sarup Ganjan Singh Bhuyan, under Act X of 1859, for 14½ annas and costs and applied for execution on the 10th March 1892. That application was dismissed on the ground of informality on the 30th June 1892, and no further

application for execution was made until the 18th May 1900. Meantime on the 19th April 1892 the judgment-debtor had instituted a suit to set aside a certain document on which the aforesaid rent-decree was based, and on the 9th August 1892 the plaint was amended so as to include a prayer to set aside the rent-decree itself. On the 1st July 1893 a temporary injunction was issued restraining the decree-holders from executing their decree pending the decision of the said suit.

On the 28th February 1894 that suit was decreed in the Plaintiff's favour, and the temporary injunction was converted into a permanent one. On appeal that decree was set aside, and the injunction was discharged on the 20th May 1897. The decree-holder thereupon on the 18th May 1900 applied for execution of the decree. Objection was taken by the judgment-debtor that the application was barred and could not issue under the provisions of sec. 92 of Act X of 1859.

The Deputy Collector held that the execution proceedings were not barred by limitation and observed as follows:—

"It appears from copies of papers filed on behalf of the judgment-creditor that an injunction as stated was issued, while from the judgment of the Sub-Judge referred to above it is clear that the judgment-creditor was prevented from executing the decree. As mentioned above this decree was set aside by the Judicial Commissioner on the 20th May 1897, and so it was on this date that the judgment-creditor's rights and title to the execution of the decree were revived. Various rulings have been cited on both sides, but considering all of them and the facts of the case I think the period of three years' limitation should run from the 20th May 1897; and as the present execution proceedings were instituted on the 18th of May 1900, the decree is not barred by limitation, and I accordingly direct the execution proceedings to be proceeded with."

Against this order the Petitioner moved the High Court and obtained the present rule to shew cause why that order and the execution proceedings should not be set aside.

*Held*—That the application of the 18th May 1900 could not be regarded as a continuation of the proceedings initiated by the decree-holders on the 10th March, or as merely a step taken in furtherance of the execution for which they had formerly applied.

That the suit brought by the judgment-debtor did not interrupt and keep in abeyance any pending execution proceedings.

That there is no authority for the proposition that the decree-holders are entitled to a fresh starting point from the 20th May 1897, and may execute their decree at any time within three years of that date.

(*L. L. R.* 5 Cal. 547 and *Rhejoy Krishna Ghose v. Koylash Chunder Bose*, 13 W. R. (F. B.) 3, referred to).

*Balm Nalini Ranjan Chatterjee* for the Petitioner.  
*Babu Jogesh Chandra Roy* for the Opposite Party.

*Rule made absolute :*

*Order and proceedings set aside.*

H. P. C.

# [CIVIL REVISIONAL JURISDICTION.]

RULE No. 1035 of 1901.

MACLEAN, C. J.	}	BINODINI DEVI, Plaintiff,
BANERJEE, J.		Petitioner,
1901.		"
17, June.		KALA CHAND CHACRAYARTI, Defendant, Opposite Party.

• *Examination by commission*—*Purdanashin lady*—*Allegation of immorality*—*Order rejecting application for examination by commission*—*Interlocutory order*—*Civil Procedure Code (Act XIV of 1882), sec. 383, 640*—*Charter Act (24 and 25 Vict., C. 104), sec. 15*—*Jurisdiction, power of superintendence of High Courts.*

• This was a Rule issued on the opposite party, to show cause why the order of Babu Bidhu Bhusan Banerjee, 3rd Munsif of Howrah, dated the 12th March 1901, rejecting the Petitioner's application for her examination should not be set aside.

The Petitioner had applied for her own examination on commission. The application was supported by an affidavit to the effect that the Petitioner was a *purdanashin* Brahmin lady. The application was made in the course of the hearing of a money suit which was brought by the Petitioner against her father, the opposite party, and was opposed by the latter, who filed a counter-affidavit alleging that his daughter, the Petitioner, was a woman of immoral character, carrying on prostitution in his own house with the help of her sister. The Munsif made the following order rejecting the application: "Plaintiff's application this day for her own examination on commission is rejected on the ground stated in the counter-affidavit filed by the Defendant, her father."

The Petitioner then moved the High Court and obtained the present Rule.

In support of the Rule, it was contended that as it was not alleged in the counter-affidavit that the Petitioner was not a *purdanashin* lady, the mere allegation of immorality against her did not justify the Munsif's order and that the High Court could interfere with the order of the Munsif under sec. 15 of 24 and 25 Vict., C. 104.

THE COURT:—The Rule is made absolute, and the Munsif is directed to constitute himself commissioner for the examination of the Petitioner. Costs to abide the result of the suit.

*Babu Mahendra Nath Roy* for the Petitioner.  
*Babu Poorna Chandra Shome* for the Opposite Party.

*Rule made absolute.*

S. C. S.

# THE Calcutta Weekly Notes.

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## High Court Notice.

Notice is hereby given that the next examination of candidates for admission as Attorneys will commence on Monday, the 5th of August 1901.

HIGH COURT, ORIGINAL SIDE: } W. R. FINK,  
The 28th June, 1901. } Registrar.

IT IS MR. JUSTICE BRETT AND NOT MR. JUSTICE Pratt, as stated in our last issue, who presides at the present Calcutta Criminal Sessions. There are only six cases in the list. Four of these are petty ones in which the accused have been committed because they are old offenders. Of the remaining two one is a case of fraud on a bank and the other an attempt at murder. The low record of crime reflects credit on the capital of the Empire.

IN VIEW OF THE RECENT RUN ON THE LIST ON THE Original Side, and the number of cases struck off in consequence, we have been asked to suggest whether it would not be practicable in future to appoint some Saturday for the revision of the Romanet cause list in Chambers. On such days, attorneys who may not be ready with their cases for any sufficient

reason, may apply for postponement or for the placing of cases not yet ripe for hearing lower down in the list. This, it is said, will cause less interruption in the regular business of the Court, and will also save parties costs resulting from cases being struck off and then getting them restored. It is also expected that this will offer greater opportunities to the attorneys to be ready with their cases and do away with the usual excuses for not being prepared to go on.

MONSIEUR LABORI, THE DISTINGUISHED FRENCH advocate, who has won the admiration of the world by his fearless advocacy on behalf of the defence in the State trials of Zola and Dreyfus, was the honoured guest of the Hardwicke Society at its last annual dinner. The flower of the English Bench and the Bar attended to honour him, as by honouring him, they deemed, they were only honouring the noble traditions of a profession whose high privilege it has always been to defend an accused however humble, no matter how grave may be the charge and how mighty the accuser. The homage done to the guest was not so much for the causes he so ably pleaded as it was for his fearless vindication of the right of defence against a powerful executive, quite regardless of the prevalent public feeling and undaunted even by the hands of an assassin. M. Labori, addressing his hosts, spoke of this right of defence and of the Bar, who are the custodians of it, in the following terms:—

The right of defence was a natural right; they showed at the same time that it was the common aim of all barristers to protect this right, which from the most ancient times had been committed as a sacred deposit to the Bars of all civilised nations. The Bar, in fact, was indispensable to secure to the advocate the liberty and the power to accomplish his professional duties. There were circumstances, he knew, where nothing else was required to assist a barrister in his sometimes arduous task than a mighty institution, a strong association of men who respected and feared for their knowledge, honour, and influence, were at the same time so thoroughly united by their professional ideal that they were in some way compelled to bring their fellow-members, in spite of their own counsel, opinions, or passions, to the support of their common authority. It had been rightly said that without independence there was no Bar. It was no less true to add that without a Bar there was no independence for the nation, and where would this be better understood or more highly proclaimed than in such an assembly of men as were there that evening, many of whom had conferred or would confer lustre upon Parliament, the Bench, and the Bar, in a country where liberty from olden times had been at the base of every political institution

where judicial power stood so high that in all parts of the world it was looked up to as a model of authority, independence, and justice, where the Bar enjoyed so much credit and consideration that it was deemed worthy of producing the most eminent members of the Bench.

THE BAR IN ENGLAND BEING ALWAYS THE STEPPING stone to the Bench, the judges have great regard and respect for the profession to which they once belonged. It is no wonder therefore that the independence of the Bar is to them a matter of no less concern than is the independence of the Bench. The Lord Chancellor, in replying to the toast to the Bench, rightly said, that without the independence of the Bar and the independence of the Bench the cause of justice was never secure. We commend his words to the profession and urge on those who have the privilege to belong to it, to make "courage, learning, independence and honour" their watch-words in life.

It might be that each nation had its own processes and forms of the administration of justice. We were not their judges. We had nothing to do with their modes of administering justice. But we did recognise this, that the same qualities in all countries and in all times, courage, independence, and honor, were to be always held in esteem by mankind. Speaking as a judge and returning thanks for the Bench, he might say that the function of a judge was not to speak but to listen. Whether that function was universally observed was one of those questions which he declined to discuss. All he could say was that it would be well if the judge would appreciate what an invaluable assistance it was to his own mind to listen to those who had prepared their arguments and were perfectly familiar with the facts. He had been reminded by the proposer of the toast that the independence of the judges was one of those things which was not of yesterday. If his historical memory was right, the independence of the judges dated from the time of William III., but undoubtedly the independence of the judges and the independence of the Bar was the great security for the administration of justice. It was idle to expect that, whether it were in respect of a popular or of an unpopular cause, you should restrict an advocate from doing what is unpopular, and only allow him to say that which is pleasing to the multitude. If such a system were to prevail among mankind the administration of justice would be in grave peril. It was one of the glories of the English Bench, one of the glories of any Bench that had respect for itself, that, however unpopular and whatever might be the circumstances which surrounded a particular case, the man who was intrusted with the interests of another should forget all that referred to himself, and only remember that he represented another. He could not forbear to say that these were topics which tempted even a judge, who was bound to listen, to go further than he would, and he would say no more than this, that he thanked them on behalf of his brother judges, and he was quite sure that they, with him, would only too gladly recognise the fact that what they owed to an independent and learned and honorable Bar was incapable of adequate expression.

## Review.

THE LAW OF LEGAL PRACTITIONERS, including the *Legal Practitioners Act (XVIII of 1879, as amended by IX of 1884 and XI of 1896), with Notes of Rulings and Rules of the several High Courts.* By Siva Prasad (B. A., B. L.), Pleader, Judge's Court, Bankipore, 1901. Price Rs. 3.

The work before us does not aspire to be an exhaustive treatise on the subject yet it gives us much useful information as to the functions, powers, and duties of the Legal Practitioners in Courts and in relation to their clients and agents. It also contains some informations of a practical nature such as rules for examination, qualifications and certificates of Vakils, Pleaders, Attorneys and Mukhtears. The book is divided into two parts, the first embracing the case law on the subject of Legal Practitioners generally, including Advocates, Vakils, Attorneys, Pleaders and Mukhtears, Revenue Agents, etc., and the second dealing with the Legal Practitioners Act and the reported decisions of our Courts thereon. Each of these parts contain considerable information which should prove useful to legal practitioners. The author's attempt to furnish members of the profession with useful hints and suggestions on matters of practical utility is also very laudable. The paper, printing and the general get up of the book are, however, far from prepossessing.

## English Notes.

COURT OF APPEAL.—*In re J. TOMKINS AND SONS.* Before LORD JUSTICE RIGBY, LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE STIRLING. 18th January 1901.

*Bankruptcy Act, 1883, sec. 148—"An officer of the company, interpretation of."*

In September 1900 a firm, called Eastwood, Limited, presented a bankruptcy petition against the above-named J. Tomkins and Sons in respect of a judgment debt of £76. The applicants had alleged that executions had been levied and thereunder the debtor's goods had been sold by the sheriff in July previously. That application was signed for the applicant company by "H. J. Byrne duly authorized under the seal of the company." The said Byrne was a clerk engaged in the company's secretariat work. By a resolution of the Board of the company some years previously Byrne was authorized to take all necessary steps in bankruptcy against debtors of the company. This authority was given under the seal of the company. The debtors raised the question that Byrne was not an officer of the company within the meaning of the above section, and urged that the bankruptcy petition was bad in consequence. Mr. Registrar, Linklater, agreed with the debtor's view that Byrne was not such an officer, but he ordered that the petition should be amended by the creditors authorizing a proper officer to act on their behalf.

The debtors appealed objecting to the amendment. The Court of Appeal held that any person *bona fide* chosen by the company to be their agent for the presentation of a bankruptcy petition became thereby an officer of the company for that purpose within the meaning of the Act. The appointment

of Byrne was consequently good and the petition good. The creditors were wrong in insisting on the amendment, therefore the appeal would be allowed but without costs. The matter would come before the Registrar on the original petition in the ordinary course and proceeded with as on a good petition.

*Mr. J. H. Kemp* for the Debtors.

*Mr. Francke* for the petitioning Creditors.

C. W. A.

**COURT OF APPEAL.**—*In re LAKE, A SOLICITOR, DYER TRUSTS.* Before LORD JUSTICES RIGBY, VAUGHAN WILLIAMS and STIRLING. 22nd February 1901.

*Bankruptcy Act, 1883, sec. 48—Preference by bankrupt—Dominant motive.*

This matter came up on appeal in the bankruptcy of Benjamin G. Lake of the firm of Lake and Lake, solicitors. The appeal was from a decision of Mr. Justice Wright. In January of last year a sum of £1,250 was received by the said bankrupt or his firm and had been misappropriated. Benjamin G. Lake was a trustee of a marriage settlement and his firm acted as solicitors thereto. Three months later the bankrupt deposited, with the trust securities with his firm for safe custody, £2,000 Didcot Newbury Railway Debenture stock accompanied by a memorandum. The question arose principally on the terms of this memorandum whether the bankrupt acted with a view to prefer the *cestui que trust* from a motive of gratitude; Mr. Justice Wright had held that that was the reason, and not mainly from a sense of the obligation to repair the breach of trust.

The COURT OF APPEAL allowed the appeal of the trustees of the settlement, on the ground that the trustee in bankruptcy should affirmatively make out that the dominant motive of the bankrupt was the desire to prefer the favoured creditor over those less favoured by him. It was admitted here that he was moved by mixed motives.

*Mr. V. Smith, K. C., and Mr. Colt* for the Appellants.

*Mr. Rawlinson, K. C., and Mr. Northcote* for the Respondents.

C. W. A.

*Appeal allowed with costs.*

**COURT OF APPEAL.**—*INMAN v. ACKROYD AND BEST, LIMITED.*—Before the MASTER OF THE ROLLS, LORD JUSTICES COLLINS and ROMER. 23rd February 1901.

*Company—Director's remuneration—Apportionment.*

The facts are stated in C. W. N., Vol. IV, p. xcii.

The claim which was resisted by the company was one by the Plaintiff, a late director of the Defendant company, for remuneration at £125 a year from 1st November 1898 to 30th May 1899 amounting to £72-1-4. The question was whether the director under the 81st article of Association was entitled to remuneration for a period less than a year.

The COURT OF APPEAL upheld Mr. Justice Bruce's decision that he was not entitled to it and referred to the two decisions: *Salton v. New Beeston Cycle Co.* (1899, 1 Ch. 775) and *In re Central De Kaap Mines* (W. N. 1899, p. 216) as supporting that view. The case of *Sydney v. Port Darwin Gold Mine* (1 Megonke 385) was based on a different state of facts.

*Mr. Edward Bray* for the Plaintiff.

*Mr. Llewelyn Davis* for the Defendants.

C. W. A.

*Appeal dismissed with costs.*

**CHANCERY DIVISION.**—*FLADGATE v. THE VINTNERS COMPANY.* Before MR. JUSTICE COZENS HARDY. 26th January 1901.

*Construction of a Will—Gift—Conditions imposed.*

The Will which was to be construed and its effect declared was that of a Mr. Cassiot. By it he bequeathed to the above company the portrait of his late friend and partner one Martiney "to be hung up by them in a conspicuous part of their Common Hall and always so to remain," and on the understanding that that condition was accepted; there was this further bequest, "the sum of £4,000 to be paid from such part of my personal estate as may by law be bequeathed for charitable purposes, enjoining the said company out of the income of the said £4,000 to keep in due and proper repair the said portrait, the surplus to be applied by the master and wardens of the said company for the benefit of individuals who have been engaged in the wine trade; and if applied by way of annuity, no single annuity to exceed £50 per annum to be held only during the pleasure of the master and wardens for the time being of the Vintners Company."

The learned Judge held that the bequest of the picture was a good bequest, the condition being not a precedent but a subsequent condition. The other gift was not valid, there was no reference to age in the description of the recipients of the bounty, nor to their poverty. The wording did not disclose any indication of a charitable gift, the intention did not appear sufficiently so as to support the gift as a charitable one. This gift therefore failed. The cost of this matter which was heard on an originating summons was to come out of the estate.

*Mr. Eve, K. C., and Mr. Cartnell* for the Plaintiff.

*Mr. A. James* for the residuary legatees.

*Mr. V. Smith, K. C., and Mr. Romer* for the Company.

C. W. A.

**KING'S BENCH DIVISION.**—*LEVY v. SCOTTISH EMPLOYERS INSURANCE, LIMITED.* Before MR. JUSTICE WILLS and MR. JUSTICE KENNEDY. 30th January 1901.

*Insurance—Contract—Authority of agent—Misstatements in application form.*

In the proposal form the Plaintiff, Levy, had stated his height to be 5ft. 8in. and weight 14st. 7lb. Both those were incorrect, the Plaintiff being a shorter and a much heavier man. In the form filled up by Plaintiff there was a printed notice that the company would not hold to be binding on them, verbal statements made to the agent and until a policy was made out, the Insurance was not complete. The Plaintiff's case rested on what one Hast, Defendant's agent, said at the time he gave to Plaintiff receipt for the £5 paid as premium "you will be insured right away if you do not hear within 14 days' trial the matter as completed." The allusion to the 14 days was made owing to the premium receipt stating that it covered that time, but it was stated thereon to be given, "subject to the conditions of the policy." The Plaintiff was totally disabled by a railway accident which was covered by the policy, but the Defendant company had immediately on receipt of Plaintiff's application declined it, before the accident happened, though Plaintiff had not heard of the refusal of his proposal before the accident. The Recorder on the findings of the jury that Plaintiff was not aware that his height and weight were not correctly stated in his application form, and that Hast did say to him as above set out, found for Plaintiff.

The Divisional Court, as above constituted on the company's appeal, set aside that finding being of opinion that at the date of the claim there was no contract of insurance. Hast had no authority from the company to insure the Plaintiff, nor did that agent contract to insure the Plaintiff; moreover if there was evidence of a contract by the agent, it was of no effect because it contradicted the terms of a written document. The agent was treated by the Plaintiff as having authority to make an entirely different contract to that contained in the proposal. The agent had no such authority. The misstatements in the proposal were material and fatal. The finding of the jury that Plaintiff did not know that his height and weight were incorrectly stated was preposterous, and could only be attributed to the Plaintiff being a poor man and the company a wealthy concern. The case of *Bawden v. London and Edinburgh Insurance Corporation* (1892, 2 Q. B. 531) was distinguished. The appeal was allowed.

Mr. Glynn for the Plaintiffs.

Mr. Dalby for the company appealing.

C. W. A.

*Judgment for Appellant.*

**BANKRUPTCY COURT.**—*In re AHMED ex parte THE OFFICIAL RECEIVER.* Before Mr. JUSTICE WRIGHT. 7th May 1901.

*Gray's Inn—Deposit by student—Right of trustee in bankruptcy.*

A concise statement of proceedings taken in the bankruptcy of Mr. Sirajuddin Ahmed, a law student

at Gray's Inn, will be found at p. cxv, Vol. V, of the C. W. N. Mr. Ahmed in January 1899 when he joined that Inn of Court had, as is usual, deposited £50. The Official Receiver as the trustee in bankruptcy now claimed to be entitled to that sum and sought an order directing the Society of Gray's Inn to make it over to him less any fees or sums then actually due and payable to the society by the bankrupt.

The claim was resisted on behalf of the society under their rules which regulates the admission of students for call to the Bar. It was urged that the society had a right to retain that deposit against all sums which may fall due from Mr. Ahmed. The learned Judge was clearly of opinion that the society was entitled to retain the £50, which was a cautionary fund, so long as there was any possibility of Mr. Ahmed's liability to them having regard to the rules of the society. The claim of the Official Receiver was therefore rejected.

Mr. Macpherson for the Official Receiver.

Mr. Clayton for the Society.

*Decision in favour of Gray's Inn.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[ON APPEAL FROM THE BOMBAY HIGH COURT.]

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR R. COUCH.

SIR FORD NORTH.

1901.

30, April.

KARIM NENSEY, Plaintiff,  
Appellant,

v.  
GEORGE K. HEINRICKS and  
D. H. GLADE, Defendants,  
Respondents.

*Construction of document—Agreement to pay on behalf of father—Death of father.*

The Respondents are merchants carrying on business at Bombay as "Glade & Co." The Appellant in the year 1894 was carrying on business in partnership with his father Nensey Peroo, his grandfather Peroo Mahomed, and his uncle Fazal Peroo and Kassam Peroo under the name and style of "Peroo Mahomed" and "Nensey Peroo" under the terms of an indenture dated 21st December, 1885.

The Appellant had an 1/4th share in the business and under the terms of that indenture the partnership was to continue during the time of the grandfather.

In the year 1891 owing to disputes between the partners it was proposed that the partnership should be dissolved. The said firm owing to its business transactions with Glade & Co., the Respondents, George K. Heinrichs of that firm was asked to act as peace-maker, with the result that the Respondents

terminated in an agreement for dissolution, this was drawn up dated 30th July 1894 and executed by all the partners excepting the Appellant. In consequence of such refusal, several conversations took place between the said Heinrichs and the Appellant and it was only upon receipt of the following letter that the Appellant signed the said dissolution agreement.

The letter was drawn up by Appellant's attorneys Messrs. Gilbert Payne and Sayani and was signed Glade & Co. The letter was addressed to Appellant.

"In consideration of your having at our request signed the agreement of dissolution of partnership made between Mr. Peroo Mahomed and Messrs. Nenssey Peroo, Cassam Peroo, Fazal Peroo and yourself, we hereby agree to pay you on behalf of Nenssey Peroo a sum of Rs. 500 per month payable on the first of each month until such time as your father Mr. Nenssey Peroo makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance."

The Respondents duly paid the said sum of Rs. 500 until the death of Nenssey Peroo which took place on 29th March 1898. The Respondent Heinrichs failed to persuade the father Nenssey Peroo to provide for Appellant on the Respondents refusing to pay any sum accrued since the said father's death. The Appellant commenced the present suit in the Bombay High Court in its original jurisdiction to recover the arrears with interest over Rs. 4,000. Mr. Justice Tyabji allowed the claim but on the Defendant's appeal that decision was reversed by the Chief Justice Jenkins and Mr. Justice Candy.

The Plaintiff then brought this appeal to His Majesty in Council. The sole question was the right construction to be placed on above set out letter which constituted the agreement.

*Mr. Lawson Walton, K. C., and Mr. Mayne* for the Appellant contended that the High Court should have decided that by the said agreement, the Defendants bound themselves to pay the said sum until the father made a provision for the Appellant's maintenance. The father's death without making such provision did not put an end to that agreement. Plaintiff was entitled to the equivalent for an asset which was of a permanent kind. He was relinquishing a right in a partnership business.

**LORD MACNAGHTEN.**—You will observe that payments were to be made on behalf of his father.

**SIR R. COUCH.**—The father was not bound to provide for the son's maintenance after his death.

*Mr. Walton.*—The Plaintiff's interest in the partnership was not dependent on his father, it was such an interest he was bartering away. The father's death rendered the agreement absolute by making the defence impossible.

*Mr. Haldane, K. C., Mr. Jardine, K. C., and Mr. [unclear]* for the Respondents were not called on.

C. W. A.

Judgment reserved.

# [PRIVY COUNCIL.]

## APPEAL FROM OUDH.

LORD HOBHOUSE.	RAJA MAHOMED MAMTAZ ALI,
LORD MACNAGHTEN.	Plaintiff, Appellant,
LORD ROBERTSON.	v.
SIR RICHARD COUCH.	FARHAT ALI KHAN and
SIR FORD NORTH.	SAKHAWAT ALI KHAN,
1901.	Defendants, Respondents.
1, May.	

*Court of Wards, powers of to deal with Ward's property—Maintenance—Assignment of villages in lieu of cash maintenance.*

These were consolidated appeals from a judgment of the Judicial Commissioners of Oudh, dated 19th May 1898, reversing decree of Civil Judge of Lucknow.

The suits raised the question of the title of the Respondents to the villages of Kasmora and Pura Mirza. The facts are these:—Rajah Riasat Ali was talukdar of Atranla in Oudh. He died in 1865 leaving him surviving a widow Dan Bibi. The Appellant is the posthumous son by that lady and was born in October 1865. On the Raja's death Dan Bibi got possession, but on 23rd August 1865 her title was challenged in a suit for possession of the estate instituted by one Mussammat Madaro as guardian of her sons, the Respondents, claiming title for them as the legitimate sons of the deceased Raja. She herself was a prostitute, but she alleged the Raja had married her. During the course of the litigation a reference was made on the 27th October 1865 to arbitrators to decide the following issue, *viz.*:—"Whether the son, born of Dan Bibi, can be the sole heir to the entire property left under the custom of the country, or Farhat Ali Khan and Sakhawat Ali Khan, the two sons born of Madaro Bibi, can also be successors to the property? If they can, what is the portion to which they and Madaro Bibi would be entitled to?"

An award was made bearing date the 18th November 1865; and the arbitrators decided against the claims of Madaro Bibi and her sons to any "share in the inheritance." They then decide that Madaro Bibi was entitled to articles given her by the deceased Raja, and to recommend maintenance for Madaro Bibi and her sons in the following terms:—"It is proper that Bibi Madaro should receive Rs. 60 per month in cash for maintenance and support during her life, on the proviso of keeping herself in the house with honour and good conduct. That the monthly stipend just proposed for the maintenance and support of children should continue for six years, after which time when the children become capable of receiving education in a Government School, the Government would then propose what they should get for their support."

"That when both these children are grown up and attain the age of discretion, they shall have villages separated for them, according to their

stipend after deduction therefrom of the Government revenue."

"That the monthly stipend will be given as follows:—

Rs. 10 per month to Bibi Madaro.

Rs. 30 per month to Farhat Ali Khan.

Rs. 20 per month to Sakhawat Ali Khan."

Two of the arbitrators appeared on the 7th December 1865 before the Deputy Commissioner, in whose Court the case was pending, and he seems to have returned the award, for on the document is endorsed a further award made on the 17th December 1865, but signed by only two of the arbitrators. Up to the 21st December 1865 it had not been filed in Court, yet on that date the Deputy Commissioner proceeded to dispose of the case, and passed a decree in the following terms:—"I dismiss the claim for the estate, but decree maintenance to Plaintiff, and the two sons Farhat Ali and Sakhawat Ali, on the terms of the award, viz.:—Plaintiff, Rs. 10; Farhat Ali, Rs. 30; and Sakhawat Ali, Rs. 20, total Rs. 60."

This decree was confirmed on appeal by the Commissioner of Fyzabad, on the 11th August 1866; and also by the Judicial Commissioner on the 2nd January 1867.

Payments by way of maintenance were made to the Respondents, but not the exact amounts decreed; and in consequence, in the year 1883, they claimed from the Deputy Commissioner, the estate still being under the management of the Court of Wards, a sum of Rs. 3,271 as arrears due to them. On the 25th May 1883 the Deputy Commissioner asked for orders, and wrote as follows:—"Their claim appears to me to be perfectly correct; and with your sanction I propose to make the payments at an early date. I also propose in accordance with the decree of 1866 (19th March) to put an end to the cash allowances for the future, and assign to them a village apiece for their maintenance. I would choose for the older Farhat Ali, a village which would give him an allowance of Rs. 500 or Rs. 600 per annum, and for the younger Sakhawat Ali, a village producing Rs. 350 or Rs. 400."

The Chief Commissioner sanctioned the proposals, and stated in his order of the 7th July 1883 that the Respondents "be given, in lieu of the present monthly allowance, two villages, yielding a profit of Rs. 600 and Rs. 400 per annum respectively, after the payment of the Government *jama*."

On receipt of this order, the manager of the estate was required to report, and he, on the 19th August 1883, suggested the villages of Kasmora and Pura Mirza as suitable for the purpose. And on the same date the Deputy Commissioner directed the immediate delivery of possession to the Respondents, and the execution of "conveyance deeds," granting them a heritable interest.

No conveyances have ever been executed, but the Respondents were at once given possession of the villages in suit, and have continuously received the

profits, which are in excess of the amount sanctioned by Government.

On coming of age, the Appellant being informed of the nature of the Respondents' possession, refused to recognise it; but was ready and willing to allow them a cash maintenance of Rs. 30 and Rs. 20 per month as decreed to them. On their refusal to surrender possession, he instituted the present suits to obtain possession of those villages.

The Judicial Commissioner found as follows:—

"The Defendants had certainly a claim to maintenance when the villages were made over to them, and it was for the benefit of the minor that such claims should be settled. Sec. 172, Act XVII of 1876, provided that the Court of Wards shall have power to give such leases or farms of the whole or parts of the immoveable property, under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors. If the Court of Wards, therefore, honestly thought it was for the advantage of the estate that the Defendants' claims should be settled by making over the villages to them, the Deputy Commissioner acted within his authority when he did so. Had there been no award or decree,—as the estate is one of considerable importance and the Defendants, as brothers of the talukdar, had a claim on him for maintenance,—I do not think it could be held that the grant of the villages to them, in lieu of their claims, was not proper, or that it was not for the advantage of the estate and its owner that a reasonable and suitable provision should be made for them in accordance with the custom of the family. Courts in fixing maintenance should have regard to the *status* in life of the ward and the amount of his income, (Trevelyan's Law relating to Minors, page 223), and the same considerations should guide the Court of Wards in settling claims to maintenance. There is nothing to indicate that the Deputy Commissioner, in making over the villages to the Defendants, had their interests in view, and not those of the Plaintiff. He did so presumably, because he thought the income of the villages was a proper amount to be given for the support of the Defendants, having regard to the rank and circumstances of the parties."

On this appeal Mr. Degruyther for Appellant submitted that the limits of Respondents' rights were to receive Rs. 30 and 20 respectively per month for life only. That the practical effect of the Deputy Commissioner's order was to make a gift of the Appellant's property to the Respondents to which they had no right. That the Court of the Judicial Commissioner had erroneously considered that they had a right to maintenance.

The questions were:—Can a guardian deal with property to the disadvantage of the ward and did the Court of Wards stand in a better position.



He submitted it did not, when such power is not given by statute.

He referred to Act XVII of 1876, secs. 161, 167, 170, and 172. He submitted that the Deputy Commissioner had not exercised a conscious judgment which he was bound to do, the minor's interest and the benefit of his property was never present to his mind. He had really given away the minor's property.

Further the Court of Wards was really the Chief Commissioner as the Deputy Commissioner was under his control and the order of the Deputy Commissioner was in violation or went beyond the sanction given by the Chief Commissioner.

THE COURT.—The Deputy Commissioner is the Court of Wards. He is under the control of the Commissioner but he is the Court of Wards.

The Respondents were not represented.

*Judgment reserved.*

C. W. A.

## CALCUTTA HIGH COURT.

### [CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 278 OF 1901.

GHOSE, J.	}	NAZIM and three others,
TAYLOR, J.		Appellants,
1901.		v.
4, June.		THE KING-EMPEROR.

*Confession—Retracted confession, if and how far admissible in evidence—Admissibility of such confession against person other than the maker thereof—Corroboration, 'amount' of, necessary—Previous convictions, how to be proved—Examination of accused to prove such previous conviction, if proper—Prejudice—Evidence Act (I of 1872), sec. 91—Criminal Procedure Code (Act V of 1898), secs. 310, 342, 511.*

This was an appeal preferred by the Appellants from jail on the 14th of April 1901, against the order of B. B. Newbould, Esq., Sessions Judge of Sylhet, dated the 15th of March 1901, convicting the Appellants of offences under secs. 457 and 411 of the Penal Code.

The facts of the case, so far as they are material to this report, were as follows:—On the 23rd July 1900, the house of the complainant, Gopal Chandra Guha, was broken into under circumstances which amounted to an offence under sec. 457, I. P. Code, (house-breaking by night). Property was stolen and upon information from one Abdul Ali, the Appellants and two other persons were arrested. Some time after the occurrence Nazim and Yasin, two of the Appellants, made confessions, and the wife of Nazim gave evidence to the effect that Nazim and Arabdi and others went to commit theft and afterwards divided the spoil. There was also evidence that Tamiz gave up some buttons which were part

of the stolen property. Nazim confessed on the 11th October 1900, and he repeated it on the 30th; and it was not withdrawn at the trial, and was put in evidence. In the second confession, Nazim exculpated Yasin, saying he did not go to commit the theft; and the evidence of his wife did not inculpate Yasin. It appears, however, that on the 11th October 1900, Yasin admitted before a Magistrate that he was one of the party of thieves and that he got Rs. 15 as his share, but that he had spent it. On the 30th October he alleged that he had made the statement in fear of his life, and this was apparently his first opportunity of retracting. No property was found in his possession and his confession was not full of details.

Nazim admitted in his examination before the Sessions Court that he was three times previously convicted, once in 1889, twice in 1890, and once by the Sessions Court in 1894, when he was sentenced to six years, all the convictions having been for theft or receiving stolen property, and there was a record of such admission on the Sessions record.

The accused were tried by the Sessions Judge of Sylhet with the aid of two assessors. One of the assessors was of opinion that Yasin and Tamiz were not guilty while the other found all the accused guilty of the offences charged. The Sessions Judge convicted all the accused of the offences under secs. 457 and 411, I. P. Code, and sentenced Nazim, in consequence of his previous convictions to ten years' rigorous imprisonment and the others to three years under sec. 457, I. P. Code, and passed no sentence under sec. 411, I. P. Code. Against this order the prisoners appealed from jail.

*Held*—A retracted confession should carry practically no weight as against a person other than the maker inasmuch as it is not made on oath, is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied in one or other of the occasions; and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.

That a conviction cannot be had on an uncorroborated and retracted confession made by an accomplice.

That the accusation made in a confession of an accomplice may be considered against a co-accused if that statement is put in evidence against him, but its evidential value would be of the slightest.

That having regard to the provisions of sec. 91 of the Evidence Act and sec. 511 of the Code of Criminal Procedure, previous convictions should be proved by copies of judgment or extracts from judgments or by any other documentary evidence of the fact of such previous convictions.

That regard being had to the provision in sec. 342 of the Criminal Procedure Code, an examination of

the accused in respect of those convictions is without legal warrant or justification.

*Basanta Kumar Ghattak v. Queen-Empress* (I. L. R. 26 Cal. 49) referred to.

A Sessions Judge is, however, justified under sec. 310, Cr. P. Code, in proceeding to pass sentence on the accused on an admission by him of previous convictions, and such sentence should not be interfered with unless such irregularity in the enquiry as to previous convictions has prejudiced the accused.

Yasin acquitted; sentence of Nazim confirmed, and those of other accused reduced.

No one appeared in this appeal.

*Appeal allowed in part.*

H. P. C.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 2373 of 1899.

MACLEAN, C. J. TAMASHA BIBI, Defendant,  
BANERJEE, J. Appellant,  
1901.  
18, June. MATHURA NATH BHOWMICK and  
others, Plaintiffs, Respondents.

*Ejectment, suit for—Notice to quit, service of Bengal Tenancy Act (VIII of 1885), sec. 49—Rules of Government (Rule 3, Ch. I., Rules of Government of Bengal, 21st December 1885)—Strict adherence to rules, if necessary—Service of summons on Defendant, procedure for, if applicable—Personal service if sufficient—Civil Procedure Code (Act XIV of 1882), secs. 541, 487—High Court Rules, Ch. IX, Rule 2.*

This was an appeal preferred on the 30th November 1899, against the decree of Babu Prasanna Kumar Ghose, Subordinate Judge of Nadia, dated the 7th August 1899, affirming that of Babu Upendra Chandra Chatterjee, Munsif of Kusthea, dated the 24th January 1899.

The facts of the case material to this report were as follows:—

The Plaintiffs were the landlords and the Defendants were their tenants. The suit, out of which this appeal arose, was an action in ejectment after notice to quit. The Plaintiffs alleged that the Defendants were *korfa* tenants, or under-riyats, having no right of occupancy in the holding, and that they had been served with notice of ejectment according to the provisions of sec. 49 of the Bengal Tenancy Act. The notice in this case was addressed to the four Defendants and was served personally upon Defendant Tamasha Bibi.

The Defendants denied service of notice, and alleged that the notice was illegal, and that they were occupancy riyats and not liable to be ejected.

The Munsif found against the Defendants and decreed the Plaintiffs' suit for ejectment. On appeal

by one of the Defendants, Tamasha Bibi, the present Appellant, the Subordinate Judge affirmed the decree of the first Court and upon the question as to service of notice observed as follows:—

As to the first question, it is to be observed, that it is admitted by both the parties to this appeal that the notice of ejectment that was issued on the Appellant was done under the provisions of sec. 49 of the Bengal Tenancy Act. But it is contended by the Appellant that that section having provided no mode of service of the notice, and the notice, the subject-matter of the suit, having been addressed to more persons than one, it should have been served according to the Government rules, provided in that behalf in para. 3, chapter 1st of Appendix I of the Rules framed by the Local Government under the Bengal Tenancy Act which prescribed that service in such a case shall be made by proclamation and beat of drum, &c., and that the service of notice in this case having not admittedly been made in accordance with those rules the service as was made like the service of summons was illegal, and was consequently ineffective, and that as such the Plaintiff's suit must fail.

From the evidence as to the service of the notice, however, I am of the same opinion with the Munsif, that as regards the present Appellant, the notice was personally served upon her. Hence the question is whether the non-service of the notice according to the rules prescribed by the Government and relied on by the Appellant vitiates this personal service or not? I am of opinion that this question must be answered in the negative. The rule referred to simply prescribes a convenient mode of service when the tenants are more than one. It does not lay down that any other mode of service much less personal service would not be sufficient. Of all modes of service, personal service being the best and surest and the notice having been so served on the Appellant, I am of opinion that her contentions based on the above rule must be unavailing and fall to the ground.

The Defendant, Tamasha Bibi, then preferred the present appeal, and the main contention urged on her behalf was as to the question of the legality of the service of notice and the maintainability or otherwise of the present suit.

*Held*—That where there are more Defendants than one, a notice to quit addressed to all the Defendants jointly in one and the same notice, must be served according to the mode of service prescribed by Rule 3 of Ch. I of the rules made by the Bengal Government, dated the 21st December 1885, under the Bengal Tenancy Act, viz., by proclamation and beat of drums, &c.

That the provision that personal service shall be effected in the manner prescribed for service of summons on a Defendant under the Code of Civil Procedure applies only to the case where the notice is addressed to a single person.

That the notice in the present case not having been served in strict compliance with the rules, the notice was bad and the suit should be dismissed.

*Babu Sharat Chandra Roy Chowdhuri for the Appellant.*

No one appeared for the Respondent.

*Appeal allowed.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, JULY 8, 1901.

[No. 33]

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### REPORTS (See Index.)

WHILE CONGRATULATING MR. JUSTICE STANLEY ON his promotion to the Chief Justiceship of the Allahabad High Court, we cannot but feel exceedingly sorry for losing from amongst us such an industrious, independent and conscientious judge. A strong judge, who is unmoved by any consideration except that of doing justice, may not always have a bland manner on the Bench but that has made him none the less popular with the profession and respected by the public. During the short period of three years that he has sat as a judge both on the Appellate and the Original Side of the Calcutta High Court, he has won for himself the regard and esteem of all. In private life he enjoys the reputation of being as perfect a gentleman as he does in public life of being an upright judge. A judge in India should be free from all prejudice of race, creed, religion and be also above the influence of the executive to be able to deal out justice uniformly to all and public opinion is agreed that such a judge is Mr. Justice Stanley. What is a gain to the North-Western Provinces is a loss to us. It is a great pity that our good judges one after another should be taken away from us. The Bar which is

very sorry to part with him, with, we are sure, give him a fitting farewell.

MR. HARRY LUSHINGTON STEPHEN WHO IS TO SUCCEED Mr. Justice Stanley as a puisne judge of the Calcutta High Court is the third son of Sir James Fitz James Stephen, the well known law member of the Legislative Council of the Government of India. We know nothing of the new judge except that he got a second class in the Law Tripos at Cambridge in 1881, joined the Inner Temple in 1882, and was called to the Bar in 1885, and that his name appears amongst barristers practising in the Welsh Circuit.

WE MUST AGAIN PROTEST AGAINST THE PRINCIPLE on which vacancies on the High Court Bench at Calcutta, especially those of barrister judges, are being filled up of late. Both Lord George Hamilton's and Mr. Chalmers's Resolution in this respect has got utterly discredited. Facts would bear out, that able men from the local Bar are always available for filling these vacancies with credit. It is quite incomprehensible to us why the claims of the local Bar should be superseded by men from the junior Bar in England, of whom little or nothing at all is known. Of course, there have been exceptions, but exceptions never prove the rule. In India where a vast amount of codified and customary laws have to be administered by the judges it is absolutely necessary that at least our High Court Judges should be thoroughly familiar with the country's laws, customs and usages and must not like the mofussil magistracy be at school on the bench. We think that no better appointment could have made in this respect than that of Sir V. Bhattacharya Aiyangar to take the place of Mr. Justice Shepherd in the Madras High Court. Why should appointments in the Calcutta High Court be made on a different principle? We do not care whether the non-civilian appointments are given to vakils or barristers, so long as we are satisfied that they are given to really able men.

## Review.

THE TRIAL OF CASES. By F. B. Taylor, B. A., I. C. S. Sold for the benefit of the Orphanages at Rs. 3-4, V. P. P., at the Catholic Orphan Press, 4, Portuguese Church Street, Calcutta.

We welcome this work which is an enlarged edition of the author's "Practical Hints to Young Judicial Officers." It consists of three parts, Part I dealing

with Criminal Cases; Part II with Civil suits; Part III containing a Synopsis of the Evidence Act, followed by an useful Appendix and Index. We feel no doubt that it will be of great assistance to young officers who have to start in most cases without any proper preliminary training. The important Codes in this country mostly embody rules of practice or case law with which familiarity can only be acquired by practice at the Bar. The provisions of the more important Codes, such as the Evidence Act, the Contract Act, the Transfer of Property Act, being mostly short abstract rules of law derived from such sources, are not always very clearly worded and often help to create confusion unless English cases or text-books are referred to for elucidating them. Youngmen at the Bar devilling for those who have grown old in the practice of law get greater opportunities of acquiring a more clear and comprehensive view of the Codes than a novice from a coaching establishment or a college whose first training in law begins with its administration. But so long as the present anomalous system of recruiting our judicial officers lasts, we shall continue to have men amongst us who develop in them a contempt for legal principles and consider themselves capable of interpreting difficult statutes quite independently of them and according to their own ideas of things. There are, however, some men who have a judicial frame of mind who from the very start set out on the right track and naturally turn out excellent judicial officers. It is but right that such officers should endeavour to instruct junior officers as to the method that has enabled them to administer justice with success. It is from this point of view that that we chiefly prize this publication. It is modest in its aims and singularly free from idiosyncrasies of any kind and presents a thoroughly sound common-sense-view of the subjects with which it deals. The heading to Part I "Be thorough, be accurate and in all matters insist on legal proof" furnishes an admirable motto. The first thing, the author tells us, an officer should endeavour to do is to make a workmanlike record and he might have added, that as he grows in age and experience he should not try to make his record appeal-proof. The author deals with the different stages of a judicial trial, both Civil and Criminal, and gives the reader only a glimpse into the vast fields of procedure and evidence, very properly avoiding details and very judiciously pointing out the principal landmarks to which, if the young judicial officers kept true they would seldom go astray. The author's exposition of the elements of procedure are interspersed with advice which young judicial officers would do well to remember. For instance the author says:—"The judge should not wait for objections when any statement, etc., tendered in evidence is obviously inadmissible or irrelevant." "Do not be impatient with a witness" and the author might have added "Do not unnecessarily interfere with witnesses when

they are being examined by the parties represented by their lawyers." The Chapters on Determination of Punishment and the Form and Nature of Sentences deserve special attention. We commend the following observations to the attention of our Magistracy. "Arbitrary and fanciful sentences should not be passed" and "the sensibility of the individual offender must be taken into account with due regard to sex and age, health and strength, illness and infirmity and even to rank and social position and education and habitual occupations." The synopsis of the Evidence Act appended at the conclusion of the book contains a very useful analysis and enables one to have a comprehensive view of the Evidence Act at a glance.

### English Notes.

COURT OF APPEAL. *BEALE v. BOND*. Before the MASTER OF THE ROLLS and LORD JUSTICES COLLINS and ROMER. 20th February 1901.

*House agent—Interpolation of contract—Terms special—Not ordinary commission.*

The facts of this case are reported in Vol. 4, C. W. N., at p. ccx.

The Court of Appeal arrived at the conclusion that the cases of *Fisher v. Drenitt* (48 L. J. Q. B. 32) and *Passingham v. King* (14 The Times L. R. 392) which had been relied on by the Divisional Court, were not applicable to this case, those cases being guides where the contract was for ordinary commission to be paid to the house agent. Here the owner of the property which he placed in the hands of the Defendant to sell had made a special bargain about it, viz., that he agreed to accept £1,150 for the property "and you are at liberty to receive anything over and above that as commission, it being understood that I am to receive £1,150 without deduction." Defendant had procured a Mr. Rosenberg as purchaser who had paid down £25 as deposit on the sum of £1,250 for which he contracted to purchase. Mr. Rosenberg failed to complete. The Plaintiff had sued to recover the deposit from Defendant, the latter had counterclaimed £100; this counterclaim was allowed by the Divisional Court, and was now refused. The Appeal Court supported the decision of the Deputy Judge of the City of London Court who had awarded to Defendant five guineas.

*Mr. Holloway* for the Plaintiff.

*Mr. Powell* for the Defendant.

C. W. N.

*Appeal allowed with costs.*

KING'S BENCH DIVISION.—*HALL v. MCWILLIAM*. Before MR. JUSTICES RIDLEY and BINGHAM. 7th June 1901.

*The Sun Spots Lottery—4 Geo. IV, Ch. 60, sec. 41.*

The question in this case was whether the Magistrate was right in convicting the printer and publisher of the "Sun" newspaper under the above Act

for the publication of a certain number of that paper containing a scheme for the sale of certain chances in what the learned Magistrate considered was a lottery. The paper appeared with certain spots of various sizes and configurations, and it was announced therein that prizes would be given to those who selected those that were meant to be the winning spots.

The Court held that the conviction was right. There was no question of any skill having been employed in the matter. What the Appellant did was to sell the paper with the chance of gaining a lottery prize. The purchaser of the paper had in his mind the chance of winning the prize. The owner may have had the object in view of advertising his paper, and not making money out of the scheme, but that did not take it out of the words of sec. 41 of the above Act.

*Mr. Hall, K. C., and Mr. Germain* against the conviction.

*Mr. Horac Avory, K. C., and Mr. Muir* in support.

C. W. A. Conviction affirmed.

CHANCERY DIVISION.—THE NEW YORK SECURITY TRUST COMPANY v. KEYSER. Before MR. JUSTICE COZENS HARDY. 21st January 1901.

*Title of a foreign curator to sue in this country—Money of a lunatic in Court, and in hands of trustees in this country.*

The Plaintiffs in this suit are the abovenamed company who are authorized and directed by the New York Court (as the appointed committees of the person and property of a Mrs. Samuels, a widow born in America and in a lunatic asylum there) to take proceedings in this country for payment of the moneys and property belonging to her in this country in Court and in the hands of trustees. The company was joined by one Ticket as Mrs. Samuels' next friend as co-Plaintiff. Though born in America and now in a lunatic asylum there, it was assumed for the purposes of this suit that her domicile became on her marriage and continues English.

The trustees as Defendants submitted to the decision of the Court so as to be protected in the matter. Mrs. Samuels was adjudged by the New York Court incompetent to manage herself or her affairs.

If Mrs. Samuels were domiciled in New York, the matter for decision would have been determined by the decision of the Court of Appeal in *Deedisheorn v. London and Westminster Bank* (1900, 2 Ch. 15), her domicile being English differentiated this case from that. The learned Judge states in his judgment that the real reason for the Court allowing such a proceeding is that the matter is for the benefit of Mrs. Samuels and only in so far as it is or such benefit, *Beale v. Smith* (9 Ch. Ap. 85), the Plaintiff company was competent to receive and give good discharge for her money and it is to them that the money is asked to be paid not to her next

friend who may be anyone. The learned Judge was satisfied that everything was being done satisfactory towards Mrs. Samuels, *Scott v. Bentley* (1 K. and J. 281), and there was no reason why the discretionary power vested in him should not be exercised. Defendants' costs would be paid out of the fund in the Court, and Plaintiffs' prayer would be granted.

ORDER.—That balance funds in Court and those in trustee's hands should be paid to Plaintiff company as committees. Liberty to trustees to pay future income to same, until further order, with liberty to apply.

*Mr. Danckwerts, Q. C., and Mr. Methold* for the Plaintiffs.

*Mr. Macnaghten, Q. C., and Mr. Alexander* for the Defendants.

C. W. A.

PROBATE COURT.—In the goods of JOHN ALEXANDER SCOTT, deceased. Before MR. JUSTICE BARNES, 11th June 1901.

*Creditor—Administration.*

Colonel John Alexander Scott died in the Punjab, India, in February 1900, intestate leaving a widow and a daughter. Neither of those ladies applied for administration. The deceased was at the time of his death in debt to one Ram Chand or Chunder, son of Dyal Chand of Sealkote in the Punjab. £119 were due to that gentleman under a decree he had secured from the Subordinate Judge of Sealkote. The deceased appeared to have about £60 in the Army and Navy Stores. Babu Ram Chand through his attorney applied for and obtained on 13th May last a citation on those ladies calling upon them to apply for administration or show cause. The citation was served and as no appearance was entered, the learned Judge made the grant to Petitioner after hearing *Mr. Pritchard* in support of the application.

C. W. A.

*Administration granted.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL.—Appeal from Bombay. KARIM NENSEY v. HEINRICHS AND ANOTHER. (See 5 C. W. N. ccxxxvi). 13th June 1901.

LORD HOBHOUSE delivered their Lordships' judgment advising His Majesty to dismiss the appeal with costs.

*Mr. Lawson Wattson, K. C., and Mr. Mayne* for the Appellant.

*Mr. Haldane, K. C., and Mr. Jardine, K. C., and Mr. Kenyon Parker* for the Respondents.

C. W. A.

PRIVY COUNCIL.—Appeal from Oudh. RAJA MOHAMMAD MUMTAZ ALI KHAN v. SAKHAWAT ALI KHAN and FARHAT ALI KHAN. (See 5 C. W. N. ccxxxvii). 13th June 1901.

Two appeals consolidated.

Sir FORD NORTH delivered their Lordships' judgment advising His Majesty to allow the appeals with costs.

Mr. Degruyther for the Appellant.

The Respondents were not represented.

C. W. A.

### PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE  
RECORDER OF RANGOON.]

LORD HOUSHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR R. COUCH.

SIR FORD NORTH.

1901.

Heard, 2, May.

Judgment, 13, June.

KONG YEE LONE & Co.,  
Defendants, Appellants,

LOWJEE NANJEE,  
Plaintiff, Respondent.

*Contract—Partner—Authority—Gaming.*

This was an appeal against a decision of the Recorder of Rangoon in an action brought by the Respondent ordering that the Appellants should pay to the Respondent the sum of Rs. 1,23,625 with interest at 6 per cent.

The action was brought by the abovenamed Lowjee Nanjee who trades under the name of Robert Sutherland & Co. against the Defendants who trade as Kong Yee Lone & Co. upon two promissory notes, the Defendants being Wong Kaim Sew (Defendant No. 1), Wong Kain Choay and Kong Wain. The promissory notes, both dated 11th September 1899, were for Rs. 1,27,820 and Rs. 5,198, of which the former was alleged to have been given for differences upon rice transactions, and the latter for brokerage. The defence was that the notes were not signed by anyone who was authorized to bind the firm and that they were given for wagering transactions and therefore could not be enforced.

The notes were in the following terms:—"on demand we, the undersigned Kong Yee Lone & Co., promise to pay to Messrs. Robert Sutherland & Co. or order the sum of rupees one lac twenty-seven thousand eight hundred and twenty only for value received in difference on rice."

Signed in Chinese  
character.

(Sd.) KONG YEE LONE & Co. (in English).

Note. The translation of the above Chinese character is Kwong ship Leang.

The second note exactly in the same terms was for "value received in brokerage." The Recorder pronounced the following judgment:—

The Plaintiff in this case is a broker and also a dealer in rice. During the year 1899 he had dealings with the Defendants who are rice-millers and bought

rice to a very large extent from them. Some of the rice he took delivery of and paid for. In other cases he resold the rice to the millers. According to his evidence these transactions were carried out on behalf of the Defendants by one Kaim Sew who has absconded. On the 11th of September the Defendants' firm owed the Plaintiff a sum of Rs. 1,27,820 for "differences," and Kaim Sew gave the Plaintiff a pro. note Exhibit A for this amount "for value received in difference on rice." He also gave him another pro. note for Rs. 5,198-1 "for value received in brokerage." Subsequently the Plaintiff received two bills from the Defendants against one Moolla Abdool Bahim for Rs. 10,500. He collected this sum, and after giving the Defendants credit for it sued for the balance Rs. 1,23,625-12.

It is not disputed that the second word in the Chinese signature on the pro. note does not read "Yee." Some witnesses say that part of it reads "ship" others that it is unintelligible.

The Defendants' case is first that the business of the firm was carried on by one Puck Chan until he became ill towards the end of 1898 and that subsequently it was carried on by one Cheng Wa. I have no doubt however after Mr. Mack's evidence that the business was carried on by Kaim Sew and there is one very significant fact in support of this, namely, that the Defendants have not been able to call any independent evidence to show that at the time of the transactions between Plaintiff and Defendants' firm the business was carried on by Chang Wa. But it is not disputed that Kaim Sew was a member of the Defendants' firm, and as a member of the firm he would be entitled to carry on business on its behalf, and no private arrangement between the partners, not communicated to the plaintiff would bind him. I hold then that Kaim Sew did carry on the business of the Defendants' firm and had power to bind it by the notes in dispute.

Then the Defendants' case further is that the notes were not signed in such a manner as to bind the firm, and evidence has been given to show that when borrowing money from the firm of R. M. M. A. the pro. notes were signed by three of the partners and the "chop" mark of the firm affixed. But Cheng Wa has to admit that he alone signed contracts in the name of the firm and did not use the "chop" mark. It has also been argued on the authority of *Kirk v. Blurton* (9 M. and W. 284) where the signature "John Blurton & Co. instead of "John Blurton" the true style of the partnership was held not to bind the firm, that as the second word in the signature is not "Yee" the Defendants are not bound. Other authorities were referred to, to the same effect, *Stephens v. Reynolds* (5 Ex. 512); *Faith v. Richmond* (11 A. and E. 339); *Leverton v. Lane* (13 C. B. 278), and *Yorkshire Banking Co. v. Beaton* (L. R. 5 C. P. D. 109).

I do not consider however that these authorities can apply in such a case as this where the signature is in a language unknown to the person taking the docu-

ment purporting to bind the firm. It is different in England where the signature is in a language known to both parties. It would be impossible to carry on business in such a town as Rangoon if it was necessary for a person taking a document purporting to be signed by a partner in the name of the firm to satisfy himself that the name was correctly signed. Documents may be, and are signed everyday in mercantile offices in Chinese, Burmese, Hindustani, Bengali, Tamil, Telugu, Gujarati, Hebrew, and other languages. No firm, or at all events very few firms, could possibly keep a collection of expert clerks who could inform them whether the signatures were correct. The question in every case must be whether the person signing purported to sign the name of the firm. It would open the door to fraud of the gravest character to hold otherwise.

Then it was argued on behalf of the Defendants that the transactions were gambling transactions and were to the knowledge of the Plaintiff fraudulent as against their firm. As to this last charge there is no evidence whatever. The question as to gambling is settled by *The Universal Stock Exchange v. Strachan* (L. R. [1897] App. Cas. 166). That was a case of bargain and sale of stock. Cave, J., in summing up said:—"A man goes to a broker and directs him to buy and sell so much stock as the case may be. That may be in the eye of the purchaser a gambling transaction or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock, if he means to sell again before the settling day arrives, that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it.....notwithstanding these ostensible terms of business was there a secret understanding that the stock should never be dealt with?" This summing up was held to be perfectly accurate.

The question then is "was there a common intention to wager." I do not see how I can so hold having regard to the fact that rice was in certain instances delivered and paid for. In the case I have just referred to and in *In re Gieve* (L. R. [1899] Q. B. D. 794) there never was any transfer of stock at all. In my opinion the Plaintiff is entitled to succeed and there will be a decree for the amount claimed with interest from date of decree at 6 per cent. with costs.

For the Appellants *Mr. Arthur Cohen, K. C.*; and *Mr. James Fox* contended, criticising the evidence, that the Recorder was wrong in holding that Wong Kain Sew, the 1st Defendant (who had disappeared from Rangoon on or about 31st October 1899, the date the action was commenced, and had not been since heard of) was the managing partner of Defend-

ants' firm or had authority to bind that firm. That there was no evidence that the signature to the promissory notes was either that of the firm, or such as they were in the habit of using.

That the so-called contracts for the differences on which the promissory notes were given were gaming and wagering transactions; that there was no consideration for the small note; and that they could not be sued on or enforced in law. Sec. 30 of the Indian Contract Act was noticed and *The Universal Stock Exchange v. Strachan* (1896, A. C. 166) and *Ex parte Gieve* (1899, 1 Q. B. D. 794) were commented on.

For the Respondent *Mr. Danckwerts* and *Mr. Mayne* in addition to commenting on the above cases contended that the transactions were legal and binding, and Wong Kain Sew had ample authority to bind the Defendant firm. They referred to *Forbes v. Marshall* (11 Exch. 166 at p. 175). It was submitted that the Indian contract was narrower than the English Act; see sec. 30. It did not contain "gaming" *Farget v. Osteguy* (1895, App. Cas. 318 at p. 323); secs. 17 and 18, Indian Registration Act.

*Mr. Cohen* replied.

LORD HOBHOUSE delivered their Lordships' decision advising His Majesty to allow the appeal with costs.

The judgment deals with the provisions of sec. 30 of the Indian Contract Act.

*Mr. Arthur Cohen, K. C.*, and *Mr. James Fox* for the Appellants.

*Mr. Danckwerts, K. C.*, and *Mr. Mayne* for the Respondent.

C. W. A.

## CALCUTTA HIGH COURT.

### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 157 OF 1901.

SALE, J.

STANLEY, J.

HARRINGTON, J.

1901.

4, July.

PUNCHANUN SING

v.

RAM LALL BISWAS and others.

*Mortgage suit when principal below Rs. 1,000—Court-fees payable by Defendant, scale of.*

The question for the consideration of the Hon'ble Judges was as to whether the Court-fees payable by a puisne mortgagee and a Defendant in a mortgage suit whose claim is under Rs. 1,000 should be on the special scale or on scale No. 2 where the Plaintiff's mortgage debt is above Rs. 1,000.

THE COURT.—We are of opinion that the Court-fees payable by the Defendant whose principal sum due on the mortgage does not exceed Rs. 1,000 should be on the special scale.

## [CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS  
Nos. 165 AND 182 OF 1900.

HILL, J.  
BRETT, J.  
1901.  
25, June.

JAMINI MOHAN CHOWDHURY and another,  
Judgment-debtors, Appellants,

v.

CHANDRA KUMAR ROY and another,  
Decree-holders, Respondents.

*Civil Procedure Code (Act XIV of 1882), secs. 291; 311—Application to set aside sales—Irregularity in the publishing of sale proclamations—Prejudice—Inadequacy of price consequent upon the irregularities—Absence of sufficient bidders—Series of postponements of less than seven days aggregating to more than seven days—Fresh proclamation if necessary—Absence of hour appointed for sale in the order for postponement—Setting aside of sale—Postponement made to depend upon contingencies, if proper.*

• These were two appeals preferred on the 7th of May 1900, against the orders of A. Pennell, Esq., District Judge of Noakhali, dated the 31st of March 1900.

The facts of the case were shortly as follows:—

The judgment-debtors, Appellants, were the shareholders in two permanent *howla* tenures, and their interest in these tenures were sold in execution of certain rent decrees. These two appeals arose out of applications made by the Appellants under sec. 311 of the Code of Civil Procedure to set aside the sale of those tenures in consequence of material irregularities in connection with the sale and the consequent substantial injury to them. The application, out of which the appeal No. 165 of 1900 arose, related to a 5 annas share, and the application out of which appeal No. 182 of 1900 arose, related roughly to a 6 annas share in those *howlas* respectively.

On the 23rd September 1899 the decree-holders obtained decrees against the judgment-debtors in respect of rent due for these *howla* interests, and on the 23rd November of the same year they applied for execution of their decrees and the 15th of January 1900 was then fixed for the sale. On the 12th January the judgment-debtors applied for stay of execution under the provisions of sec. 546 of the Code of Civil Procedure, they having preferred an appeal to the High Court against the decrees. On this application the District Judge directed that the sale should be adjourned to the 22nd January in order to enable the judgment-debtors to furnish the requisite security. Then on the 22nd January the Judge by an order of that date directed that as it was necessary to test the property pledged by the debtors, this property was to be tested by the Nazir of the Munsif's Court and the Nazir was directed to submit his report in regard to the sufficiency of the property as security on or before the 27th January, and the sale was accordingly adjourned to the 27th. On the 27th it was recorded in the order-sheet that the report of the Nazir had not yet been received and that the sale stood adjourned to the 1st February.

On the 1st February the report of the Nazir would seem to have been received. An order of that date stated that the security offered was altogether insufficient and that the District Judge therefore refused to stay execution and directed that the sale should proceed. On the same day the property in dispute in these appeals was sold and purchased by the decree-holders. Subsequently on the 2nd March the judgment-debtors made the application under sec. 311, Civil Procedure Code, out of which these appeals arose. The irregularities of which they complained were, *firstly*, that the sale proclamations had not, in compliance with the provisions of sec. 287 read with sec. 274 of the Code, been fixed upon the property to be sold; *secondly*, it was contended that the provisions of sec. 291 of the Code had been violated inasmuch as there had been a postponement of the sale for more than 7 days without the issue of a fresh sale proclamation, and then they also complained that the orders postponing the sale were improper as they had been made to depend upon contingencies, and that it was impossible under the circumstances that intending buyers could know at what time the sale would take place. There was another objection also based on the fact that in the orders by which the sale was postponed there was no hour fixed at which the sale should take place.

The District Judge overruled these objections.

Against that order of the District Judge the judgment-debtors preferred these two appeals, and on their behalf the same objections, as were taken before the Judge, were urged.

*Held*—That the fixing of the sale-proclamation upon the property not of the judgment-debtor but of the decree-holder at a distance of some half-a mile from the judgment-debtor's property violated the principles on which the law on the mode of serving a proclamation is founded; and that there was in this respect a material irregularity in the publishing of the sale.

That a series of short postponements of less than seven days which amounted in the aggregate to more than seven days were equivalent in the sense of sec. 291 of the Code of Civil Procedure to a postponement of more than seven days, and a fresh proclamation of sale would be necessary; and a failure to issue a fresh proclamation of sale, in the present case, after the postponement of the sale to the 1st February, was a material irregularity in the sense of sec. 311 of the Code. *Satish Chunder Rai Chowdhuri v. Thomas* (1. L. R. 11 Cal. 658) referred to.

That in this case the Court inferred as a matter of fact that the inadequacy of price was due to the paucity of bidders which was directly the result of the irregularities in the publishing of the sale upon which the judgment-debtors had placed reliance.

That orders for postponement of sale should not be made to depend upon contingencies and that the hour at which the sale would be held should be mentioned in the order of postponement in order to give notice to intending bidders.



*Surnomoyee Deli v. Dakhina Ranjan Sanyal*, (I. L. R. 24 Cal. 291) referred to and followed.

That there was a very substantial difference between the price fetched at the sale and the actual value of the property resulting in material and substantial injury to the judgment-debtors and the sale was vitiated, and should be set aside.

*Mr. A. M. Bose and Babu Baikunta Nath Das* for the Appellants.

*Dr. Rashbehary Ghose and Babus Lal Mohan Das and Akhoy Kumar Banerjee* for the Respondents.

*Order and sale set aside.*

H. P. C.

# [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREES

Nos. 1164 and 1392 of 1898.

THE SECRETARY OF STATE  
FOR INDIA IN COUNCIL,  
Defendant No. 1,  
Appellant,

SM. JAGAT MOHINI DAS,  
Plaintiff, and MR. STEPHEN  
AUGUSTUS RALLI and  
anr., Defendants Nos. 2  
and 3, Respondents,  
and

JAGAT MOHINI DAS,  
Plaintiff, Appellant,

v.

THE SECRETARY OF STATE  
FOR INDIA IN COUNCIL and  
ors., Defendants,  
Respondents.

MACLEAN, C. J.  
BANERJEE, J.  
1901.

Heard, 10 and 13, May.  
Judgment, 26, June.

*Suit for possession and mesne profits and damages—Attachment under the criminal law of property believed to belong to absconding accused—Criminal Procedure Code (Act V of 1898), sec. 88—Act XVIII of 1850—Liability of Government for mesne profits and damages—Period for which liable—Proper parties to suit—Release of property after suit and before judgment, whether affects liability and suit—Civil Procedure Code (Act XIV of 1882), sec. 212—Partnership, determination of on death of some member of firm after decree—Representatives of deceased members—Contract Act (IX of 1872), sec. 253, cl. 10—Express contract if necessary to fix liability—Attachment caused by private prosecutor, whether absolves Government from liability to pay damages.*

These two appeals were preferred on the 14th June and 18th July 1898 respectively, against the decrees of C. P. Caspersz, Esq., Additional District Judge of 24-Pergunnahs, dated the 2nd April 1898, passed on appeal against the decrees of Babu Bulloram Mukhick, Subordinate Judge, first Court, of Alipur, dated the 27th January 1897.

These two appeals arose out of a suit brought by the Plaintiff-Respondent, Sreemuty Jagat Mohini

Dasi, in the first-mentioned appeal against the Secretary of State for India in Council, Messrs. Ralli Brothers and Baroda Prosad Roy Chaudhuri, for recovery of possession of certain immoveable property, namely, a garden with mesne profits. The allegations in the plaint on which the suit was based were shortly these:—That the property in dispute belonged to the Plaintiff; that Defendant No. 2, Messrs. Ralli Brothers, having instituted criminal proceedings against Defendant No. 3, Baroda Prosad Roy Chaudhuri, and the accused not having appeared, the property in dispute was, on the 1st of July 1895, attached at the instance of Defendant No. 2 under sec. 88 of the Code of Criminal Procedure, as the property of the accused; that the Plaintiff was thereby dispossessed from the garden, many of the trees in it had been destroyed for want of proper care, and the garden had remained in the possession of the servants of Defendant No. 1, the Secretary of State; and that notwithstanding that the Plaintiff served Defendant No. 1 with a notice under sec. 424 of the Code of Civil Procedure before bringing this suit, the property in dispute had not been released to her.

The Defendant No. 1 in his defence alleged that the property in dispute was attached by the Criminal Court at the instance of Defendant No. 2, and that the accused Baroda Prosad Roy Chaudhuri did not appear within the time specified in the proclamation issued against him or at any time. He also disputed the Plaintiff's title to the garden in suit, and he denied his liability generally. The Defendant No. 2 denied liability. Defendant No. 3 did not enter appearance. The property was released from the attachment after the filing of the written statement. The Subordinate Judge gave the Plaintiff a decree against Defendants Nos. 1 and 2, and directed that the amount of the mesne profits and damages be ascertained in execution of the decree. Against that decree Defendants Nos. 1 and 2 preferred separate appeals, and the Additional District Judge dismissed the appeal of the former and decreed that of the latter.

Against this decree of the District Judge Defendant No. 1 preferred appeal No. 1164, urging that upon the facts found, no case was made out against him, and the Plaintiff preferred appeal No. 1392 in which he urged that upon the fact, found the liability of Defendant No. 2 was made out, and that the Court below was wrong in exonerating Defendant No. 2 from liability.

*Held*—That the attachment of the property under sec. 88 of the Code of Criminal Procedure having been made by the Magistrate in the discharge of judicial duties and no want of good faith having been imputed either to the Magistrate or to the police-officers who acted under his orders both the Magistrate and the police-officers are protected by Act XVIII of 1850; and that the Defendant No. 1 could not be made liable for mesne profits and damages for any period preceding the date on

which the property, if it had been the property of the absconding offender, would have come to be at the disposal of Government under sec. 88.

That the property in suit being admittedly the property of the Plaintiff and it having been attached as the property of Defendant No. 3, and that the fact being that at the date of the suit, the property, if it had been rightly attached, would have been either actually at the disposal of Government, or likely soon to be at its disposal, and Government not having repudiated its connection with the property when notice of this suit was given or at any time before, the Plaintiff was right in making Defendant No. 1 a party to the suit, so that the question of title might be decided in his presence and possession might be awarded as against him.

That the release of the property from attachment after the filing of the written statement and only a few days before judgment was pronounced in Plaintiff's favour by the first Court could not affect the suit.

That the Defendant No. 1 was liable for mesne profits and damages in respect of the period subsequent to the date, when the property, if rightly attached, would have come to be at the disposal of Government under sec. 88 of the Code of Criminal Procedure, which date should, along with the amount of mesne profits and damages, be ascertained in execution proceedings under sec. 212 of the Code of Civil Procedure.

In appeal No. 1392—That the operation of sec. 253, cl. (10) of the Contract Act (IX of 1872), is subject to express contract and the Defendants who have special means of knowledge on the subject not having shown that there was no contract to the contrary or that the persons substituted in the place of certain Defendants, members of the firm of Messrs. Rulli Brothers who had died since the date of the lower Appellate Court's decree were not proper parties, the appeal can properly proceed.

That upon the finding of the Court below that "the Defendant No. 2, a private prosecutor, through legal and other agents, did cause the attachment to be effected," Defendant No. 2 must be held liable for damages and mesne profits.

*Shabjan Bibi v. Sheikh Sheriatullah* (12 W. R. 324) referred to and followed.

*Lock v. Ashton* (12 Q. B. 871) distinguished.

In No. 1164 *Babu Ram Charan Mitter* and *Babu Srish Chandra Choudhuri* for the Appellants.

*Babu Dwarka Nath Chuckerbutty, Dr. Ashutosh Mukherjee* and *Babus Nalini Nath Sen* and *Joy Gopal Ghosa* for the Respondents.

In No. 1392 *Babus Dwarka Nath Chuckerbutty* and *Joy Gopal Ghosa* for the Appellants.

*Babus Ram Charan Mitter* and *Srish Chandra Chaudhuri, Dr. Ashutosh Mukherjee* and *Nalini Nath Sen* for the Respondents.

*Appeal No. 1164 dismissed.*

*Appeal No. 1392 allowed.*

H. P. C.

## List of Business for the Judicial Committee of the Privy Council.

JUNE AND JULY 1901.

(The sittings were to commence on Tuesday, the 18th June 1901, at half past 10 a. m.)

### INDIAN APPEALS.

	Record received		
Civil	Set down for hearing	Subject	Solicitor
<b>Madras</b>			
Rangayya Goundan and others v. Nanjappa and others	21 01	Suit for specific performance of a contract to sell an estate, whether there was a <i>judicial sale</i> (Civil Procedure Code sec. 13 and 4)	R. I. Innes (A) Odwell and Armstrong (R)
N. A. Subramaniam v. The King Emperor	21 11 00	Criminal appeal	R. T. Fisher (A)
	26 01	Alleged improper admission of evidence and misjoinder of issues	Solicitor, India Office (R)
<b>N.-W. P. Allahabad.</b>			
Rudra Krishna Prasad v. Rati Bishan Chaud	11 01	Whether a contract to buy a lot from Respondent was broken by Appellant or Respondent	I. C. Sumner (A) Pyke and Parrott (R)
Batal Be, and others v. Min Ali Khan and others	11 29	Limitation	Barrow, Rogers and Nevill (A) <i>Et parte</i>
<b>Bengal.</b>			
Rup Poddumund Singh and others v. Haves and others executors of Poddumund Chandra Debce	11 00	Construction of the terms of a family settlement and decree thereon	F. I. Wilson and Co (A) Gordon Dalrymple and Hugh (R)
<b>N.-W. P. Allahabad.</b>			
Aschu Ali Khan v. Khan Sher Ali Khan and others (three appeals consolidated)	50 00	Dispute between brothers alleged joint accounts, set off limitation	Pyke and Parrott (A) Ranken Ford Ford and Chester (R)
<b>Oudh.</b>			
Munshi Dhu v. Razumji Singh	11 8 00	Suit by Appellant on bills of exchange alleged to have been executed by or on behalf of Respondent's father in Appellant's favour	Young, Jackson, Board and King (A) Lawford, Waterhouse and Lawford (R)
Gopal Bakshi Singh v. Gopal Singh and others	47 00	Claim by Appellants for income of the village granted to the Respondent's ancestor in satisfaction of a grant once jurisdiction of Assistant Judicial Commissioner to hear the appeal alone, sec. 8, Act XIV of 1901	Watkins and Lamont (A) T. L. Wilson and Co (R)
<b>N.-W. P. Allahabad.</b>			
Bahadur Singh and others v. Mohi Singh and others	21 5 00	Whether Appellants are entitled to recover from Respondents certain jungle lands	Barrow, Rogers and Nevill (A) <i>Et parte</i>

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, JULY 15, 1901.

[No. 34]

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(TESTAMENTARY AND INTEREST.) In the goods of Atalchoney Dosser. Succession Act, s. 19 (1) (ORIGINAL APPEAL.) Kedar Nath Chatterjee v. The King-Emperor. Penal Code ss. 24, 25, 497, 471—Intention (CRIMINAL REVISIONAL.) Lalit Mohan Mahtia v. Mahanajia Suiya Kant Acharya Bahadur. Criminal Procedure Code—Case under s. 145, Cr. P. Code—High Court, power of, to transfer—Letters Patent, s. 29—Charter Act—“Case” and “criminal case”	cclii
(CIVIL APPELLATE.) Raj Narain Mookerjee v. Phul Kumari Debi. Administration—Discharge of society—Probate and Administration Act, s. 78—Indian Contract Act, s. 130	cclii
REPORTS (See Index.)	

THE LORD MAYOR OF LONDON IN PROPOSING THE toast to His Majesty at the banquet at which he detained the judges proposed “The King, member of the Middle Temple and Barrister-at-Law.” His Majesty was delighted his guests and will no doubt delight the profession in India. His Majesty was called to the Bar at the Middle Temple and was made Benchers forty years ago and also acted as its treasurer in 1887.

THE BUSINESS BEFORE THE JUDICIAL COMMITTEE does not appear to be heavy. Of the fifteen appeals the list, nine were from India, three from Canada, two from Australia and New Zealand and one from the Extra-territorial Court of Constantinople.

ALTHOUGH THE LIST OF APPEALS BEFORE THE JUDICIAL COMMITTEE may not be heavy yet their Lordships do not appear to be any the less expeditious disposing of them. In the course of the first week's sitting last term their Lordships had finished the hearing in seven of the Indian appeals. The case of *Adgar* involved questions of complicated accounts and was likely to last for two days more.

The criminal case of *Subramanyer Iyer v. King-Emperor*, was to have come off before a special Court on Wednesday the 5th June last.

JUDGING FROM THE PROGRESS OF JUDICIAL WORK in the House of Lords we have no reason to congratulate ourselves at the prospect of the Judicial Committee being merged into the House of Lords. Out of the 28 appeals before the Lords last term fourteen had reappeared in the list from that of the previous session. In two appeals, judgment appears to have been reserved for over two terms, in three more, since the last term and in one, since last year. Although the Judicial Committee may occasionally have to reserve judgments in cases which require consideration, yet it is seldom that we find a judgment reserved beyond a term. From a comparative view of the progress of business in the two final Courts of Appeal we have come to doubt whether we shall have anything to gain from there being one Imperial Court of Appeal for the whole Empire. The appointment of Sir John Edge to represent India in the Committee for the consideration of the scheme has also seriously shaken our confidence in it.

AN ADVOCATE WHO FEARLESSLY DISCHARGES HIS DUTIES may become an object of admiration to the world quite apart from the merits of the case he pleads. Sir Francis Jeune in proposing the toast to Maître Labori at the Lord Mayor's dinner emphasised this fact in the following terms:—

Lawyers, at any rate, knew the difference between the merit of a cause and the merit of an advocate engaged in it; and what they were there to honour and what they desired to honour was not the cause or any cause in which Maître Labori had been engaged, but they desired to honour the advocate and the man.

MAÎTRE LABORI'S POPULARITY IN PROFESSIONAL circles in England may well be estimated from the following account that he gave of himself at Lord Mayor's dinner. It is remarkable how in doing honour to an able counsel the judges in England also freely joined. Maître Labori in returning thanks said:—

For the past ten days his life had been an uninterrupted fête—a fête the more dear to his mind and to his heart because

it was a professional *fête*. He might say to all his hosts of the past ten days who were present that he would not forget the banquet of the Hardwicke Society. He would never forget it as long as he lived. That banquet, so dear to his heart, had been succeeded by *fêtes* not less charming. On the day following the Hardwicke Society's banquet the Lord Chief Justice of England himself did him the honour to ask him to be present at a sitting of his Court. Sir Charles Darling and other Judges had done the same. On Tuesday Lincoln's Inn wished to receive him, and he hoped Mr. Justice Mathew, whom he had known long before, would forgive him for having committed a grave indiscretion in this country. When he read on the invitation of Lincoln's Inn "no speeches," he went there and passed a most excellent evening and ate a splendid dinner. But to his surprise, when they passed from the hall to the Benchers' apartment, where they had many bottles of excellent wine, Mr. Justice Mathew said that there was a strict law which forbade speaking on those occasions, but that it, like other laws, could be violated, and he addressed him in charming and graceful words to which he was naturally bound to reply. Then that morning he had been to the Middle Temple, where he had seen the barristers, at luncheon in their hall, and had again been received with cordiality. That night it was Sir F. Jeune, who rose to propose a toast in his honour. He rose in the midst of the Judges of England and the colonels at the table of the Lord Mayor of London.

There can be no better proof of the high respect in which law and the legal profession is held in England.

MAETRE LABOURI'S ATTITUDE AT THESE PUBLIC RECEPTIONS will be best understood from the concluding lines of his speech.

Now that he was about to leave them, his true friends and dear comrades, he would like to reiterate that which had rendered the welcome precious was the fact that he was here as a simple citizen, a private man, and an advocate and the liberty of an advocate was such that he could rise in the midst of the advocates of another country knowing that he would not utter a word or even raise a thought which would be regarded as in any way inimical to the love which every true citizen had for his country, when that country was one of freedom and justice.

#### COULD PRIVATE ASSOCIATIONS RANK AS CONSTITUENCIES.

The revised Regulations of 1899 issued under 55 and 56 Vict., C. 14, by the Government of India for the election of members of the Bengal Legislative Council are in some respects a constitutional curiosity. The latest in this respect is Reg. II, D., which proposes that in Bengal the landholders might elect a representative for the Council through the medium of some association or associations that the local Government may from time to time nominate on this behalf. The local Government has, of late, in supercession of a seat formerly reserved for a group of *mofussil* municipalities, called upon a private association of persons in this city to elect a member on behalf of the land-holders of Bengal. The right of this association to elect a member on behalf of the landlords is being questioned. It is said that there are many members in that association who do not pay a pice of land revenue or

own any revenue-paying land and yet they are now through this new indulgence of the Government entitled to elect a member on behalf of the land holders of Bengal who are a very large class and who are insufficiently represented in that body. A further source of anomaly is said to be that there is a class of members belonging to this association who only own land in this town, to which the Bengal Tenancy Act, does not apply and it is urged with considerable force that it is not fair that they should take part in the election although they may not be governed by the same laws. Further, that the interests of the landlords in Calcutta are already sufficiently represented in Council by the member for the Calcutta Corporation and the new seat created by the Reg. 1899 must be meant for land-holders owning land outside Presidency town.

Without pronouncing upon the merits of such contentions, we may say, that we are certain of one thing and that is, that no private association or body of men can on any principle be raised into constituencies. The reason is simple enough. Every association not incorporated either by charters or by or under any statute, is more or less an informal body. No legal check can be exercised over their action or mode of conducting business. Not being incorporated under the law they are free to alter their rules or to deviate from them or indulgences without any risk of their action being called into question in a Court of law and of being declared *ultra vires*. This in itself, we venture to think is sufficient reason why private associations should not be converted by the Government into an electorate. "Legislation by rules" is a growing evil in India and this is but an instance how such rule may run counter to the fundamental principles of law and legislation.

Apart from general principles we consider it but just that the revenue paying zemindars of Bengal should protest against a rule that empowers the non-revenue paying members of any particular association to have a voice in the election of their representative. It is still more hard on them that the membership of an association which can be secured, as they allege, on a promise, not always followed by payment, of a subscription, should be clothed with powers to return members to the Provincial Legislature to the exclusion of thousands of people who actually pay, perhaps, hundred times more in land-revenue under the penalty of sunset-laws. Such land-holders are scattered all over this Presidency. They do not care nor is it convenient to them to become members of associations situate in Calcutta. As for the few who happen to be members, what guarantee is there against any powerful clique swamping them by admitting or recognising as members, as many "gentlemen of Indian origin as may be desirous of promoting their objects?" No land but mere "Indian origin" being the only qualification that is

said to be required for becoming a member of the association. Such being the status of the electorate which now lays claim to represent the land-holders of Bengal, though many of the prominent members of that community are known to disclaim any connection with it, it would be no wonder if the election would end in a fiasco.

Be that as it may, it is to be deplored that the Executive Government should play in this manner with Parliamentary Statutes which were seriously intended for the reconstitution of the Indian Legislatures, partially though it be, on a representative basis. If, however, what has been done by the Bengal Government, is now too late to be undone, we would urge on the Government to avoid its repetition in the future and to take the earliest opportunity of amending Reg. II, D. of the Regulations of 1899 on the lines that the Government of Bombay has adopted for securing representatives of land-holders in that Presidency.

The Bombay Regulation which seems to us to be far more reasonable in this respect, provides by Reg. D (i) that one member is to be returned in the local Council by the Sirdars of Deccan as contained in a list prepared in conformity with a Government Resolution defining the qualifications requisite for the exercise of the franchise. Then in a second seat in the same Council is allotted Reg. II, D (ii) to land-holders of Sind and the requisite qualification of a zemindar voter is that he must pay not less than Rs. 1,000 annually as ordinary land revenue. If the Bengal Government could confer on the zemindars of this Presidency franchise on some similar basis there will be no scope for any fiasco. Otherwise it is difficult to say what evil fruit may grow from the seeds of dissension that the Government may have unwittingly sown by the adoption of the present course.

### English Notes.

**CHANCERY DIVISION.**—*In re THE RHODESIAN PROPERTIES, LIMITED.* Before Mr. JUSTICE WRIGHT. 12th June 1901.

*Solicitor, his retaining fee—Winding up of company.*

The articles of Association of the above company *inter alia* provided, that Messrs. Birchall shall be the solicitors of the company at an annual retaining fee of 100 guineas. Mr. George Birchall giving his address the same as that of the solicitors presented a petition for the winding up of the company. The debt alleged to be due to him was made up of among others a fee which he credited as '£105 retaining fee to 1901.'

For the company the debt was disputed, its insolvency was denied, and objections were taken also to the impropriety of procedure.

The learned Judge was of opinion that the action

of the solicitor was an abuse of the process of the Court. The action of the solicitor in embodying in the articles of association such an unusual clause for his own benefit did not meet with the approval of the Judge; before doing so he should have explained to the Directors and possibly to the shareholders and given them an opportunity of taking independent advice. He doubted whether the solicitor was entitled to the retaining fee he claimed, and he was not satisfied that the insolvency of the company was proved; the petition must be dismissed.

*Mr. S. Smith for the Petitioner.*

*Mr. Butcher, K. C., and Mr. Cartmell for the Company.*

*Decision in favour of the Company.*

• C. 4V. A.

### Notes of Cases.

(The important ones to be fully reported hereafter.)

#### PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH

1901.

• 20, June.

BABU GUNGA BAKSH SINGH,  
Plaintiff, Appellant,

v.

BABU DALIP SINGH and others,  
Defendants, Respondents.

*Act XIV of 1891, sec. 8.*

This was an appeal from a decree of the Additional Judicial Commissioner of Oudh dismissing the Plaintiff's appeal to him.

*Mr. Deyrugther* for the Appellant submitted that under Sec. 8, Act XIV of 1891, the Additional Judicial Commissioner had no jurisdiction, sitting alone, to hear the appeal, it should have been heard by him and the Judicial Commissioner sitting together.

*Mr. Mayne* for the Respondents admitted that that appeared to be so.

During the course of the arguments 4 L. A., p. 178, and *Ex parte Anderson* (L. R. 5 Ch. App. 473) were mentioned—also that no costs were allowed by their Lordships.

• A discussion then took place whether their Lordships should hear the appeal granting special leave to Appellant and remand the case for trial by a proper Court of Appeal.

In the result their Lordships gave judgment discharging the decree of the Additional Judicial Commissioner and remanding the cause to be tried by a properly-constituted Court of Appeal.

C. W. A.

## PRIVY COUNCIL.

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.  
1901.

18, June.

RADHA KRISHN DAS,

Appellant,

v.

RAI BISHUN CHAND,

Respondent.

*Civil Procedure Code (Act XIV of 1885), secs. 595, 596 and 600—Leave to appeal to the Privy Council—Value of appeal—Case under Rs. 2,000.*

This was an appeal against the decision of the High Court of Allahabad, which reversed the decision of the Subordinate Judge of Benares.

Mr. Mayne for the Appellant.

Mr. A. J. Wallach for the Respondent.

Mr. Wallach took a preliminary objection on the ground that leave for appeal has been granted under sec. 596 of the Code of Civil Procedure, although the amount in question and the subject-matter was under the value of Rs. 10,000, that is to say, two thousand rupees.

The petition for leave to appeal contains the following paragraph:—

‘That though the valuation of the appeal is below Rs. 10,000, it involves substantial questions of law and fact.

‘The Petitioner being desirous to appeal to Her Majesty in Council, humbly prays that this Hon. Court may be pleased to grant certificate under sec. 596 of the Code of Civil Procedure for the following grounds.’

Thereupon two of the Judges of the High Court made the following order:—

‘Let certificate issue, that the case is a fit one for appeal to Her Majesty in Council.’

In the application for leave to appeal the same Judges certified—

‘That though the valuation of the case is below Rs. 10,000, yet as regards the value and nature of the case, it fulfils the requirements of sec. 596 of Act No. XIV of 1882.’

Mr. Wallach submitted that leave to appeal should have been asked for under sec. 595 (c) and sec. 600 of the Civil Procedure Code.

Sec. 595 (c): “An appeal shall lie to Her Majesty in Council from any decree, when the case as herein-after provided is certified to be one fit for appeal to Her Majesty in Council.”

Sec. 600: “Every petition under sec. 595 must state the grounds of appeal and pray for a certificate either that as regards amount or value and nature, the case fulfils the requirements of sec. 596 or that it is otherwise a fit one for appeal to Her Majesty in Council.”

The circumstances of this case did fulfil the requirements of sec. 596, and the certificate granted by the High Court was contradictory in itself. The High Court ought to have granted a certificate under secs. 595 (c) and 600, i.e., that although

the amount is under Rs. 10,000 the case is otherwise a fit one for appeal to Her Majesty in Council.

*Banarsi Parshad v. Kashi Krishna Narain and another* (L. R. 27 I. A. 11).

Mr. Mayne.—A mistake was made by the Registrar—it is a clerical error and should have been sec. 595.

The mistake is not such a one, that the Appellant should be debarred from being heard.

LORD DAVEY delivered their Lordships’ judgment to the following effect:—The application for leave to appeal “is made under sec. 596 (reads the section). That section states clearly that the amount in question must be Rs. 10,000 or upwards. In this case the amount is Rs. 2,000. The case cited and decided by the Board is quite clear.” It is true that by secs. 595 and 600 an appeal may be granted, if the High Court certifies that the case is fit for appeal “and otherwise,” i.e., when not meeting the conditions of sec. 596.

That is clearly intended to meet special cases such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process, which could not be performed without special exercise of that discretion, evinced by the fitting certificate. The certificate runs:—

“That though the valuation of the case is below Rs. 10,000, yet as regards the value and the nature of the case, it fulfils the requirements of sec. 596 of Act No. XIV of 1882.”

It does nothing of the kind, because the value and nature of a case under sec. 596 must be Rs. 10,000 or upwards.

In granting the certificate the Judges of the High Court performed a ministerial act, and they did not use their judicial functions and discretion in granting the certificate as they ought to have done under sec. 600.

And under the circumstances their Lordships are of opinion that the preliminary objection taken is a good one, they will humbly advise His Majesty to dismiss the appeal.

The Appellants are ordered to pay costs.

C. W. A.

Appeal dismissed.

## CALCUTTA HIGH COURT.

## [ORDINARY] ORIGINAL CIVIL JURISDICTION.

In the matter of sec. 622 of the Civil Procedure Code and

SALE, J.  
1901.  
25, June.

In the matter of Interpleader  
Suit No. 6493 of 1901  
MILLIE AUGUSTA SARA SHARD,  
Plaintiff,

RIDOO CHUNDER NUNDY  
and others, Defendants.

*Civil Procedure Code (Act XIV of 1885), sec.*

622—*Irregularity—Decree—Trustee—Decree against trustee—Execution against trust property.*

This was an application under sec. 622, Civil Procedure Code, to set aside an attachment issued under a decree of the Small Cause Court, dated the 16th January 1901. The applicants were Laura Elizabeth Madden and Millie Augusta Sara Shard and the circumstances under which the application was made are as follows:—Mrs. Madden was the proprietress of the Adelphi Hotel, and prior to her marriage with the Defendant, she executed a deed of settlement rendering the hotel a trust property to be dealt with under the settlement. The trustee originally was a Mr. Brown, and on his retirement the Defendant, Lieutenant Madden, was appointed trustee in his place. The Plaintiffs instituted the present suit in the Small Cause Court for the recovery of the price of goods supplied to the Adelphi Hotel against Lieutenant Madden both in his personal capacity and also as trustee under the deed of settlement, and in their plaint after setting out the execution of the deed of settlement, the Plaintiffs proceeded to state:—"That in the ordinary course of business at the request of the manager for the time being of the business, who was duly authorised by the Defendant on that behalf they supplied and delivered to the hotel on various dates between the months of February and July 1898 and in the months of May and June 1900, miscellaneous stores of the aggregate value of Rs. 794-4-9." They then went on to claim interest and stated that demand had been made for the value of those goods. No appearance was entered on behalf of the Defendant, and on the 16th January 1901 the Registrar passed a default decree in the presence of Mrs. Madden.

Under an arrangement come to between the Plaintiffs and Mrs. Madden, the latter paid to the Plaintiffs Rs. 200 on the date of the decree and agreed to pay the balance of the decree by monthly instalments of Rs. 100. Two months after this decree Lieutenant Madden retired from the trust and Mrs. Shard, one of the present applicants, was appointed trustee in his place.

On the failure of Mrs. Madden to pay two instalments the Plaintiffs applied for execution of their decree and in execution certain billiard tables belonging to the Adelphi Hotel were attached by the Small Cause Court. Mrs. Shard thereupon filed a claim as trustee which was heard before the Chief Judge as an interpleader suit and was dismissed by him with costs. The present applicants thereupon made this application under sec. 622, Civil Procedure Code.

Mr. Sinha (Mr. Bell with him) shewed cause:—Mrs. Madden was not a party either to the original suit or to the claim case. She has no *locus standi* in this matter and cannot be heard.

The Chief Judge has found that the decree was against Lieutenant Madden as trustee, and the new trustee, Mrs. Shard, was bound by it. There can

be no doubt that the decree was against Lieutenant Madden both as trustee and in his personal capacity. Even if the Chief Judge was wrong on that point, that is not a matter that can be dealt with by this Court under sec. 622, Civil Procedure Code. Then Mrs. Shard was not entitled to file a claim. She is in the same position as Lieutenant Madden having succeeded him as trustee, and a representative of a judgment-debtor cannot file a claim with regard to any property attached.

Mrs. Madden appeared in person to support the rule.—The property attached is trust property and cannot be attached in execution of this decree. The decree was against Lieutenant Madden personally. This Court, as a Court of Equity, would attempt to uphold the intentions of the settlor as regards the trust. It was never her intention that the business should be swallowed up by her creditors. They can recover their money, if due, from the trustee, and the trustee would be entitled to recover it from the estate, unless something was due to the estate from him. That cannot be decided in this suit. As to her position the Court would add her as a party now. The case of *Johnson* (15 Ch. D. 555) is in my favour.

Held.—That technically Mrs. Madden has no *locus standi* in these proceedings, but that does not prevent the Court from disposing of this application on its merits, since Mrs. Shard has a right to bring the matters stated in her petition before this Court, and to ask for an order thereon. This does not mean that Mrs. Shard has any better right to make the present application than the judgment-debtor himself would have had, if he had continued to be the trustee.

That no decree could under the circumstances have been made against the judgment-debtor other than a personal decree.

That under the circumstances of this case, before a decree can be obtained which could be executed against the trust property, it would have to be shewn, *first*, that the trust property under the terms of the settlement was devoted to the purposes of the business of a hotel; and, *secondly*, that the circumstances were such that the Defendant as trustee would be entitled to be indemnified by the trust property to the extent of the claim and that the Plaintiffs as creditors of the hotel business were entitled to stand in the shoes of the trustee in respect of the indemnity and to be recouped out of the trust estate.

The more fact that the trustee, in carrying on the business of a trust, had rendered himself personally responsible for the business debts would of itself give creditors a right to proceed against the trust property. See *Strickland v. Symons* (L. R. 26 Ch. D. 217); *In re Johnson, Shearman v. Robinson* (L. R. 15 Ch. D. 548); *Roybould v. Turner* (L. R. [1900] 1 Ch. 199) referred to.

That the trust properties could not be attached

in execution of the decree and the attachment of the trust property was an irregularity of procedure which would come under sec. 622, Civil Procedure Code.

Messrs. For and Mundul, Attorneys for Ridoy Chunder Nundy and ors.

S. R. D.

Application allowed.

### [TESTAMENTARY AND INTESTATE JURISDICTION.]

HARINGTON, J.

1901.

1, June.

In the goods of ARADHON&Y  
DONSEE, deceased.

*Succession duty when payable—Court-fees Act (VII of 1870, as amended by Act XI of 1899), sec. 19 (1).*

The deceased who was governed by the Bengal School of Hindu Law died on the 1st day of July 1897 intestate leaving her surviving 4 sons and 2 daughters and certain Government promissory notes which were given to her by her sons at the time of the partition and division of the moveable properties amongst themselves to be held and enjoyed by her as a Hindu mother.

Since her death two of her sons and one daughter died. The application was made by the eldest son with consent of the representatives of one of the deceased sons for grant of letters of administration to him, the other surviving son and the widow of the other, deceased son refusing either to join in the application or to consent thereto though requested so to do.

Babu Peari Lal Halder for the applicant submitted that as he apprehends opposition to the application for grant of the letters of administration to his client from the parties who have refused to join, he would at the first instance ask for citation to be issued on them. He further submitted that inasmuch as he does not at the first instance ask for grant of letters of administration the payment of the succession duty which is payable under sec. 19 (1) of the amended Court-fees Act before any order for grant can be made may be delayed till the time comes for making the actual order for such grant.

*Held*—That the citation do issue to the parties who refused to join and that the payment of the stamp duty be delayed till the time comes for making the order for grant of letters of administration.

The duty is payable before the order for grant of probate or letters of administration can be made, but not necessarily payable at the time of the application for such grant.

Messrs. Banerjee and Halder, Attorneys for the Applicant.

K. K. D.

### [CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 119 of 1901.

GHOSH, J.

TAYLOR, J.

1901.

Heard, 26, June.

Judgment, 9, July.

KEDAR NATH CHATTERJEE,

Appellant,

v.

THE KING-EMPEROR, Respondent.

*Penal Code (Act XLV of 1860), secs. 24, 25, 467.*

471 - Forgery—Using a forged document knowing it to be forged—"Fraudulently" and "dishonestly," meaning of—"False document"—Suit upon a bond for enforcement of payment—Absence of intention to cause wrongful loss if any defence—Intention to deceive.

This was an appeal preferred against an order of the Sessions Judge of Birbhum, convicting the Appellant Kedar Nath Chatterjee of the offence of using as genuine a forged document knowing it to be forged under sec. 471 read with sec. 467 of the Penal Code and sentencing him to two years' rigorous imprisonment.

The facts of the case were shortly as follows:—One Ram Chandra Mukherjee executed in favour of Mohesh Chandra Banerjee a mortgage bond on the 9th of Falgun 1290. A suit was brought upon this document by the Appellant Kedar Nath Chatterjee against the heirs of Ram Chandra Mukherjee, he being then dead, upon the ground that he was the beneficial holder of the bond, Mohesh Chandra Banerjee being only his *benumdar*. It was, however, found, in the course of the trial of that case, that the bond produced was not the true document executed by Ram Chandra, but rather a forgery, and accordingly that suit was dismissed. The Appellant was thereupon indicted for the offence of using as genuine a forged document, knowing it to be forged. It was conceded on all hands that Ram Chandra Mukherjee executed on the 9th Falgun 1290 a mortgage bond of Rs. 199, but the question raised was whether the document that was produced by or on behalf of Kedar Nath Chatterjee in the suit instituted by him for the enforcement of the said bond was the true document. The document that was produced purported to be an exact *fac simile* of the original mortgage deed, with all the endorsements of registration on the back thereof, as also the seal of the Registrar. But there was internal evidence afforded by the document itself or rather by the endorsements appearing on the back of it that it could not be the true document which was executed by Ram Chandra Mukherjee and subsequently registered before the Sub-Registrar of deeds; and there was evidence to show that the document in question was a forgery. The case for prosecution was that the original document executed by Ram Chandra Mukherjee was paid up and discharged and the document then torn up into two pieces, and that the Appellant Kedar Nath Chatterjee having managed through some of his people to get hold of this torn document, prepared the document in question by forging the writings and the endorsements therein.

The Sessions Judge was unable to hold upon the evidence such as it was adduced on behalf of the prosecution that the case, set up by them that the original document was paid up and discharged, was satisfactorily proved.

In appeal it was contended on behalf of the Ap-



pellant that upon the finding of the Sessions Judge it must be taken that the money covered by the mortgage bond was due to Kedar Nath Chatterjee, and therefore the document produced by him, though it might be a forgery, could not be regarded as a "false document" within the meaning of sec. 466, I. P. Code, and that therefore the Appellant could not be held guilty of fraudulently or dishonestly uttering a forged document.

*Held*—That the intention to cause wrongful loss to another and a deception, actual or intended, are not the necessary ingredients of the intent to defraud.

That there is a real distinction between the meaning of the terms "fraudulently" and "dishonestly."

That the word "fraudulently" denotes an intention to deceive.

That though the act of the Appellant in producing a forged bond in the suit that he brought was not proved to be dishonest within the meaning of sec. 21 of the Penal Code, yet it was fraudulent, inasmuch as it was done with the intent to commit a fraud upon the Court, viz., to make that Court believe that he was entitled to recover money upon the basis of the particular document then produced.

*Queen-Empress v. Abbas Ali* (I. C. W. N. 255; s. c. I. L. R. 25 Cal. 512); *Lalit Mohan Sarkar v. Queen-Empress* (I. L. R. 22 Cal. 313); *In re Rhunum Kwee* (I. L. R. 9 Cal. 53) referred to.

*Queen-Empress v. Sheo Dayal* (I. L. R. 7 All. 495) dissented from.

Mr. P. L. Roy, with him Babu Nalini Ranjan Chatterjee, for the Appellant.

Babu Atulya Charan Basu for the Crown.

H. P. C. Appeal dismissed.

#### [CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 473 OF 1901.

GHOSE, J.

TAYLOR, J.

1901.

Heard, 21, June.

Judgment, 9, July.

LALIT MOHAN MOITRA,

Petitioner,

MAHARAJA SURYA KANT

ACHARYA CHAUDHURI BAHADUR,  
Opposite Party.

*Criminal Procedure Code* (Act I of 1898), secs. 145, 526, 435, 439—*Charter Act* (24 and 25 Vict., Ch. 104)—*Letters Patent*, sec. 29—*Case* under sec. 145, *Criminal Procedure Code*, transfer of—*High Court*, power of, to transfer such cases—"Case" and "criminal case," meaning of, as used in the Code—*Whether co-extensive and interchangeable*—*Reasonable apprehension of bias in the officer trying a case*—*Expediency of transfer*—*Absence of real bias*—*Inconvenience to parties or witnesses*—*Previous law*.

This was a rule on the District Magistrate of Maldah to shew cause why the case under sec. 145 of the Criminal Procedure Code, pending in the file of the said District Magistrate, should not be transferred to Rajshahi or some other district.

In the present case this rule was obtained for the

transfer of a case pending before the District Magistrate of Maldah on the ground of the Magistrate having used certain words and expressions in the course of the investigation to the agent of the Petitioner, Lalit Mohan Moitra, calculated to create in his mind a reasonable apprehension that justice might not be done to him. It was alleged in the affidavits filed in this Court as also in a petition put in before the Magistrate on the 10th May 1901 that such words were in fact used by the Magistrate and further that the witnesses to be examined in the case on either side were witnesses who would come from near the property, the subject-matter of the dispute, and the means of communication between that part of the district of Maldah and the town were generally the same as between it and Rajshahi.

At the hearing of the rule, the District Magistrate submitted through a Deputy Magistrate an explanation in which among other matters he raised the question whether under sec. 526 of the Code of Criminal Procedure the High Court had power to transfer a case under sec. 145 of the Code to some other Magistrate. He relied upon the case of *Pandurang Gobind Priyari* (I. L. R. 24 Bom. 179).

The Advocate-General (Mr. J. T. Woodroffe) appeared on behalf of the opposite party, and raised the same question, and also contended that in the circumstances of the case it was not expedient to transfer the proceedings from Maldah to some other Magistracy.

Mr. Jackson for the Petitioner argued that the decision in I. L. R. 24 Bom. 179 was erroneously decided and that there was no warrant for the view taken by the Chief Justice of Bombay. He further contended that the High Court had power both under sec. 526, Criminal Procedure Code, as also under the Charter Act to order a transfer of cases under sec. 145, Criminal Procedure Code, which are undoubtedly criminal cases. He also urged that cases under secs. 107, 110, Criminal Procedure Code, were constantly transferred. The present case was, on the merits, a fit one which should be transferred.

*Held* (by GHOSE, J.)—That an investigation in a case under sec. 145 of the Code of Criminal Procedure is an "enquiry" within the meaning of sec. 4, cl. (k): *Satia Chunder Pande v. Rajendra Nath Bagchi* (I. L. R. 22 Cal. 198).

That the expression "criminal case" used in sec. 526 of the Code does not necessarily refer to some offence committed.

That proceedings under sec. 145 of the Code partake of the character of and may be described as criminal cases.

That the expression "criminal case," occurring in sec. 526, may be distinguished from a civil case, and that a criminal case is one over which a Criminal Court exercises jurisdiction.

That it is doubtful whether the Legislature meant to confer on the High Court the power by

sec. 526 of the Code, of making a transfer of a case other than those in which a person is charged with an offence.

That the High Court has the power to make an order of transfer of a case under sec. 145 of the Code, which a Magistrate has taken cognizance of, under its general powers of superintendence under sec. 15 of the Charter Act.

That if by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it would be expedient for the ends of justice to transfer the case from his file to that of some other officer competent to try it, though there may not be any actual bias, *Queen-Empress v. Bhairab Chunder Chuckerbatty* (2 C. W. N. 65 : s. c. I. L. R. 25 Cal. 727) ; *Dupeyron v. Driver* (I. L. R. 23 Cal. 495).

That a transfer in this case was expedient for the ends of justice, and that the transfer would not cause any real hardship to any of the parties concerned or to their witnesses.

*Held* (by TAYLOR, J.)—That the two expressions “cases” and “criminal cases” are not, in the Code of Criminal Procedure, co extensive, and that the phrases are not used indiscriminately or interchangeably.

That the phrase “criminal case” is intended to be used in a limited sense and not to apply to every case cognizable by a Criminal Court.

That it is doubtful whether the High Court has the power under sec. 526 of the Code to transfer cases which do not relate to matters which may strictly be described as “criminal,” as relating to a crime or offence under the law.

That the High Court has such power under sec. 29 of the Letters Patent, where the expression “criminal case” appears without the distinction which apparently exists in the Code of Criminal Procedure in respect of cases tried by a Criminal Court as opposed to civil cases.

*Mr. Jackson*, with him *Babu Sarat Chandra Khan*, for the Petitioner.

*The Advocate-General* (*Mr. J. T. Woodroffe*), with him *Babus Dwarka Nath Chuckerbatty* and *Joy Gopal Ghosha*, for the Opposite Party.

*Rule made absolute : Transfer ordered.*

H. P. C.

## [CIVIL APPELLATE JURISDICTION].

APPEAL FROM ORIGINAL ORDER.

No. 181 of 1899.

MACLEAN, C. J.

BANERJEE, J.  
1900.

RAJ NARAIN MOOKERJEE,  
Petitioner, Appellant,

Heard, 9, April.  
1901.

PHUL KUMARI DEBI,  
Opposite Party, Respondent.

Judgment, 8, July.

*Administration bond—Surety—Mal-administration*

*—Discharge of surety—Probate and Administration Act (V of 1881), sec. 78 Indian Contract Act (IX of 1872), sec. 130.*

This was an appeal against an order of B. L. Gupta, Esq., District Judge of Hughli, dated the 29th March 1899, dismissing the Petitioner's application for leave to withdraw from a surety bond executed under sec. 78 of Act V of 1881.

Phul Kumari Debi, the Opposite Party, took out letters of administration to the estate of her mother Nistarini Debi, deceased, in 1895. On the 29th May 1895 the Petitioner, Raj Narain Mukerjee, who was the brother of Phul Kumari, executed a surety bond under sec. 78 of the Probate and Administration Act. On the 25th of February 1899 Raj Narain made an application to the District Judge of Hughli by whom the letters of administration had been granted, alleging that the administratrix was wilfully wasting the estate and praying that the bond might be cancelled and he might be relieved from all future liability thereunder. The District Judge did not enquire into the charge of mal-administration but summarily rejected the application on the ground that there was no statutory provision to justify such an application, and that a person who had executed a surety bond under sec. 78 of Act V of 1881, must continue liable till the whole estate was administered.

The Petitioner appealed to the High Court, and on the 9th April 1900 their Lordships remanded the case for investigation into the charges of mal-administration. On the 16th August 1900 the District Judge found on the evidence that the charge of wilful mal-administration was fully established. This finding was sent up to the High Court, and no objection was taken to its correctness by either party. The case was then argued upon the point whether or not the Petitioner was entitled to withdraw from the surety bond.

*Held*—That when upon grant of letters of administration a surety has executed a bond under sec. 78 of Act V of 1881, he is entitled at any time to withdraw, upon proof that the administratrix is mal-administering the estate.

That sec. 130 of the Indian Contract Act is applicable to the case of a surety bond executed under sec. 78 of Act V of 1891.

That sec. 78 of Act V of 1881 is not limited in its operation to the execution of a surety bond when the letters are first granted, but is also applicable if during the continuance of the letters, the bond becomes inoperative by reason of the death of the surety or its cancellation from some other cause.

*Burgess v. Eue* (L. R. 13 Eq. Ca. 450), *Baisoin v. Chokshi* (I. L. R. 19 Bom. 245) referred to.

*Dr. Ashutosh Mukerjee* and *Babus Jnanendra Nath Bose* and *Biraj Mohun Mozumdar* for the Appellant.

*Babu Saroda Churn Mitter* and *Babu Benode Behari Mukerjee* for the Respondent.

*Appeal allowed.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, JULY 22, 1901.

[No. 35]

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#### REPORTS (See Index.)

THE BAR ENTERTAINED MR. JUSTICE STANLEY TO a farewell dinner at the Saturday Club on Saturday, the 20th of July last. This is a rare honour and it testifies to the popularity of the judge with the Bar.

WE ARE GLAD TO FIND THAT THE HON'BLE THE Chief Justice has taken note of the complaint of the profession to which we gave expression, namely, that there should not be a fixed body of examiners for the admission of attorneys. This is the first time after years that a departure has been made in this respect and some fresh blood introduced into the old body. The new examiners are Mr. St. John Stephen and Mr. J. G. Woodroffe in place of Mr. Miller and Mr. Allen respectively, now absent from India, and Mr. H. C. Eggar, in place of Mr. Stokoe, who has resigned. Mr. W. R. Fink, the Registrar, and Babu Gonesh Chunder Chunder will continue to act as examiners.

WE DEEPLY REGRET TO RECORD THE PREMATURE death of Mr. Manik Lal Dutt, B. Sc., Bar-at-Law. He was a distinguished scholar both of the Calcutta and the London Universities. It is a great pity that this country does not offer any opportunities for young men with more than ordinary scientific attainments, and naturally the Bar is fast becoming the burial ground of a large number of promising young men of this country. Mr. Dutt's first struggles had long been over and he was getting a

fair amount of work, but his career would surely have been one of much greater usefulness if he had been given early opportunities to toil in a laboratory and had not to fall back on the Bar for a living. He leaves a widow and a child to whom we convey our sincerest condolence.

IT IS ALWAYS REFRESHING TO GO THROUGH THE PAGES of the Journal of the Society of Comparative Legislation. The June number, which is the first of the new series for 1901, maintains the scientific spirit and also the high standard on which the journal is conducted. Minds steeped in legal technicalities will often find relief in going through its pages where laws are viewed on the broad basis of general principles and are considered with special reference to their service or disservice to mankind. Researches in criminal law continue to find place in its pages, and the laws and legislation of India engage no mean share of its attention.

MR. CRACKANTHORPE'S ADDRESS ON CRIME AND Punishment from a Comparative Point of View, delivered before the Society in February last and noticed by us at the time, is now published in the pages of the Society's Journal. His prefatory sketch tracing the changes in the ideas of crime and punishment and its effect on the treatment of youthful offenders, forms by far the more interesting portion of the address. The rest of it, which contrasts the effects of previous convictions on punishment under different systems of law and deals with other miscellaneous matters, though not treated in the same systematic manner, yet makes out a sufficiently strong case for the necessity of an International Commission for arriving at some common principles of punishment.

## CRIME AND PUNISHMENT.

The primitive idea of punishment in European jurisprudence was revenge. The person wronged had the right of avenging the wrongs with the assistance of the State. Fitz James Stephen referring to this stage of English jurisprudence says: "Crimes were regarded as private wrongs, revenged rather than punished by those who were injured by them, first by private war, afterwards by

summary execution, and then by a public demonstration of justice, slowly organized in such a way as to bear many traces of a rough system."

When society was sufficiently organised and law and order fairly established, crime ceased to be regarded as a matter of mere personal concern and became a matter of greater concern to the State as well. The practice of avenging private wrongs was neither conducive to public peace nor to public morals, and in the interest of both it was considered preferable that the State should punish criminals instead. Criminals are always a source of danger and are often a standing menace to society and in their repression lay the protection of community. Punishment thus in course of time came to be regarded more in the defensive light than in the offensive. Marquese Beccaria of Milan in his famous work published in 1770 propounded that the only true measure of crime was the *damage done to the community*. Although by this time punishment had shifted its centre from the standpoint of personal retribution to that of social defence, yet it displayed little consideration for the criminal concerned. Beccaria maintained that the intention of the accused was of no moment, the result of his act was all in all. Or in other words crime was regarded by him only in the *objective* light. Beccaria's theory ruled the civilized world up till late. Bentham was influenced by it and it may be doubted whether even Fitz James Stephen ever recovered from its effects. According to the latter "the Criminal Law proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies the sentiment by inflicting punishment which express it." This point of view he regards as "healthy, natural and deserving of encouragement." Needless to say that this displays little pity for the criminal himself.

But contemporaneously with this writer, scientific knowledge and philosophical thought were fast superseding historic method of reasoning and viewed in this new light crime and punishment appealed to the human mind in altogether a new aspect. Pellegrino Rossi's reformation theory had by this time almost superseded Beccaria's theory of social defence.

Social defence, according to Rossi, was but a secondary consideration, the primary being restoration of public order and the reformation of the criminal. The difference between the two schools chiefly consists in the fact that the former regarded crime merely in the *objective* light and the latter in the *subjective* light as well.

The French Code, which was influenced by the former, views each crime as such and even attempts to commit crime are treated in it with the same rigour as the crimes themselves, and accessories are punished as if they were principals. The Belgian Code which has been more influenced by the latter, makes a distinction in each case, and makes every allowance for extenuating circumstances all round.

A still later development in the subjective view

of crime must be ascribed to the influence of the evolution theory.

MM. Tarde and Lecassagne in France, M. Prinz in Belgium, M. Fornitzki in Russia are the Chief exponents of a school who maintain that a criminal is a complex product of the propensities he has inherited and the atmosphere in which he has been brought up. They, therefore, contend for a limited responsibility, which lies half-way between plenary free-will and complete mental alienation.

A still later development are the theories of the Italian Schools headed by Lombrose and Garofalo. The former is an anthropologist who lays principal stress on the physiological peculiarities of the criminal, while the latter insists more on the influence of social factors of life.

In Germany crime and its causes form a separate department of study of which Professor List of the Berlin University is the chief exponent. In France a society after which the English Society of Comparative Legislation takes its name is doing like its sister institution in England most valuable work in this direction.

With the advancement of knowledge about crime and criminals the idea is gaining ground throughout the civilized world that, perhaps, the educative method is likely to do more lasting good than the purely punitive.

#### SOME FACTS ABOUT THE KING'S CORONATION.

Whenever Edward is crowned it will be the duty of Frank Seaman Dymoke, hereditary king's champion, to step forward, duly equipped, to challenge all who are bold enough to deny the king to be the lawful sovereign. The office of king's champion dates back to the coronation of William the Conqueror, who conferred upon Lord Marmion, of Fontenoy and Marmion, the title of king's champion, and with it the manor and barony of Scirevelby, in Lincolnshire. The house and lands were held by "barony and grand serjeantry," the terms of the tenure requiring that at the coronation "the lord of the manor, or some person in his name, if he be not able, shall come well armed for war, upon a good war-horse, into the presence of our lord the king, and shall then and there cause it to be proclaimed that if any one shall say that our lord and king has no right to his crown or kingdom, he will be ready and prepared to defend with his body the right of the king and kingdom against him, and all others whatsoever." The title of king's champion descended in direct line from the lords of Fontenoy until the reign of Henry IV., and then through the failure of heirs male the championship passed into the Ludlow family by the marriage of one of Marmion's daughters with Sir Thomas de Ludlow, whose granddaughter married Sir John Dymoke, in the reign of Edward III. The title and manor has remained in the Dymoke family to the present day.

Though the champion has not publicly entered Westminster Hall to make his challenge, since, the coronation of George IV., he was ready within the precincts of the hall, at the coronation of William IV. and Victoria, in case he should be called on to fulfil the terms of his tenure. In both cases he had his white horse saddled and his armor ready to don at an instant's notice.

When the coronation of George IV. took place in Westminster Abbey, the ill-used Queen Caroline attempted to force an entrance into the Abbey to interrupt the ceremony; she reached the door leading to the cloisters, but found it locked.

She knocked on it for some time but finally had to retire. More than one influential Englishman asked permission to challenge the King's right to be crowned without the Queen, but she declined to allow the sacrifice, for it would have meant imprisonment or death to the challenger.

Many changes have been made in the title of the sovereign of England as the centuries passed. In the days of the Heptarchy was first heard the title "*Rex gentis Anglorum*," but the style King of England was first used by Egbert in 828. King John, at the end of the twelfth century, was the first to use the pronoun "we" in his communications with his subjects. The monarch is still designated "Defender of the Faith," a title conferred by Pope Leo X upon Henry VIII, in recognition of a theological polemic against Luther which the much-married king had written. When Henry renounced Romanism and declared that the Pope had no power or jurisdiction over him, Pope Paul III, revoked the permission to use the title, but the King, much annoyed, caused an act of Parliament to be passed (35 Henry VIII., cap. 3), which annexed to the Crown of England for ever the style of "Supreme Head of the Church" and "Defender of the Faith."

The best authorities, such as the "Encyclopædia Britannica," state that it is under the above-mentioned act that the title of *Fidei Defensor* has ever since been used, but that statement cannot be correct, for the 1 and 2 Philip and Mary, cap. viii., sec. 20, repealed the entire act of King Henry in the following emphatic words:

"Act for the ratification of the King's Majesty's style shall henceforth be repealed, frustrate, void, and of none effect."

The title of *Fidei Defensor* has never been revived in any English Act of Parliament, and must, therefore, still depend for its right to be used on the Pope's bestowal. When Mary came to the throne, Cardinal Pole was sent as Papal Nuncio, and in pronouncing the absolution over the kneeling King, Queen and entire Parliament, he removed, in the Pope's name, all "censures, judgments and pains," and it was soon evident that it was held the Pope's bar to the title was one of the censures removed. It was customary in those times to print the whole of the acts of a session in one continuous roll, and preface them with the full style and title of the King. In the preface to the acts of the very session in which the act of King Henry was repealed, the title cropped up, and in the preface to the acts of the second session the full titles of the monarch are set forth in these words:

"Acts made at a Parliament begun and holden at Westminster the one and twentieth day of October, in the 2 and 3 year of the reign of our most Gracious Sovereign Lord and Lady, Philip and Mary, by the Grace of God King and Queen of England, France, Naples, Jerusalem and Ireland; Defenders of the Faith; Princes of Spain and Sicily," etc.

It was Henry VIII. who first adopted the title King of Ireland instead of "Lord." It was not until the union of England and Scotland in the reign of Queen Anne that "Great Britain" came into use. When the act of union was passed and Ireland lost its legislative independence, it was ordered that the royal title should be: "*Georgius Tertius, Dei Gratia, Britanniarum Rex, Fidei Defensor*." This was the first time the long-prized title, "King of France," had been dropped, and this was only one hundred years ago (1801). On the 21st of January, 1837, Hanover was dropped from the Queen's style when she came to the throne, no woman, according to the Constitution of that country, being eligible to reign. Another change was made in 1876 when Queen Victoria was proclaimed Empress of India.

Certain isles and even towns still have the right to be mentioned in any proclamation which requires the king's signature, though this has not been insisted on except on very rare occasions. The proclamation of King Edward VII., "requiring all persons being in office or authority" to continue in the execution of their duties, specifies as the places to which this shall refer as: "Our United Kingdom of Great Britain and Ireland, Dominion of Wales, Town of Berwick-upon Tweed, Isles of Jersey, Guernsey, Alderney,

Sark or Man, or any of Our Foreign Possessions, or Colonies, or Our Empire of India."

The oath which the new king will have to take on his coronation is the one prescribed by statute (1 Will. and Mary, st. 1, c. 6.) with a slight modification on account of the disestablishment of the High Church. It had been found that prior kings had tampered with the oath, and there is in existence a copy of the oath sworn to by Henry VIII., interlined and altered with his own hand. To prevent any such changes in future the wording of the oath was established by statute.

He will take his place in a chair before and below the throne. Then the Archbishop of Canterbury, accompanied by the high officers of the State, presents him to the people to receive their homage, which is rendered by the boys of Westminster School. This is called "the recognition." Then follows the oblation of gifts on the altar; then the Litany is chanted, and the Communion office commenced. After the Nicene Creed the coronation oaths are taken.

The Archbishop of Canterbury will demand:

"Sir, is your majesty willing to take the oath?" To which Edward will reply: "I am willing." Then the Archbishop will put these questions, a printed copy of which, together with the necessary responses, will have been given to the king:

"Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the dominions thereto belonging, according to the statutes in Parliament agreed on, and the respective laws and customs of the same?"

The King: "I solemnly promise so to do."

"Will you, to your power, cause law and justice, in mercy, to be executed in all your judgments?"

"I will."

"Will you, to the utmost of your power, maintain the laws of God, the true profession of the gospel and the Protestant reformed religion, established by law? And will you maintain and preserve inviolably the settlement of the united church of England and Ireland, and the doctrine, worship, discipline and government thereof, as by law established within England and Ireland, and the territories thereunto belonging? And will you preserve to the bishops and clergy of England and Ireland, and to the churches there committed to their charge, all such rights and privileges as do, or shall appertain unto them, or any of them?"

"All this I promise to do."

The king then goes to the altar, and laying his hands upon the Gospels, takes the following oath:

"The things which I have heretofore promised, I will perform and keep, so help me God."

The king then kisses the book and signs the oath.

After the taking of the oaths comes the anointing and the vesting of sovereign with the Episcopal insignia, the alb, the stole and the pallium. The stole is the insignia of priesthood; only an Archbishop, or spiritual head of the church, can wear the pallium.

The spurs, sword of state, and the sceptre are next presented. The coronation follows and then the enthronement and homage. Lastly the Communion Office is completed. Should Alexandra be crowned queen consort she will be anointed, crowned and enthroned immediately after the king's enthronization is completed, and she will be conducted to her own throne on the king's left hand, the royal pair receiving the sacramental bread and wine together.

The coronation takes place in the Chapel of Edward the Confessor, Westminster Abbey, the king sitting on the original coronation chair, the queen consort on that made for the coronation of William and Mary.

The coronation chair has been in use for centuries. In the seat of the chair is the "stone of destiny" upon which the kings of Scotland were crowned since the beginning of the sixth century, and prior to which time it had been in use for the same purpose in Ireland for at least a thousand years, and as many claim, from the time it was taken into Ireland

from Bethel, where it had been set up by Jacob for a pillar. (Genesis xxviii, 18.) The history of the "stone of destiny" can be traced back clearly for two thousand years.

After his coronation the King is entitled to many privileges and perquisites, one of which is the right to the head of every whale caught on the coast of his kingdom. The tail goes to Queen Alexandra, the object of the division being to guarantee that the Queen's wardrobe shall be furnished with whalebone. The King is entitled to every sturgeon brought to land in the United Kingdom; a law which is evaded by astute fishermen taking the sturgeons to some foreign port and reshipping them to England. At the coronation and every anniversary thereafter the King is entitled to receive from divers persons a tablecloth, worth three shillings; two white doves, two white hares, a catapult, a pound of cummin seed, a horse and halter, a pair of scutelet horse, a curry-comb, a coat of gray fur, a nightcap, a falcon, two knives, a lance, worth two shillings, and from his tailor a silver needle.

When Henry VI. returned from the coronation in France, at the conduit in Cheap were formed "several wells—the Well of Mercie, the Well of Grace, and the Well of Pitee—and at each well a ladie, standing, administered the waters to all who asked, and these waters were found to be wine. About these wells were set various trees in full leaf and fruit, all hevvilie laden with oranges, almonds, pomegranates, olives, lemons, dates, quinces, blanderells, peaches, costards, wardenes and plums."

When Edward VI. was crowned he had to stop the procession for a considerable time to watch the antics of a foreign rope dancer whose rope was stretched from St. Paul's steeple downward to a great anchor near the gate of the Dean's house. The dancer came down the rope from the top of St. Paul's headformost, kissed the king's foot and then ran up again and turned somersaults and danced and performed for the space of half an hour.

When Queen Mary passed through the city for her coronation the Lord Mayor had engaged a Dutchman to stand on the weathervane on the top of St. Paul's steeple, holding in his hand a streamer five yards long, which he waved about. Then he stood on one foot on the weathervane and afterwards knelt down on it. The city paid him for this performance the sum of £16 13s. 4d.

At the coronation of Edward VII. it is not likely that ropewalkers or acrobats will be engaged by the City, but there is no doubt that brilliant illuminations and plenty of bunting will testify to the fact that though the queen may be mourned, a live king is of more advantage to trade than a dead queen. The queen is dead! Long live the king!—*Green Flag*.

## English Notes.

PROBATE AND DIVORCE DIVISION.—VALENTINE v. VALENTINE. Before the PRESIDENT 7th June 1901.

*Examination on commission of witnesses abroad before service of citation in the cause.—Costs.*

This was an application on behalf of the wife as an urgent one for the issue of a commission to examine certain witnesses in Canada.

The applicant was not aware whether the suit was going to be defended by the husband. The ground of the application was that the witnesses were connected with a criminal trial in Toronto; and there were reasons for believing that, if they were not examined at once, they would disappear. *Brown v. Brown* (33 L. J. P. & M. 203) was relied on.

The learned PRESIDENT granted the application at the wife's expense, remarking that at that stage he

could not make the husband liable for such expenses and reserving all questions regarding the admissibility of such evidence when the trial came on and also costs of the matter.

*Mr. Barnard* for the Petitioner.

C. W. A.

KING'S BENCH DIVISION.—THORNE v. CASSON. Before Mr. JUSTICE CHANNELL. 25th April 1901.

*Husband and wife—Dressmaker's bills—Husband's liability.*

The dressmaker Mrs. Thorne (trading at Brighton under the name Lucie Amott) sued Casson for price of costumes supplied to "Mrs. Casson" amounting to over £85. He was not married to "Mrs. Casson." Her case was that he had held "Mrs. Casson" out as having authority to pledge his credit; Mr. Casson denied that such was the fact and *per contra* alleged that he had made a sufficient allowance for dress to the lady in question and had forbidden her to pledge his credit.

The learned Judge observed in his summing up to the jury that the fact that the lady in question was not married to Mr. Casson did not alter the question of his liability. The case must be considered in the same light as if she were his wife. In the matter of dresses an arrangement was often made by the husband giving the wife an allowance and forbidding her to pledge his credit, and such arrangement had been recognized and given effect to by Courts of Justice; it did not matter whether he paid her the allowance, regularly or not. In the case of dealings with butchers, bakers and such tradespeople, that practice was not unusual with husbands; and where claims were made by such parties, the husband could not successfully resist the claim on the same ground. Further in the case of dressmakers the fact that ignorance was pleaded by Plaintiff regarding the directions given by the husband to the wife would be of no avail. It was settled law that in such case the husband could only be made responsible for his wife's acts in ordering goods in the same way that he could be made liable for the acts of any other agent under the ordinary agency law. Then there was still a further consideration and that was whether notwithstanding the directions not to pledge his credit, had the husband done anything to make the Plaintiff suppose that he was allowing his wife to pledge his credit, if so he would be liable. The jury should consider whether notwithstanding his injunctions not to pledge his credit he had so behaved himself as to entitle Plaintiff to believe that he had authorized the lady to pledge his credit.

The learned Judge commented on the evidence and jury found for Plaintiff. Stay of execution was granted.

*Mr. Rose Innes* for the Plaintiff.

*Mr. German* for the Defendant.

C. W. A.

*Verdict for Plaintiff.*

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL. Appeal from Oudh. *SUKH DEI v. KEDAR NATH AND OTHERS.* 22nd June 1901.

Three consolidated appeals.

LORD MACNAGHTEN to-day delivered their Lordships' judgment advising His Majesty to dismiss the appeals. The Appellants were ordered to pay one set of costs of the consolidated appeals to be apportioned between the Respondents in the discretion of the Registrar in the event of their not agreeing.

In the course of their judgment their Lordships observe that Appellants' counsel said everything that could be said in support of the appeals, "but there were no materials on which even a plausible argument could be based."

*Mr. Asquith, K. C.*, and *Mr. J. S. Miers* for the Appellants.

*Mr. Branson* for one of the Respondents.

*Mr. Degruyther* for the other Respondents.

C. W. A.

PRIVY COUNCIL. Appeal from Bengal. *HARRIS v. BROWN.* (5 C. W. N. cxx). 22nd June 1901.

SIR RICHARD COUCH delivered to-day their Lordships' judgment advising His Majesty to allow the appeal with costs.

*Mr. Asquith, K. C.*, and *Mr. Mayne* for the Appellants.

Respondents were not represented.

C. W. A.

## PRIVY COUNCIL.

[APPEAL FROM THE CALCUTTA HIGH COURT.]

LORD HOBHOUSE. DEBI PRASAD CHOWDHURY,

LORD DAVEY. Plaintiff, Appellant,

LORD ROBERTSON, " "

SIR R. COUCH. RANI RADHA CHOWDHURAI

1901. and others, Defendants,

27, June. Respondents.

*Special leave to appeal—Deposit of security.*

Petition states that Petitioner instituted this suit at Bhagalpore praying for a declaration that he was the next reversionary heir to one Shib Nag Chandi, the deceased husband of the first Respondent abovenamed, and that a certain *hebbanmah* executed by her in favour of the other Defendants-Respondents would be inoperative as against him after the widow's death.

Sub-Judge decided in Plaintiff's favour. On Defendants' appeal the High Court on 19th February 1900 allowed the appeal and dismissed the suit on the ground that Petitioner had not proved that he was the reversioner.

On the 14th August 1900 certificate was granted

that the case was a fit one for appeal to Her Majesty in Council.

On the 27th November 1900 on Petitioner's application, the usual time for making the deposit having expired, the High Court made an order enlarging the time for deposit to on or before the 1st December.

Petitioner being poor, and after several unsuccessful attempts, he succeeded in making arrangements for a loan from one Babu Badan Chand, and on 1st December Babu Tarini Prosunno Das, the son of Badan Chand, went to the office of the High Court with a vakil named Babu Lakshmi Narain Singh, and there produced before the Deputy Registrar the necessary sums of money and stated that he was ready to pay it over as soon as his father could procure a proper assurance from Petitioner, and an affidavit was presented same day of Tarini Prosunno Das supporting above facts, and a petition praying the Court that a further delay of one week from 1th December might be granted to perfect the security. That application was refused and the leave to appeal was struck off.

Petition stated that Petitioner had now made arrangements with one Babu Udit Narain Singh and Ram Bahadur Singh, who were ready to undertake all the expenses of the appeal and to prosecute it effectually and to make such deposits on such terms as His Majesty in Council may direct and prayed for special leave.

After hearing *Mr. Mayne* for Petitioner their Lordships granted leave to appeal on the understanding that usual security was deposited here with the Registrar within one month from this date.

*Leave granted.*

C. W. A.

## CALCUTTA HIGH COURT.

### TESTAMENTARY AND INTESTATE JURISDICTION

STANLEY, J.	}	In the goods of LUCHMINARAIN,
1901.		deceased, RAMRICK DAS,
1, July.		" "
		MUSKIT. BEEJEE COOMAR.

*Probate action—Receiver, discharge of—Grant of probate—Costs as against the impugnant—Costs occasioned by the appointment of a Receiver.*

This was an application for probate of the last Will and testament of the deceased abovenamed, in which a caveat had been filed by his adoptive mother, the abovenamed Defendant and which had been set down as a contentious cause. The case originally set up by the caveatrix was (1) that the Will was a forgery, (2) that the testator was not, at the time the Will was said to have been executed, physically and mentally capable of executing the Will, and (3) that the Will was executed, if at all,

under undue influence. The last plea was, however, withdrawn at the time of hearing. The case was heard at great length and the hearing lasted for 33 working days. To-day his Lordship delivered judgment by which he found that the Will was a genuine document, and that the testator was at the time physically and mentally capable of making a Will. He accordingly discharged the caveat and granted probate of the Will.

*The Advocate-General* (Hon'ble J. T. Woodroffe) and Messrs. Jackson, Palit, O'Keefe, Garth, A. Chaudhuri, Sinha, S. R. Das, K. Chawdhuri, and S. K. Mullick for the Executor.

Messrs. W. C. Bonnerjee, R. Mitra, J. G. Woodroffe, Knight and Shelley Bonnerjee for the Caveatrix.

*The Advocate-General.*—I submit we are entitled to the costs of this suit. I also ask that the Receiver be discharged.

*Mr. Mitra.*—There must be a substantive application for that.

*The Advocate-General.*—I am entitled to apply now and to ask that the Receiver be discharged by the same order by which probate is granted to me. See Kerr on Receivers (4th Ed.), p. 30, where it is said "after the litigation is over in the Probate Court, the practice is to discharge the Receiver and dispose of the costs: and if it appear that there was no reasonable ground for instituting the action at all, the Court will order the Plaintiff to pay all the costs, though a Receiver has been appointed." In *Barton v. Rock* (22 Beav. 376), it was laid down that the practice of the Court was, upon the grant of probate, to discharge the Receiver, stay all proceedings in the suit and dispose of the costs. The same practice has been followed in this Court. [STANLEY, J.—The order that you might be entitled to is that upon probate being taken out the Receiver be discharged.] The order that was made by Sale, J., in *Nergie v. Nergie* (unreported) was that the probate was to be granted but not to be issued until the provisions of the Court Fees Act be complied with and the Receiver was ordered to be and was thereby discharged. I ask for a similar order. [STANLEY, J.—I am entirely with you on that point. Now that I have found that the Will is genuine, I do not think the Receiver should hold the assets any longer.] As to costs, where the next-of-kin exercises his right to put an executor on proof of his Will vexatiously or makes charges which they were not justified by the evidence in doing, they are liable to be condemned in costs, see Coot's Probate Practice (4th Ed.), p. 266 and (11th Ed.), p. 504. In this case the caveatrix had made charges of forgery and undue influence, and under those circumstances the Court will always condemn them in costs. See *Bury v. Bullin* [2 Moo. P. C. 480 at p. 492 (1838)], *Coppin v. Dillon* (4 Hag. 375), *Constable v. Tuffnell* (4 Hag. 508).

In this country, costs are entirely in the discretion

of the Court. In *In the goods of Annie Black* (unreported, Hill, J., 17th April 1895) costs were given against the impugnant. There also his Lordship found that the defence when it was started was vague and without any foundation. Similar order was made in *In the goods of Kaminey Dassee, Madhusudan Seal v. Benode Behary, Dutt* (unreported, Amcer Ali, J., 1st January 1898). Where that has been the case the successful party has never been mulcted in costs. It is only where the impugnant restricts himself to requiring the Will to be proved in solemn form that no order for costs is made against him. A similar order was made in *In the goods of Khas Mehal* [5 C. W. N. 505 (1901)]. I also ask that the order for costs should carry with it all the costs and charges of the Receiver *pendente lite*. See *Fisher v. Fisher* [L. R. 4 P. D. 231 (1878)], where it was held that in a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit. See also *West v. Goodrick* [31 L. J., Probate Div. 39 (1861)]. I ask for a direction to the Taxing Officer as to those costs as also for directions under Belchambers' Rules and Orders, p. 382, headings 10, 14 and 16. That was done in *Gobind Chunder Dutt v. S. S. Gladstone* (unreported, Hill, J., 29th March 1892). A similar order was made in *Drachenfels* (1 L. R. 27 Cal. 860).

*Mr. R. Mitra, contra.*—There should be a substantive application for the discharge of the Receiver. The Advocate-General has not been able to refer to a single case where the Receiver has been at once discharged. [STANLEY, J.—I hardly require a case for that.] In this case the application for Receiver was made by the promovent himself, how can he ask for costs of that. [STANLEY, J.—It became necessary by your conduct.] We were entitled to come in and ask the executor to prove the Will in solemn form; then the promovent applied for the appointment of a Receiver; how can they now ask for costs which were incurred at their own instance.

There has never been a case of a Receiver being discharged before probate is taken out.

This is a case in which we are entitled to costs out of the estate. The Court has found that there were suspicious circumstances. This was pre-eminently a case for investigation. The unsuccessful party is entitled to costs out of the estate in a case which from its peculiar circumstances pre-eminently calls for investigation; see Coot's Probate Practice, p. 502, and the cases cited there. Under the circumstances of this case as found by the Court the mother was justified in appearing. See *Zeenah Begum's case* (unreported, Stanley, J., 17th May 1899) and *In the goods of Gooroo Churn Ghose* (unreported.) As to directions under headings 10, 14 and 16 of Belchambers' Rules and Orders there is nothing shewn that they incurred any extra costs for collecting evidence. Who are the witnesses who



have been called who were not present at the garden at the time of Luxminarain's death?

*The Advocate-General* in reply.—The appointment of the Receiver became necessary by reason of their conduct and the estate should not be made to suffer for it.

*Held*—That the Receiver should out of funds in his hands first pay the duty in respect of the probate and upon the grant of probate he be discharged and pass his accounts. That there were circumstances in this case which justified the Defendant in requiring the Will to be proved in solemn form and if she had contended herself with requiring that and with cross-examining the Plaintiff's witnesses, she would have been entitled to costs out of the estate.

That a great portion of the time occupied by this investigation was due to the charges made against the Plaintiff. Under the circumstances.

*Ordered*—That the Defendant do pay her own costs and pay to the Plaintiff all costs occasioned to the estate by the appointment of a Receiver and the costs of the last 15 days' hearing and all reserved costs, the costs to be taxed on scale No. 2.

*Mr. Mitra*.—Do these costs include the Receiver's commission?

*THE COURT*.—That is a matter for the Taxing Officer.

*Mr. N. C. Bose*, Attorney for the Promovent.

*Messrs. Kally Nath Mitter and Sarbadhicary*, Attorneys for the Impugnant.

S. R. D.

#### [ORDINARY ORIGINAL CIVIL JURISDICTION.]

In the matter of sec. 39 of the  
Presidency Small Cause Court Act,  
XV of 1882, (as amended  
by Act I of 1895),  
and

HARRINGTON, J.  
1901.

8, July.

In the matter of KUCHIL CHANDRA  
SARKAR and GOPAL CHUNDER  
DEY and another.

*The evidence upon which the Court acts in transferring a Small Cause Court suit under sec. 39 of Act XV of 1882, as amended by Act I of 1895, is the ex parte statement of the Defendant—Applications for rescinding or altering such orders.*

The Defendant, Gopal Chunder Dey, obtained an *ex parte* order on the 22nd of March 1901 for transfer to the High Court of the Small Cause Court Suit No. 2797 between the parties abovenamed under the provisions of sec. 39 of the Presidency Small Cause Court Act as amended by Act I of 1895. In his affidavit in support of the application for transfer, the Defendant had stated that he had ample means to satisfy any decree that might be passed against him in the said suit.

As against the order for transfer, the Plaintiff in the above suit applied on notice to the said Defendant,

that it might be rescinded, or made conditional upon the Defendant paying into Court the amount of the claim and costs on furnishing sufficient security therefor, and that the costs of and incidental to the application might be dealt with as costs in the cause.

*Mr. Sinha*, for the Plaintiff, contended that the Defendant had not a *bona fide* defence to the action and that upon the Plaintiff's affidavits it was apparent that the Defendant had not sufficient means to satisfy the decree which might be made in the suit. He further stated that the Court had rescinded such orders of transfer or made them conditional upon the Defendant finding security, upon good cause shown. Analogy was to be found in the procedure laid down in Chapter XXXIX of the Civil Procedure Code, relating to the summary trial of suits on negotiable instruments.

*Mr. A. Chaudhuri*, for the Defendant, Gopal Chunder Dey, contended that the Court had already considered the question as to whether there was *prima facie* a good defence to the action when it made the order for transfer. That is all that the Court can be required to do at this stage of the case, otherwise it would be calling upon the Court to determine the merits of the defence in an interlocutory application. Further, nothing had been alleged in the Plaintiff's affidavits which would have entitled him to ask for security from the Defendant in the Court where the suit had been instituted. The Defendant asserted that he had sufficient means and although the Plaintiff denied the truth of the statement the Court should not be called upon to try that issue. The whole object of the section which provides for *ex parte* applications would be frustrated if such applications as the present were entertained.

His Lordship Mr. Justice Harrington held, that such applications for rescinding or altering the original *ex parte* order for transfer should not be encouraged. The section under which the original application had been made for transfer, gave the Defendant the right to apply *ex parte*. It is an express provision, and the section itself gives the Court power in the first instance to call upon the Defendant to give security for costs. The evidence upon which the Court acts in making the order is the *ex parte* statement of the Defendant. If it was intended that the decision of the Court should not be on *ex parte* statements, the section would have so provided. The Defendant having at the time he had made his application for transfer satisfied the Court, it was not now open to the Plaintiff to come into Court to vary the order.

His Lordship refused the Plaintiff's application, and directed that the costs be costs in the suit.

*Babu Kalimohan Rakhi*, Attorney for the Plaintiff:

*Babu Dhwanissar Mitter*, Attorney for the Defendant.

*Application refused.*

## Government Notification.

### REVENUE DEPARTMENT—(LAND REVENUE).

#### NOTIFICATION—No. 1006T.R.

*The 5th July 1901.*—In exercise of the powers conferred by sec. 189 and sub-sec. (6) of sec. 190 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor is pleased to make the following rules under the said Act, as amended by the Bengal Tenancy (Amendment) Act, III (B. C.) of 1898, and to direct that they shall be substituted for Rules 45 to 54 for the disposal of applications under sec. 103 in Ch. VI of the Rules under the Act, published under Government Notification No. 1111R., dated the 10th January 1899, in Part I, page 33 of the *Calcutta Gazette* of the 11th idem.

*Applications under sec. 103 for the record of particulars specified in sec. 102 in estates or tenures.*

45. These applications shall be made to the Collector of the district.

46. The application shall specify—

- (a) the status of the applicant, viz., whether he is a proprietor or a tenure-holder;
- (b) the particulars specified in sec. 102, Bengal Tenancy Act, in respect of which the application is made;
- (c) the number of tenants occupying the estate or tenure or part thereof in respect of which the application is made, the total rent payable by them at the time, and the estimated area covered by the application (so far as the applicant is able to give these particulars).

47. (a) If the application is made by a proprietor, it shall not be admitted unless the name of the applicant and the extent of his interest are registered under Act VII (B. C.) of 1876.

(b) If the application is made by a tenure-holder, it shall not be admitted unless the right of the tenure-holder and the extent of his interest is admitted by the superior landlord or is proved to the satisfaction of the Collector.

48. On receipt of the application, the Collector shall forward it to the Commissioner with any remarks which he may think necessary.

49. The Commissioner may call for further information, or may require the application to be amended.

50. If the Commissioner considers that the application cannot be granted with advantage to the interests of all persons concerned, he may reject it. If he approves it, he shall forward the application, with an expression of his opinion, for the orders of the Board of Revenue.

51. A Commissioner rejecting an application shall record his reasons for doing so, and the applicant, if dissatisfied with the order, may appeal within one month to the Board of Revenue.

52. When an application is referred to the Board under rule 50, or an appeal is preferred under rule 51, the Board may call for further information if necessary, and shall pass such orders as it may think fit for allowing or rejecting the application.

53. As soon as an application is allowed, the Collector shall call upon the applicant to deposit eight annas per acre of the estimated extent of the estate or tenure or part thereof in respect of which the application has been allowed. If the Collector is unable to estimate the area, he shall require a deposit at the rate of Rs. 2 for each tenant. If the amount does not exceed Rs. 500, the applicant must deposit the whole amount in advance.

If it exceeds Rs. 500, the applicant shall deposit the sum of Rs. 500, and shall give such security as the Collector may require for the payment of the balance of the deposit in such instalments as the Collector may from time to time demand.

If the amount deposited as above proves more than sufficient to cover the cost of the proceedings, the unexpended balance will be refunded on their termination.

If the amount deposited proves insufficient to cover the cost, the applicant shall, when required by the Collector, deposit from time to time such further sums as the Collector may think necessary for the completion of the proceedings. If he shall fail to do so, the proceedings may be stopped and the order allowing the application cancelled.

54. Revenue officers deputed to carry on proceedings under sec. 103 are hereby vested with the powers mentioned in sec. 189 (a) and (b).

55. If the application be for the ascertainment and record of all the particulars mentioned in sec. 102, a record similar to the record of rights described in rule 8 above shall be prepared, and the Revenue officer shall follow the procedure prescribed in rules 4-19 above, except so far as such procedure relates to the record of proprietary interest, or the record of proprietor's private lands under Chap. XI of the Bengal Tenancy Act.

If the application is for the ascertainment and record of some only of the particulars specified in sec. 102, the Revenue officer shall ascertain and record the particulars in such manner as may be most convenient, and shall follow, so far as necessary, the rules above referred to.

56. When the particulars, for the ascertainment of which the proceedings have been instituted, have been ascertained, the Revenue officer shall prepare a draft record and publish it. For this purpose he shall follow the procedure laid down in rule 20 above and he shall receive and dispose of objections in accordance with the procedure laid down in rule 21 above.

57. When all objections have been disposed of as provided for in the preceding rule, the Revenue officer shall correct the draft record in accordance with the order passed by him, and shall finally frame the record and shall endorse on it a certificate that it has been duly prepared in accordance with the preceding rules.

58. The Revenue officer having finally prepared the record shall cause it to be published in accordance with the procedure laid down in rule 35 above. He shall also cause a copy of it to be made for the applicant under sec. 103, and shall make it over to him. An extract from the record relating to his interest shall also be given to each tenure-holder and raiyat in the estate or tenure.

The final copy of the record, and of the map, if prepared, shall be deposited in the office of the Collector of the district.

#### NOTIFICATION—No. 1007T.R.

*The 5th July 1901.*—All Deputy Collectors in the Lower Provinces of Bengal are hereby authorised to discharge the functions of a Revenue Officer under sec. 103 of the Bengal Tenancy Act, VIII of 1885, as amended by Act III (B. C.) of 1898, and are vested with the powers mentioned in sec. 189 (a) and (b) of the Act, under Rule 54, Chap. VI of the Rules framed by Government under that Act and published in the *Calcutta Gazette* under Notification No. 1006T.R. of this date.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, JULY 29, 1901.

[No. 36]

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### REPORTS (See Index.)

WE DRAW ATTENTION TO THE CASE OF *P. & O. S. N. Co. v. The King* (p. 268, *infra*) which relates to crew space for lascars on board an English vessel. The decision is not only of great public importance but in so far as it relates to the question of conflict between an Act of Parliament and an Act of the Indian Legislature is also of considerable legal importance.

A LETTER HAS BEEN ADDRESSED TO US ON BEHALF OF the Madras lawyers, which we publish in another column, asking our opinion as to the propriety of a counsel continuing his practice at the Bar, after his appointment to the Bench has been announced. While there is authority in support of the practice of judges reverting to the Bar, we are unable to find any as regards the propriety of a judge-elect continuing his practice at the Bar. Professional opinion here is decidedly against it. Applying to that opinion the test of reason, we agree that a judge-elect ought not to accept any retainer or fresh professional engagements and as regards those in which he had been retained or engaged prior to the public announcement of his appointment, he ought to cancel them so far as practicable by returning the fees that he might have received for them, retaining only such fees for consultation or reading as he might have legitimately earned for work done. But there may be circumstances, as in a part-heard case, where the giving up of a brief by counsel may be a great hardship to the client, and counsel may consider himself under a moral obligation to continue

his engagement till the close of the case. If the professional engagements of Sir Bashyam Iyengar are of this nature, he can surely refuse to take his seat before fulfilling them. But in no other case would a judge-elect be justified in postponing the taking of his seat on the Bench on the ground of outstanding professional engagements.

THE FOLLOWING NOTE IN THE PAGES OF THE *Journal of the Society of Comparative Legislation* on recalcitrant spouse and judicial separation would seem to favour the view of Hindu law as expressed by Ghose and Stevens, JJ., in the case of *Mon Mohini v. Basant Kumar* (5 C. W. N. 673). The only point of difference lies in the fact that Hindu law recognises the power of the husband to contract a second marriage. But it must be remembered that the policy of the Hindu law as also public opinion amongst Hindus have always been opposed to the contracting of a second marriage, except when there has been a failure of issue by the first wife (Mann IX, 81, 82). Marriage, according to Hindu ideas, is more a spiritual than a social duty, and its central idea is to have male offspring, whose spiritual and meritorious acts can alone confer salvation on the soul of his parents and his ancestors. This being so, there can be no doubt that it would be opposed both to public policy and to the spirit of Hindu law, to encourage either judicial separation or bigamy. The social status of women in the eyes of the law should by all means be raised, but this cannot certainly be achieved by the relaxation of matrimonial ties. The readiness with which orders for judicial separation are made now-a-days, is not certainly conducive either to public morals or to the raising of the standard of self-respect in either man or woman. We therefore welcome the protest that has been raised in this respect by our learned contemporary. Referring to a Montreal case it says:—

Allowing for this inequality, that what is sauce for the goose is not sauce for the gander, the decision seems a sound one. A wife deserting her husband and refusing to return may justly be designated *injure grave*. It is not only a frustration of all the ends of the matrimonial compact, but it leaves the husband in the situation of being married without any of the amenities of the married state, or the power of contracting a fresh union. It is the peculiar seriousness of this wrong which has led English law to grant that singular anomaly, specific performance of the matrimonial contract in the shape of a decree for restitution of conjugal

rights; and though it no longer enforces the decree by imprisoning the contumacious spouse and gives the Court power to order a judicial separation instead, it still in form enjoins such spouse to return to cohabitation and render conjugal amenities. Yet it must be confessed that a judicial separation or a *separation de corps* is at best an inadequate and very unsatisfactory remedy, and the relations it creates little short of a satire on marriage. The epithet which the President of the Divorce Division chose in a recent case to sum up the situation of the separated spouses was "deplorable"; and the worst is that under the summary matrimonial jurisdiction of Magistrates in England the judicial separation is becoming increasingly common, with a corresponding danger to social morals.

THE PRACTICE IN THE MATTER OF HEARING THIRD COUNSEL on the same side, as discussed in the case of *Brij Coomuree v. Ramrick Dass*, is modelled on that which obtained in the old Supreme Court, and that in its turn was founded on the practice which prevailed in the Court of Appeal in Chancery. In *Hoare v. Bembridge* ([1872] 21 (Eng.) W. R. 43), the Solicitor-General, Cotton, Q. C., and Bush appeared for the Appellant. Bush, the third counsel, was about to address the Court, presumably after both his leaders had done so, though that is not expressly stated in the report, when Lord Selborne, L. C., stated that he intended to follow the rule laid down by the Lords Justices, that, there were special circumstances, not more than two counsel would be heard on the same side. In *Sneeshy v. The Lancashire and Yorkshire Railway Co* ([1875] L. R. 1 Q. B. D. 43 at p. 41) Herschell, Q. C., and Beasley appeared for the Appellant. Beasley, after Herschell's address to the Court, had nothing to add but asked for the direction of the Court as to whether more than one counsel could be heard. In reply Lord Cairns, L. C., said: "The practice must be uniform in this Court, and will be assimilated to the former practice in the Court of Appeal in Chancery, and two counsel will therefore be heard for each side." We are informed that this question, namely, as to whether three counsel are entitled to be heard on the same side, was once raised before Garth, C. J., and it was there decided that a third counsel on the same side is not entitled to be heard, but we are unable to trace the order or the case in which it was made. Further information will be welcome.

#### PRIVILEGE OF PEERAGE.

From a purely legal point of view, we may regret the plea of guilty entered by Earl Russell at his recent trial before the House of Lords for bigamy. The tribunal included, as a matter of course, all the law lords, and it was hoped that the opportunity might be seized to consider and, if need be, to review the decision in *Le Memrier's case* (L. R. App. Ca. 517, 1895) with respect to matrimonial domicile, on which the legal validity in England of the Earl's Nevada marriage would depend. The abrupt termination of the proceedings does not deprive them, however, of their extreme constitutional interest.

A peer of the realm is so seldom indicted for felony that it must have come as a novelty to many to learn that he cannot be tried in the same way as an ordinary subject of His Majesty. Up to a certain stage the procedure is identical. The charge is preferred in the ordinary way before a magistrate, and, if the magistrate commits the peer for trial, the committal is to the Central Criminal Court. In that Court, if an indictment for felony is found against him, he is arraigned in a similar fashion to any commoner. But the Statute 7 and 8 Geo. IV, c. 28, sec. 1, which determines the effect of a plea of "not guilty," does not apply to persons having the privilege of peerage: and a peer, although, apparently, under 4 and 5 Vict., c. 22, he must plead in the same way as a commoner, does not "put himself upon the country," and cannot demand a trial by jury. There can be no waiver of the privilege of peerage, which will usually appear to the Court by the description of the accused in the indictment. When Lord Coleridge, L. C. J., in 1887, permitted an Irish peer, Lord Graves, to waive his privilege in order that a formal verdict of "not guilty" might be taken, his ruling was adversely commented upon in the House of Lords by Lord Halsbury, L. C., Lord Herschell and Lord Fitzgerald. Lord Coleridge was found alone in his opinion that such waiver was permissible, and it may be added that the precedents were altogether against him, for the exact contrary had been laid down in the resolutions of all the judges in the early cases of *Lord Daer*, temp. Henry VIII (Kel. 89) and *Lord Audley*, temp. Charles I (3 Howell's State Trials, 402). In the latter case, it was held that the right of a peer of the realm to trial by his peers was "no privilege, but the law declared by Magna Charta, which, if he would not plead to by a trial of his peers, it was standing mute." Where, therefore, a Lord of Parliament is charged with treason or felony, the only Court which can try the indictment is the House of Lords, that is to say, to speak with legal precision, the King in Parliament, or, in the event of Parliament not being in session, the Court of the Lord High Steward. In either event, a Lord High Steward is appointed by commission from the Crown, who is usually the Lord Chancellor, and it is his duty to preside over the proceedings. When the trial is before the House of Lords, all peers of Parliament are competent to sit as judges of law and fact and have a full right to speak on the question before the House: but the votes of the Bishops are not taken. If Parliament is not sitting and the trial is held in the Court of the Lord High Steward, that official is the only judge of law and practice, and, although all Lords of Parliament are summoned and have a right to attend as Lords Triers, they are judges of fact only. The procedure, which is full of old-fashioned solemnity, is based upon strict precedent. There has not been a trial of a peer for

Felony since 1841, when the Earl of Cardigan was indicted for killing Captain Tuckett in a duel, and was acquitted on the ground that, whereas the indictment was for shooting at Harvey Garnett Phipps Tuckett with intent, and so forth, the Crown had failed to show that the person shot at bore that name in full—a technical variance in description which the passing of the Statute 14 and 15 Vict., c. 100, has since rendered immaterial. The proceedings on that occasion are fully reported at pp. 602 to 667 of the fourth volume of the new series of State Trials edited by Mr. Wallis, the present Advocate-General of Madras, and the form of trial then observed would appear to have been closely adhered to in the case of Earl Russell. When the indictment for felony has been found in the ordinary court of trial and the privilege of the defendant ascertained, a judge of the Court communicates the fact to the Lord Chancellor as Speaker of the House of Lords. The House proceeds to adopt a motion that “an humble address be presented to His Majesty to acquaint His Majesty” that a certain day has been appointed for the trial, and “humbly to desire that His Majesty will be graciously pleased to appoint a Lord High Steward to continue during the said trial.” The defendant peer is taken into the custody of Black Rod, and his surrender notified to the House. On the day of the trial, the peers assemble in their robes, and sit covered throughout the proceedings. The roll is called, and when every peer present has answered to his name, proclamation is made by the Serjeant-at-arms for the Yeoman Usher to bring the defendant peer to the Bar. He is thereupon brought to the Bar, uncovered and without his robes, and on approaching makes three reverences, and kneels until directed by the Lord High Steward to rise. Upon rising his next act is to make three more reverences, one to the Lord High Steward and one to the peers upon either side, who return the same with due formality. The prisoner is then conducted to the stool provided for him within the Bar, near to his counsel. He is “acquainted that he must address himself to the Lords in general, and not to the Lord High Steward,” and is arraigned on the indictment drawn against him by the Clerk of the Crown, who asks of him, “How say you, my Lord, are you guilty of the felony with which you stand charged, or not guilty?” If the reply be “Not guilty, my Lords,” the further question is put, “How will your Lordship be tried?” “By my peers,” is the answer, which is followed by the rejoinder from the Clerk of the Crown, “God send your Lordship a good deliverance.” The case for the Crown is then opened, and the proceedings which follow are on the lines of an ordinary criminal trial until the stage of deliberation is reached. The question of “guilty” or “not guilty” is put to the vote, and the Lord High Steward, standing up, calls every peer by

name from a list, beginning with the junior baron and concluding with the senior peer of highest rank present. As the question is put to each peer, he stands up in his place uncovered, and laying his right hand upon his breast, replies “guilty” or “not guilty,” as the case may be, “upon my honour.” If a peer is convicted of felony, he is now, under 4 and 5 Vict., c. 22, liable to punishment in the same way as any other of His Majesty's subjects. Doubts existed at the trial of the Earl of Cardigan in 1841 as to whether the benefit of clergy and peerage could be claimed under 1 Edw. VI, c. 12, sec. 13, or whether the section had been repealed, as far as peers were concerned, by the Statute 7 and 8 Geo. IV, c. 28, which abolished benefit of clergy; and the Act of 1841 was expressly passed to remove all such doubts. When the verdict has been given and sentence, if any, pronounced, proclamation is made for dissolving the commission issued by the Crown to the Lord High Steward. The white staff of office is delivered by the Gentleman Usher of the Black Rod to the Lord High Steward, who stands up uncovered and breaks it in two, declaring the commission to be dissolved. It may be observed that the Act 4 and 5 Vict., c. 22, while it provides that peers must plead as commoners, does not alter their mode of trial: and continuance of the privilege of peers as to the mode of trial is expressly recognized in sec. 29 of 19 and 20 Vict., c. 16 (which empowers the Court of King's Bench to order certain offenders to be tried at the Central Criminal Court) and in sec. 19 of the Jurisdiction in Homicides Act, 1862, (25 and 26 Vict., c. 65). The privilege extends to peeresses as well as to peers, but is limited to cases of treason and felony; and in cases of misdemeanour a peer may be tried like any commoner. The limitation, as Sir James Fitz James Stephen has pointed out in his History of the Criminal Law in England, is certainly as old as 1442, but that learned lawyer declares his inability to give the history of its evolution. According to the same authority, the office of Lord High Steward is probably a remnant of the Curia Regis or King's Court, which has survived unimpaired from the Norman conquest, if not from earlier times. The Earls of Leicester (we are told by Sir Edward Coke) held the office in hereditary succession until Simon de Montfort forfeited it to Henry III by rebellion. Henry granted the office and the earldom to his second son, Edmund, whence it descended to Henry of Bolingbroke, son and heir of John of Gaunt, and afterwards Henry IV. Since the reign of that monarch, it has been granted *huc vice* when occasion arose for the services of such an officer at the trial of a peer or at a coronation. There have been four trials of peers in the House of Lords since the end of the reign of George II, namely, Earl Ferrers for murder in 1760, Lord Byron for murder in 1765, the Duchess of Kingston for bigamy in 1776, and the Earl of Cardigan in 1841. Trials in the Court of the Lord High

Steward have been extremely rare, and it is believed that the trial of Lord Delamere for treason before Jeffreys in 1686, is the last instance upon record. Lord Ferrers, it may be noted, was convicted and duly executed, a silken cord being provided for him out of consideration for his rank. In the cases of Lord Byron (who was found guilty of manslaughter) and the Duchess of Kingston, the Act of Edward VI was successfully pleaded, which allowed benefit of peerage in all cases of felony, except wilful murder and poisoning of malice prepense, and the defendants were discharged on payment of costs: but as has already been stated, the Statute 4 and 5 Viet., c. 22 has put an end to all such devices for evading punishment.

H. E. A. C.

### Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

DEAR SIR,—Sir V. Bhashyam Iyengar, who was appointed a judge of the High Court, Madras, in succession to Mr. Justice Shephard, has not yet taken charge of his judicial duties but is still practising at the bar. The reason for not taking his seat on the bench is, we understand, that he wishes to fulfil some of his professional engagements before he leaves the bar. The Madras lawyers wish to know your opinion as to the propriety of a man practising at the bar after his appointment as a judge has been announced.

HIGH COURT,  
Madras, 16th July 1901.

LAWYER.

### English Notes.

COMMERCIAL COURT.—THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* THE KING. Before MR. JUSTICE MATHEW. 21st June 1901.

*Crew space for lascars—The Merchant Shipping Acts, 1854 and 1894—Indian Act XIII of 1876—Conflict between Act of Parliament and Government of India Act—Interpretation of statutes.*

The question was which Act governed the matter of the requisite space to be provided by the company in their ships for the lascars. The company contended that the Indian Act is the one they had to follow and they had complied with its requirements. That position was controverted, the other side contending that the Merchant Shipping Act should be followed.

The learned Judge gave a considered judgment which *inter alia* states: "The Petitioners' ships were registered in the United Kingdom in accordance with the said Act of 1854 and the statutes amending the same, Act IV Geo. IV, c. 80, was an Act consolidating the law regarding trade to and from India. Sec. 25 thereof empowered the Governor-General of India to make regulations to be observed by the owners of vessels trading under the authority of the Act of which the crews were wholly or in part com-

posed of lascars "for the due supply of provisions, clothing and other necessary accommodation of" such lascars. Sec. 26 that such regulations until repealed and altered were to be observed if they formed part of the Act. Now it was contended that by those sections the Governor-General had been given absolute power to exercise exclusive jurisdiction for the protection of lascars, though it could not be disputed that any such regulations as were made might at any time have been modified by subsequent enactments of the Imperial Parliament. It was said that that Act had authorized the subsequent Indian legislation as to lascars, and that an independent Code of regulations had been contemplated for lascars as distinguished from other seamen. The learned Judge held that the Indian legislation did not spring from that Act but from the 1854 Merchant Shipping Act. The definition clause of this last-mentioned Act showed that it applied to ships such as those owned by this Company and to their crews and no distinction was drawn between the European and lascar portion of a crew. Part III of the Act of 1854 contained various provisions as to crews but no provision as to the crew space to be appropriated. The Act contained two very important sections. Sec. 288 empowered the Governor-General of India in Council to apply or adopt any of the provisions in Part III to any British Ships registered at, trading with, or being at any place within his jurisdiction; and sec. 290 which said that if in any matter relating to any ship or to any person belonging to any ship there appeared to be any conflict of laws, then if there was in Part III of the Act any provision, on the subject applying to such ships the case should be governed by such provision, and if not, the case should be governed by the law of the place where the ship was registered. That Act having been passed, the first Indian Act was passed on the subject in 1859, and it clearly appeared from the preamble that it was passed in pursuance of powers conferred by sec. 288 of the Act of 1854. The Indian Act provided for the first time by sec. 70, but only very imperfectly; for the crew space to be appropriated for the seamen, both European and lascars. That statute was acted on down to 1876 when an Amendment Act was passed. Meanwhile by the Merchant Shipping Amendment Act, 1867, ample provisions had been made for crew space for seamen in ships to which the Act applied. Those provisions had been repealed by the Merchant Shipping Act, 1894, under sec. 210, whereof further provision was made for crew space. After the passing of that Act there could be no question, but that the Indian Act was in conflict with the Imperial Act. Sec. 288 of the Act of 1854 had been re-enacted by sec. 265 of the Act of 1894, and the position therefore was that in the case of a conflict the Imperial Act was to prevail. The position was perfectly clear, the Crown was entitled to the declaration that the company was bound to provide crew space for the lascars employed in their ships in accordance with

the provisions of the Act of 1894. That Act and not the Indian Act governed the question.

*Sir Robert Reid, K. C., Mr. Bray, K. C., and Mr. Scrutton, K. C., for the Company, Petitioners.*

*The Attorney-General, the Solicitor-General and Mr. Sutton for the Crown.*

*Decision in favour of the Crown.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM THE MADRAS HIGH COURT.]

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

N. A. SUBRAMANIA IYER

v.

THE KING-EMPEROR.

1901.

6, 8, 26, and 28, June.]

*Joinder of charges—Tender of pardon—King's evidence—Charter Act—Letters Patent, 1865, sec. 26.*

This was an appeal against a decision of the High Court of Judicature at Madras under sec. 26 of the Letters Patent of 1865, which in modification of the verdict of the jury in a case tried at the First Criminal Sessions for the Town of Madras in 1900, and of the sentence pronounced in pursuance of such verdict by the presiding Judge, sentenced this Appellant to a term of two years' rigorous imprisonment and a fine of Rs. 5,000 and in default of payment of the fine to a further term of nine months' rigorous imprisonment.

The Appellant, N. A. Subramania Iyer, was Superintendent of the Military Accounts Department of Madras. John Lewis Philip D'Santos was Supervisor of the same Department subordinate to him.

On the 8th day of November 1899 the Chief Presidency Magistrate of Madras framed ten charges against the Appellant and the said D'Santos for offences under secs. 109, 161 and 384, of the Indian Penal Code, and committed them for trial on the said charges to the High Court of Madras.

The case came on for hearing at the First Criminal Sessions for the year 1900 when the Appellant and the said D'Santos were jointly charged under the said sections upon an indictment which contained seven counts.

The first count stated as follows:—

"That they, the said N. A. Subramania Iyer and the said John L. P. D'Santos, being public servants to wit, respectively Deputy Examiner, Superintendent and Supervisor of the Accounts Branch of the Military Accounts Department, in or about the month of March 1896 did conspire and combine

together, and thereafter until the month of November 1898 did continue so to conspire and combine, for the purpose of extorting money and obtaining illegal gratifications from clerks in the Accounts Branch of the Military Accounts Department for himself the said N. A. Subramania Iyer, in pursuance of and according to which said conspiracy and combination the said N. A. Subramania Iyer did obtain for himself through the said John L. P. D'Santos divers sums of money, to wit, from one Kaliana Chetty during the years 96, 97 and 98 sums amounting in the aggregate to Rs. 680; from one C. Balasundra Mudaly the sum of Rs. 100 on or about August 27th, 1896, the sum of Rs. 50 on or about March 1st, 1897, and the sum of Rs. 100 on or about May 10th, 1897; from one K. Sreenivasa Charry the sum of Rs. 100 on or about October 2nd, 1898; and from one C. Vedachella Chetty the sum of Rs. 5 in August 1898, the sum of Rs. 5 in September 1898, the sum of Rs. 3 in October 1898, and the sum of Rs. 3 in November 1898, and that they have thereby committed an offence punishable under secs. 109 and 384 and secs. 109 and 161 of the Indian Penal Code, and within the cognizance of the High Court of Judicature at Madras aforesaid."

The second, fourth and sixth counts charged the Appellant with having, on or about the 7th August 1896, the 1st March 1897, and the 10th May 1897 respectively, dishonestly induced one C. Balasund Moodelliar to pay to himself through the said J. P. D'Santos the sums of Rs. 100, Rs. 50 and Rs. 100, the first and second of such acts being charged as an offence punishable under sec. 161 or 384 of the Indian Penal Code while the third is charged as an offence under secs. 109 and 161. The third, fifth and seventh counts charged D'Santos with having abetted the Appellant in the commission of the offences set out in counts two, four and six respectively, and as being thereby punishable under secs. 109 and 161 or 384.

On the 14th February 1900 the case came on for trial before Mr. Justice Boddam, when the Appellant's counsel took two objections to the indictment, first, that the first count was bad in itself under sec. 234 of the Criminal Procedure Code, and, secondly, that under the same section the union of the first count with the second, fourth and sixth made the whole indictment bad for misjoinder.

Then objections were overruled by Mr. Justice Boddam who recorded the following reasons:—

"I see no objection to the first count. It charges one offence, viz., the offence of a continuing conspiracy, which has been carried out in the manner therein shown and thereby shown to be a continuing conspiracy and is punishable as abetment under sec. 109."

"I see no objection to the first count being combined with the rest of the indictment under sec. 230."

On behalf of the Crown an application was made that a conditional pardon might be tendered to the second accused. The learned Judge declined to consider the application until the second accused had pleaded to the charges preferred against him. He then pleaded guilty to the 1st, 3rd, 5th and 7th counts, and his plea was recorded.

Before the pardon was tendered the Appellant's counsel objected that such a tender would be *ultra vires*, firstly, because the offences in question were not exclusively triable by the High Court, and, secondly, because pardon could not be tendered to D'Santos as he had already pleaded guilty. The objection was overruled, the learned Judge then tendered to the second accused a pardon under sec. 338 of the Criminal Procedure Code, following the words of sec. 337, and he was then removed from the dock. The whole of this proceeding took place in accordance with a previous arrangement arrived at between D'Santos and the Government Solicitor, and the plea of guilty however apparently voluntary, was in fact made in the hope of purchasing a pardon.

The jury was then empanelled and the trial proceeded upon the entire indictment, and evidence was given upon all the criminal acts charged in the first and subsequent counts. When the evidence of D'Santos was tendered, the Appellant's counsel objected to his being sworn on the ground of the validity of his pardon. This objection was overruled.

The only evidence which is material in the present appeal is that bearing on the sixth count.

Balasundara Moodelly, after speaking to the previous bribes which he said he had paid D'Santos at his request for the purpose of being paid to the Appellant, says that on the 30th April 1897, he received from D'Santos a letter marked B. "Before receiving this letter I had a conversation with D'Santos: He asked me to give Rs. 100 to the Iyer for having given me permanent promotion. I said I would speak to my father." From his father he procured two notes each for Rs. 50 which are identified as Nos. T 32418 and T 43491. These Balasundara gave on the 10th May to D'Santos in a cover. This cover he says D'Santos took into the Appellant's room and subsequently returned leaving the cover empty on Balasundara's desk. As he sat he heard the Appellant call Sivachandra Row and ask him to change some currency notes, Sivachandra was a clerk in the office, Balasundara says that there was no attempt at secrecy in getting the notes changed by Sivachandra, and that beside Sivachandra he had frequently seen peons and mucchees take notes to change. It is proved that on the 10th May Sivachandra changed these two notes for a single note of Rs. 100, and that on the 26th May he purchased on behalf of the Appellant Government paper for Rs. 800, this note of Rs. 100 being part of the

price paid. Sivachandra is not called for the prosecution. He is produced as a witness for the defence and swears that he received the two Rs. 50 notes from Balasundara and changed them into one for Rs. 100. That on the 25th May he received Rs. 800 from the Appellant to purchase Government securities and put them into his box; that the purchase was made on the 26th and that he paid in his own Rs. 100 note taking in its place small notes part of those supplied by the Appellant.

D'Santos in his evidence threw the whole blame as to the demand for and the receipt of the bribes upon the Appellant. He admitted that about February a pardon was suggested in reference to which he says he went to the Government Solicitor, Mr. Barclay, and made a written statement. "It struck me I was likely to be convicted on the prosecution evidence. I was anxious to escape being convicted. I did not intend to stand my trial. Whether I am pardoned or not I am speaking the truth from strong moral grounds."

At the close of the evidence the jury found the Appellant guilty on the first, second and sixth counts, being advised by the Judge not to find a verdict of guilty on the fourth. By six to three they found that D'Santos had not spoken truth throughout. The Judge then ordered him to be placed in the dock, and sentenced the Appellant to three years' rigorous imprisonment with a fine of Rs. 8,000, and in default of payment to a further year's rigorous imprisonment. D'Santos was sentenced to three years' rigorous imprisonment.

Subsequently to this conviction and sentence the Officiating Advocate-General gave a certificate under sec. 26 of the Letters Patent for the High Court of Judicature at Madras, the material clauses of which are as follows:—

"(a) That in my judgment the learned Judge who presided at the First Criminal Sessions of the High Court of Judicature at Madras for 1900 erred in law in deciding that it was competent to him to tender a pardon to D'Santos notwithstanding that none of the offences in respect of which the said N. A. Subramania Iyer was being tried was within the meaning of the Criminal Procedure Code, exclusively triable by the High Court and that therefore, the learned Judge erred in law in admitting the evidence given by D'Santos as a witness for the Crown after pardon had been tendered to him and in placing the same before the jury.

"(b) That in my judgment the said learned Judge erred in law in not striking out the first count from the indictment but trying and convicting the said N. A. Subramania Iyer on it and in allowing evidence to be adduced by the Crown in respect of the first count as regards matters of alleged extortions of money and illegal gratifications therein specified other than those forming the subject-matter of the second, fourth and sixth counts and placing the same before the jury.



"(c) That in my judgment the learned Judge erred in law in trying the said N. A. Subramania Iyer on the first, second, fourth and sixth counts at one trial."

Upon this certificate the case was heard twice before the full Court of six Judges. First upon the question of law and next upon the facts.

On the questions of law all the Judges held that the offer of a pardon to D'Santos was illegal, but all with the exception of Davies, J., held that his evidence was still admissible.

As to the first count while the Chief Justice, Shephard and Boddam, JJ., held that it was good, Benson, Moore and Davies, JJ., held that it was bad.

All the Judges, except Boddam, J., held that whether it was good or bad its union with the remaining counts made the whole indictment bad for misjoinder. But all the Judges, except Davies, J., who gave a qualified opinion, thought that it was open to them to strike out the first count and deal with the evidence applicable to the remaining counts.

Upon the final hearing upon the facts all the Judges were of opinion that the Appellant should be acquitted on the second count. They also agreed in thinking that D'Santos was utterly untruthful and that no reliance whatever could be placed upon his evidence. As to the sixth count which alone remained all the Judges except Davies, J., were of opinion that after excluding the evidence of D'Santos and disbelieving as they did the evidence of Sivachandra, there was enough left to support the conviction of the Appellant on the sixth count. Davies, J., thought that the charge being laid as one of bribery, the evidence of Balasundara was the evidence of an accomplice, which according to the invariable practice of the Courts of India required corroboration. As to Sivachandra he said, "now whether this story be true or false it is no corroboration of Balasundara's story and brings nothing home to the first accused. I therefore find that there is no legal evidence upon which the sixth count can be supported. Supposing again that I am wrong in appreciating the evidence, surely it was a case in which the jury might have doubts and might have given the accused the benefit of the doubt." Then he relied on the judgment of the Lord Chancellor in *Makin v. Attorney-General for New South Wales* (A. C. [1894] 57) as showing that where the accused was entitled to the finding of a jury, it was not open to the Court upon different evidence from that which had been before the jury to pronounce that he was guilty.

The result was that in modification of the original sentence the Court sentenced the Appellant to a term of two years' rigorous imprisonment and a fine of Rs. 5,000, and in default of payment of the fine to a further term of nine months' rigorous imprisonment.

Mr. Mayne for the Appellant contended that the

Court was wrong in holding that while the tender of pardon to D'Santos was illegal, his evidence given to earn a pardon was admissible; D'Santos was not a convicted person, he was an accused person under trial awaiting judgment. The tender of pardon was illegal. He referred to *Reg v. Hanmanta* (1. L. R. 1 Bom. 610, see 617); *Empress of India v. Asghar Ali* (1. L. R. 2 All. 260). Criminal Procedure Code, secs. 337, 338, 342 and 343. Evidence Act, sec. 24, Oaths Act, 1873, sec. 5. A trial does not necessarily come to an end with a plea of guilty, *Queen v. Chenna Pavachi* (1. L. R. 23 Mad. 151), when the accused gave his evidence he was an incompetent witness and an oath could not be lawfully administered to him.

Excepting the offence of conspiracy punishable under sec. 121A of the Indian Penal Code (waging war against the Queen) there was no offence of conspiracy as such under the Penal law of India. It is only otherwise indictable when it amounts to abetment; secs. 107, 108 and 109 were read, each offence abetted makes a separate offence of abetment and more than one such offence can be tried together only under the provisions of secs. 233 and 234, Criminal Procedure Code. Upon the charge of bribery he submitted that there was no evidence on which a conviction could take place excluding the evidence of D'Santos who had been unanimously disbelieved, sec. 167, Evidence Act. The High Court had no jurisdiction to substitute for the verdict of the jury their own verdict founded on evidence being residue of the evidence before the jury. Their power was limited under sec. 26 of the Letters Patent. The High Court had no jurisdiction to amend the indictment by striking out the first count. He contrasted sec. 2 of XI and XII Vict., c. 87 (1848), which was followed in the New South Wales Criminal Amendment Act, 1883, and was the basis of the ruling in (1884) A. C., p. 57, with secs. 25, 26, 27, 28 and 38 of the Letters Patent.

The trying of the four different counts together at one and same trial is illegal, sec. 233, Criminal Procedure Code, whole trial inoperative if more than three counts joined, sec. 334.

*Queen-Empress v. Chandi Singh* (1. L. R. 14 Cal. 395); *Re Luchminarain* (1. L. R. 14 Cal. 128, see 131.) *Queen-Empress v. Fokerapa* (1. L. R. 15 Bom. 491, see 498).

In the matter of *Abdur Rahman* (1. L. R. 27 Cal. 839, see 845-7).

The following cases were also referred to:—*Regina v. Navroji Dadubhai* (9 Bom. H. C. R. 358, see 367 and 372).

*Queen v. Haribol Chunder Ghose*, (1. L. R. 1 Cal. 207, see 216-17).

*Imperatrix v. Pitamber Jina* (1. L. R. 2 Bom. 61).

*Queen-Empress v. O'Hara* (1. L. R. 17 Cal. 642).

*Waffadar Khan v. Queen-Empress* (1. L. R. 21 Cal. 935).

*Makin v. Attorney-General, New South Wales* (1894, A. C. 57, see. 69). *Regina v. Mellor*, p. 468 at p. 519 bottom.

On the question of costs, see *Macleod v. Attorney-General of New South Wales* (1891, A. C. 455).

The LORD CHANCELLOR.—Your contention is that the man has been tried contrary to law. It is not merely the proper or improper admission of evidence. The New South Wales case came under a particular statute.

*Mr. Phillips* then addressed their Lordships on behalf of the Crown.

The LORD CHANCELLOR.—You will have to deal with the fact that the offences were committed over a much greater period than 12 months and were all tried together. Whether the Appellant has not been tried for more offences than the law permits at one trial.

*Mr. Phillips* rested his argument on sec. 335, Criminal Procedure Code, the whole series of Acts were connected together so as to form one transaction. He commented on some of the decisions referred to by *Mr. Mayne*. He referred to sec. 537, Criminal Procedure Code, and urged that the order of the High Court had not occasioned any failure of justice, (L. R. 27 I. A., p. 846). Improper admission of evidence was not of itself ground for reversal of any decision under terms of sec. 167, Evidence Act, (I. L. R. 1 Cal. 216-7).

The accused person mentioned in the sections of the Code to which *Mr. Mayne* drew attention meant the person who was to be tried.

The High Court has power to review the case sec. 26, Charter Act, and finally determine points of law and to alter the sentence, and pass such judgment and sentence as shall seem right.

The LORD CHANCELLOR.—Can the High Court make the trial right by altering the record?

*Mr. Phillips*.—There must be a point of law, and that point must have been decided, then the Court may correct the decision and deal with the sentence.

The LORD CHANCELLOR at the close of the arguments said:—Their Lordships would take time to consider their judgment.

C. W. A.

## CALCUTTA HIGH COURT.

### [CIVIL APPELLATE JURISDICTION.]

#### APPEAL FROM ORIGINAL SIDE.

In the goods of LUXMINARAIN

MACLEAN, C. J. BOGIA, deceased, MUSST. BRIJ  
BANERJEE, J. COOMARJEE, Defendant,  
HILL, J. Appellant,

1901.

18, July.

RAMRICK DASS, Plaintiff,  
Respondent.

Practice—Counsel, number of, entitled to address the Court on the same side.

When in an appeal one counsel has opened for the Appellant and has been followed by another counsel, a third counsel is not entitled to reply.

Messrs. W. C. Bonnerjee, Mittra, J. G. Woodroffe, Knight and Shelly Bonnerjee for the Appellant.

The Advocate-General, Palit, O'Kinealy and Garth for the Respondent.

In this appeal *Mr. Mittra*, in the absence of *Mr. W. C. Bonnerjee*, opened the appeal and was followed on the same side by *Mr. J. G. Woodroffe*. The Advocate-General addressed the Court on behalf of the Respondent, after which *Mr. W. C. Bonnerjee* rose to reply on behalf of the Appellant.

The Advocate-General.—*Mr. Bonnerjee* is not entitled to be heard. Either *Mr. Mittra* or *Mr. J. G. Woodroffe* ought to reply.

*Mr. W. C. Bonnerjee*.—I leave myself in the hands of the Court. I know of one instance in which three counsel were heard on the same side. That was the case of *Troglucko Nath Ghose v. Girindra Chunder Ghose* which is reported but not on this point. There the present Advocate-General who appeared for the Appellant with *Sir Griffith Evans* and myself opened for the Appellant and was followed by *Sir Griffith Evans*. At the close of the Respondent's case neither the Advocate-General nor *Sir Griffith Evans* were in Court, and the Court heard me in reply although the Respondent's counsel objected to my being heard.

The Advocate-General.—The practice here is the same as that prevailing in England; and that is, when one counsel opens and is followed on the same side by another a third counsel is not entitled to reply. The instance cited by *Mr. Bonnerjee* is an exceptional one, for in that case neither of the two counsel who addressed the Court on behalf of the Appellant in the first instance was in Court at the time of the reply. This is not so in this case for *J. G. Woodroffe* is in Court. I maintain that the practice I have stated is the practice that prevails in these Courts and therefore *Mr. Bonnerjee* is not entitled to be heard in reply.

*Mr. W. C. Bonnerjee*.—I accept the learned Advocate-General's statement as to the practice, but this is a somewhat exceptional case. I was briefed for the Defendant in this appeal and would have opened the appeal had it not been that I was absent from Calcutta on Tuesday morning when the appeal came on for hearing.

MACLEAN, C. J.—As we have been told by the head of the Bar that this is the practice we must accept it.

*Mr. J. G. Woodroffe* then replied.

K. S. B.

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

THERE WILL BE SOME CHANGES IN THE CONSTITUTION in the High Court Benches from Tuesday the 6th of August next. There will be a special Bench presided over by Mr. Justice Ameer Ali to dispose of admitted criminal appeals, the list of criminal cases being at present very heavy. Mr. Justice Ghose and Mr. Justice Harrington will attend to the current criminal business other than admitted appeals. Mr. Justice Taylor will sit with Mr. Justice Hill in the Rajshahye Group. There will be no changes in the Presidency and Patna and Burdwan Groups. Since Mr. Justice Harrington is going over to the Appellate Side, Mr. Justice Sale and Mr. Justice Stanley will during the present week attend to the ordinary business on the Original Side. Mr. Justice Stanley is not likely to sit on the Original Side after the present week and it is expected that in the course of the next week there will be further changes in the constitution of the Benches.

WE ARE GLAD TO BE INFORMED THAT SIR BHASYAM Iyengar never in fact practised at the Bar since his appointment was announced and that he took his

seat on the Bench of the Madras High Court from the 1st of August last.

WE UNDERSTAND THAT THE HON'BLE THE CHIEF Justice's scheme for the reorganisation of the Original Side Offices and the appointment of another barrister judge, has been submitted by the Government of India to the Bengal Government for consideration and opinion. Even if the recommendations of the Chief Justice meets with the ready approval of both the Bengal and the India Government, it is not likely that the changes contemplated will come into operation before November 1902. The Attorneys, however, seem to be anxious that some temporary arrangements should be made in the meantime for the taxation of bills, which are said to be continually falling into arrears from the want of an adequate staff.

THE Capital, THE COMMERCIAL ORGAN OF CALCUTTA, has raised, not a day too soon, a vehement protest against the filling up of public offices on the principle of patronage. We have often urged that vacancies on the Bench should, so far as practicable, be filled by a judicious selection from amongst the members of the local Bar. We recognise at the same time the importance of getting out occasionally some really good men from the English Bar. They come to this country with an open mind, with broader views of justice and equity, and the introduction of such fresh blood into the body of our judiciary is always likely to improve the health and tone of the High Court Benches.

WE ALSO AGREE WITH OUR CONTEMPORARY THAT BOTH the emoluments and duties of the Offices of the Official Receiver, Official Assignee and Official Trustee may be divided with great advantage to the public. The law offices should not be filled up or regulated on any different principle from that of other public offices. Having regard to the reforms that the Chief Justice is anxious to introduce on the Original Side, and the Government in the Administrator-General's Office, it is only appropriate that the question of the reorganisation, reform, or readjustment of other law offices should also be taken in hand at one and the same time.

IT IS NOT UNCOMMON AMONGST JUDGES TO CONSULT each other about different matters arising out of cases, with a view to come to a decision. There can

be little objection to this practice when the judges are of co-ordinate powers and are independent of each other except, perhaps, on the ground that it is not always fair to a judge, who has not had the advantage of either hearing the argument or going into the whole case, to be asked to pronounce an opinion with regard to it. But when any opinion has been expressed by a judge under such circumstances, it seems to be reasonable that the opinion itself, as also the reasons for it, should be clearly embodied in the judgment especially when reliance is placed on such opinion. Such is the view expressed by the Judicial Committee in the case of *Harris v. Brown* (5 C. W. N. cccx) to be shortly reported by us in full.

The learned Judges say that in the construction of the clause they have had the advantage of the opinion of Mr. Justice Gupta who is fully conversant with the Bengali language which is his mother tongue and who agrees with them in the meaning to be attached to it. Then Lordships remark upon this that Judges who have heard the arguments and who are responsible for the decision can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a Judge of the High Court. It is true that this case is a peculiar one in which Judges have to interpret a language which seems to be imperfectly known to themselves and to be familiar to a colleague. But then then Lordships are not informed how Mr. Justice Gupta translates the Bengali words. It is only said that he agrees with the meaning which the other learned Judges below attach to the clause in question.

#### MEANING OF WORDS IN A WILL.

We noticed in the columns of the *Englishman* of 1st August last a paragraph commenting on the recent Privy Council decision in *Harris v. Brown* which commences as follows: "The Judicial Committee of the Privy Council has lately been called upon to decide a moot question of Bengali interpretation, and in doing so have reversed the decision both of the Subordinate Judge of Backerganj—himself a Bengali—and of the High Court." As we cannot publish a full report of this appeal till our next issue, we consider it proper to remove any misapprehension in the public mind that the above remarks may give rise to as regards the correctness of the decision of the Judicial Committee. In their judgment their Lordships of the Privy Council say: "In his judgment he (the Subordinate Judge) states the paragraph of the Will in the same words as are stated in the translation in the transmitted record of the proceedings with one exception. Instead of the words being, as in that, 'the executor will make over his share to him' it is, 'the executor will make over charge of his share to him.'" Later on their Lordships say: "The official translation in the record, that by the sworn interpreter of the High Court, and that of the Judges agree regarding the critical words;" and further "The learned Judges (of the High Court) say that, as the Subordinate Judge is a Bengali, it would require very cogent reasons to induce them to

place a different construction on the clause in question. Certainly, it is impossible to be too careful in ascertaining the exact effect of the Bengali terms. But that has been done after an unusual amount of testing and there is *no disagreement about it.*" The italics are our own and are conclusive that not only did their Lordships of the Privy Council not interfere with the translation of the Bengali words given by the Subordinate Judge, but they accepted it and based their decision on such translation. All they did was to apply principles of law, well-known and well-established both in England and India, to that translation. Unfortunately, however, such principles of law seem to have been overlooked by the learned Subordinate Judge who decided the case in the first instance and the learned Judges of the High Court who affirmed his decision. The Will directs that the testator's residuary estate "shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother." . . . "The sons of those daughters (of my brother) shall after their birth remain under the guardianship of the executor *sahib* until they attain majority at the expiry of 21 (twenty-one) years, and whenever the eldest son of any of the ladies shall attain majority, the executor will make over his share to him to his satisfaction." The Subordinate Judge and the learned Judges of the High Court seem to have overlooked the well-known axiom in interpreting Wills that a testator must be taken to have intended what he has said. See *Brodbeck v. Thomson* (1858, 12 Moo. P. C. C. 116), *Abbot v. Muddleton*, (1858, 7 H. L. C. 68). Instead of doing this the learned Judges seem to have read into the Will words of their own, refusing at the same time to give to the words in the Will their ordinary meaning. Both the Court of first instance and the lower Appellate Court in interpreting the Will imported into the residuary bequest after the words "to be born to each of the daughters of my late brother" the words "who shall survive and attain the age of twenty-one years." On the other hand their Lordships of the Privy Council in their judgment say: "The only safe course is to give to his (the testator's) words their plain ordinary meaning." The reasonableness of this rule of law is so obvious that, we are sure, our contemporary will now share with us the apprehension that it is not their Lordships' decision but that of the Courts below that was "calculated to disturb settled principles." Our contemporary will also agree that law is common sense and as such is most acceptable both to the lay and the legal mind when it is interpreted in a common sense fashion. It is not always the fault of the law but oftener of its interpretation that has drawn on it questionable complements and it is certainly useful to remember what the learned Chief Justice once said at the Convocation of the Calcutta University, that the best law is that which is most consonant with common sense.

## English Notes.

COMMERCIAL COURT.—*REPELTO v. FRIARY STEAMSHIP COMPANY.* Before MR. JUSTICE MATHEW. 16th February 1901.

*Contract—Buyer's right of approval of article—Condition precedent.*

Defendants bargained to sell their steamship *Friary* to Plaintiff for £19,000. A deposit thereon was to be paid of £1,900 which was paid. The *Friary* as per agreement was to be delivered to Plaintiff at Cardiff. The Plaintiff had the right of approval "on full and complete inspection of hull and machinery." On the arrival of the vessel at Cardiff the Plaintiff had her inspected by an engineer and a surveyor, but before he obtained the latter's report, he notified to Defendant that he did not approve of the ship.

This was an action to recover the deposit money. The defence was that Plaintiff was only entitled to refuse to complete the purchase, if after inspection he found valid reasons for not approving, and that the refusal was arbitrary and not *bona fide*.

After evidence had been gone into, the learned Judge found that the Plaintiff had rejected the vessel on reasonable grounds, and the circumstances justified his doing so. The decisions showed that where a buyer had the right of approving of the article to be purchased, that approval was a condition precedent of the contract coming into effect. Of course the buyer must not act deceitfully or capriciously. If he acted *bona fide*, the fact that he exaggerated the defects would not disentitle him to refuse to complete the purchase. The evidence disclosed good faith, and on the terms of the contract judgment must be in his favour for the recovery of the deposit with costs.

*Mr. Eldon Banks, K. C., and Mr. Bailhache* for the Plaintiff.

*Mr. Joseph Walton, K. C., and Mr. Horridge* for the Company.

*Judgment for Plaintiff.*

C. W. A.

COURT OF APPEAL.—*COOPER v. KNIGHT.* Before the MASTER OF THE ROILS, LORDS JUSTICES COLLINS and ROMER. 25th February 1901.

*Breach of promise of marriage—Service of writ out of jurisdiction—Order XI, Rule 1(c).*

This was an application which was refused by Mr. Justice Channel for service of a writ at Brussels where the Defendant Knight, a florist, resided. The writ was based on the promise to marry made in England and the performance was to take place also within the jurisdiction, and *Comber v. Leyland* (1898, A. C. 524) was relied on. The Plaintiff stated in her affidavit that the reply to her letter requesting an explanation of his silence was unsatisfactory.

The COURT OF APPEAL gave leave to issue and serve the writ out of the jurisdiction.

*Mr. Bosall* supported the application.

C. W. A.

*Appeal allowed.*

CHANCERY DIVISION.—*PEARKS, GUNSTON, AND TEE, LIMITED v. THOMPSON TALMEY & CO.* Before MR. JUSTICE FARWELL. 8th February 1901.

*Right of limited company to trade under another name—Secs. 41 and 42, Companies Act, 1862—Injunction to restrain use of designation "Talmey & Co."*

The Defendants, Thompson and Rumino, were formerly employed in a South Kensington Poulterer's shop called "Talmey & Co." Besides that shop they had a number of other shops in London and in the country. Mr. Alfred Talmey who conducted that particular shop had assigned the lease and good-will to the Plaintiffs' predecessors in title. The two Defendants set up a poulterer's shop close by after they left Plaintiffs' establishment where they were assistants in service and designated it, "Thompson Talmey & Co." The only reason given by them for so doing was that Alfred Talmey was Thompson's brother-in-law and Thompson had named a son of his "Talmey." It appeared from the evidence that Thompson Talmey & Co. had written to a customer of the old South Kensington establishment drawing attention to their shop and soliciting custom; neither the letter nor the reasons given for assuming the Talmey name were justified by Defendants' counsel, and the latter were considered ridiculous by the learned Judge. On the point of law argued he held on a construction of sec. 41 of the above Act, that the name of an old firm may be retained by a limited company so long as in other respects the company complied with that Act. No doubt Plaintiffs had been guilty of breach of certain provisions of sec. 41, but penalty for such breach had been provided in the following section, and if he were to accede to Defendants' request to refuse the injunction for that reason, he would be imposing an additional penalty not contemplated by the Act and in opposition to the House of Lords' ruling in the case of *Wright v. Horton* (12 A. C. 371).

*Mr. Uppohn, K. C., and Mr. Galbraith* in support of the grant of injunction.

*Mr. Butler, K. C., and Mr. Buckmaster* for the defence.

C. W. A.

*Injunction granted.*

CHANCERY DIVISION.—*THE RIVER PLATE CONSTRUCTION COMPANY v. CHARLES BRIGHT.* Before MR. JUSTICE FARWELL. 24th April 1901.

*Arbitration Act, 1889—Binding effect of award—Conduct of party repudiating it.*

The question in this case was whether Mr. Charles Bright had affirmed an award by a letter which he wrote to the construction company's solicitor, after his having issued a writ to have the award set

aside on the grounds (1) that it was bad for uncertainty and (2) the arbitrator refusing to state a case on a question of law, to wit, the construction and validity of an agreement of 10th August 1899.

That agreement was made between the above-named construction company, Messrs. Capel and Co., brokers, and Mr. Charles Bright. It was for the purpose of forming an English company to acquire the Montevideo tramways. Mr. Charles Bright, called thereon the vendor, was to secure extended concessions from the Municipality of Montevideo and their consent to use electric traction. The parties fell out over such agreement. The arbitrator who was nominated after Mr. Bright had issued his writ, delivered his award on 11th March 1901, and directed Mr. Bright to pay £60,000 to Capel & Co. as purchase-money for shares to the like nominal amount in the construction company. On 29th March 1901 the following letter was written as aforesaid by Mr. Bright: "In accordance with Mr. Capel & Co.'s letter to sell to me £60,000 ordinary shares in the River Plate Construction Co., Ltd. with all rights and privileges as defined in the agreement of 10th August 1899, I beg to say that I have decided to purchase such shares and I have sold the same and will call with the purchasers who will take transfer and pay for same." It was stated in the letter that it was without prejudice to the illegality of the award. On Mr. Bright moving to set aside the award he was met by the above letter as affirming the award.

MR. JUSTICE FARWELL allowed the objection as a good objection and dismissed Mr. Bright's motion with costs, but granted leave to appeal.

*Mr. Willis, K. C., and Mr. Schiller for Mr. Bright.*

*Mr. Upjohn, K. C., and Mr. Saksnonne for the objector.*

C. W. A.

*Objection allowed.*

CHANCERY DIVISION.—SCOTT v. THE BRITISH AND FOREIGN SCHOOL SOCIETY (*in re VAUGHAN*). Before MR. JUSTICE JOYCE. 19th February 1901.

*Will—Construction—Defective description of legatee—Admissibility of evidence to explain testator's meaning—Description in account-books.*

The testator, Henry Vaughan, a well-known collector of pictures, residing in the Regents Park District, made a Will in 1887; he thereby bequeathed the residue of his personal property in trust to pay the proceeds to trustees of "the British and Foreign Schools in the Borough Road, London." He had taken great interest in the British and Foreign School Society, and from 1856 down to his death in 1899 he had been a governor thereof. At the time of the date of the Will the society had land belonging to it in the Borough Road whereon it had built a school, but when the testator died that had been disposed of, the school being removed to Isleworth, but it had schools in other parts of the

country. The society was founded in 1808, it had no trustees, and its object was the training of persons of both sexes "on the British system." The society in its documents always alluded to the Borough Road establishment as one school.

The dispute was between that society and the next-of-kin of the testator. The trustees of the Will sought the direction of the Court for their protection.

The learned Judge having alluded to the facts, pointed to the words used in the Will British and Foreign Schools and said there was no person exactly satisfying that description. In the Borough Road there was one school only belonging to the British and Foreign School Society. The legatee was not specifically named. Consequently there was an ambiguity; putting therefore himself in the position of the testator he found that ten years later than the date of the Will, the testator in his account books frequently referred to the society as the British and Foreign Schools, that was evidence admissible to explain the meaning, and his judgment must be in favour of the society.

*Mr. Astbury, K. C., and Mr. Herbert for the Society.*

*Mr. Terrell, K. C., and Mr. Danney for the Next-of-kin.*

*Mr. Birrell, K. C., and Mr. Knight for the Trustees of the Will.*

Decision in favour of the British and Foreign School Society.

C. W. A.

CHANCERY DIVISION.—EDGAR OLIVER v. BANK OF ENGLAND. Before MR. JUSTICE KEKEWICH. 21st February 1901.

*Stock broker—Honest misrepresentation of a fact—Agent assuming authority, which he does not possess.*

FIRBANK'S EXECUTORS v. HUMPHREYS (L. R. 18 Q. B. D. 54) followed.

In this case certain consols stood in the names of the Appellant and his brother a solicitor called F. W. Oliver as trustees for certain persons. Powers-of-attorney were sent to a firm of stock brokers named Starkey Leveson and Cooke purporting to be signed by the two Olivers desiring them to transfer the same stock value over £2,000 into the names of other parties. The power-of-attorneys were made out to two of the members of the firm Starkey and Leveson, but Mr. Starkey alone demanded to act and did act under the powers-of-attorney. After the death of F. W. Oliver, the Plaintiff discovered that his name had been forged by his brother in the said powers-of-attorney and the result of such forgery the transfer of the stock unknown to him. He therefore commenced this action against the Bank for compelling replacement of the stocks into his name. The Bank consequently served the said firm of stock brokers with a third party notice

claiming to be indemnified by the firm and individual members thereof.

Judgment by the learned Judge was pronounced in favour of Plaintiff declaring the liability of the Bank to retransfer to the name of Plaintiff like stocks of same value. Then with regard to the really contested matter whether the representation of the stock brokers constituted such a warranty in law, by the several members of that firm, as to entitle the Bank to be indemnified against their liability by the firm or any of its members, the learned Judge quoted the following passage from the above-mentioned decision "Speaking generally, an action for damages will not lie against a person who honestly makes a representation which misleads another. But to this general rule there is at least one exception well established, and that is that where an agent assumes an authority which he does not possess and induces another to deal with him upon the faith that he has the authority which he assumes." That principle was applicable to a case that was not a contract, and the transaction now in consideration came within the purview of the above decision. Mr. Starkey, though he had unquestionably acted honestly, was liable to make good the loss to the Bank. The later cases went further than the earlier cases relied on for the stock brokers by their counsel. Mr. Starkey's partners were however not liable, the transfers being executed by Mr. Starkey alone as attorney which constituted his liability.

Mr. Swinfen Eady, K. C., and Mr. S. Smith for the Firm.

Mr. Warrington, K. C., and Mr. Pattison for the Plaintiff.

Mr. Latham, K. C., and Mr. Wright for the Bank.  
C. W. A.

### Notes of Cases.

(The important ones to be fully reported hereafter.)

#### PRIVY COUNCIL.

[ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.]

LORD HOBHOUSE.  
LORD DAVEY.  
LORD ROBERTSON.  
SIR R. COUCH.  
1901.  
22, June.  
RICHARD SPURRIER AND JOHN  
LE CROMER, Agents in Jersey  
of the Sun Insurance Office,  
Appellants,  
GEORGE F. LA CLOCHE,  
Respondent.

*Petition for leave to defend an appeal in formâ pauperis.*

Suit was brought by Respondent against the Appellants as agents as above for the sum of £1,000 with interest thereon and also for £300 damages and costs.

On the 6th November 1900 the inferior member of the Royal Court of Jersey decided in Petitioner's favour for £1,000, the amount of the Insurance with costs.

Appellants thereupon obtained leave to appeal to the superior member of that Court.

The superior member confirmed the order of the inferior member.

The Appellants then obtained leave to appeal to His Majesty in Council.

The Petitioner in his petition stated that he was very poor, supporting the statement by affidavits, and that by reason of such poverty was unable to defend such appeal unless he be admitted to do so in *formâ pauperis*.

And he prayed for an order that he may be admitted to appear to and defend such appeal in *formâ pauperis*.

In his affidavit Petitioner stated that he was not worth in all the world the sum of five pounds in lands, tenements, goods or chattels, the wearing apparel and the subject-matter in dispute excepted.

Mr. R. Story Deans appeared in support of the application. He admitted that he could produce no precedent in support of his application, but there was a practice in the High Court of Justice granting such applications.

LORD HOBHOUSE intimated that liberty to defend in *formâ pauperis* would be granted.

C. W. A.

*Leave granted.*

#### PRIVY COUNCIL.

[FROM THE DOWNWARD ISLANDS AND THE ROYAL COURT OF ST. LUCIA.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR R. COUCH.

1901.

22, June.

QUINLAN

QUINLAN.

*Application for rescinding an order granting leave to appeal in formâ pauperis.*

In this case leave to appeal in *formâ pauperis* was granted by the Judicial Committee advising Her late Majesty to that effect on the 22nd May 1900. The facts are set out at p. cclxxvii of Vol. IV of the Calcutta Weekly Notes.

Mr. Mayne now contended that such leave should be rescinded on the ground that the proceedings of the Courts were all regular and the Court in neither of the cases could have properly come to any other conclusion than was arrived at. That in fact if the application had then been opposed, their Lordships would have refused it as a frivolous one.

Mr. Bernard Campion opposed, and he further submitted that this application should be rejected inasmuch as the Judge was so prejudiced that he was incapable of pronouncing a proper judgment. After hearing Mr. Mayne

LORD HOBHOUSE said their Lordships will advise His Majesty to rescind the order. Their reasons would be stated on a future occasion.

C. W. A.

## PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH

.1901.

20, June.

BABU MURLI DHUR,  
Plaintiff, Appellant,LAL RAGHURAJ SINGH,  
Defendant, Respondent.*Credibility of witnesses.*

This was an appeal from a decree of the Court of the Judicial Commissioner of Oudh, reversing a decree of the Sub-Judge of Bara Banki.

The Plaintiff-Appellant is the son of Rai Narain Das, a retired Judge of the Small Cause Court, Lucknow. The Respondent is the only son of Raja Narender Bahadur Singh, talukdar of Harha, deceased, who was the original Defendant.

The present suit was filed on 23rd June 1892. The plaint alleged that on the 25th March 1889 the said Raja had executed 9 bills of exchange in favour of Appellant for a total sum of Rs. 8,444: that the consideration for those bills was a former debt for which bills of exchange had been executed by the said Raja, the interest promised was at 18 per cent. per annum according to the former practice. That on the 2nd September 1891 the said Raja had signed and made over to Appellant an account admitting Rs. 11,879 as then due, that no payment had been made and the principal and interest on date of suit was Rs. 13,626 for which sum with interest a decree was sought.

For the defence it was alleged that he never had any dealings with Plaintiff, that he had not borrowed any money from him, that he had not executed any bills of exchange; nor had he settled the accounts, nor signed the account of 2nd September 1891.

In support of his claim Plaintiff produced 9 bills of exchange purporting to be signed by the Raja by the pen of Rani Sahib. The said account of 2nd September 1891 was produced signed by the Raja, and marked Exhibit A3, and Letters A6 to A11 were produced.

The matters for decision on such pleadings were entirely matters of fact.

*Mr. Mayne* on the evidence contending that on the oral evidence it was proved that the money was paid for the Raja and received into his house, and all the proceedings up to and including the account were passed through his office, in the usual course of business, and that there was no reason to disbelieve the witnesses who assert that the Raja was personally cognizant of the transaction.

*Mr. Degruther* for the Respondent supported the decision of the High Court. That Court had held that the case of the Plaintiff is a fabrication with the object of recovering money which had been lent to the Rani or Suraj Bali and was irrecoverable from the real debtor.

C. W. A.

*Judgment reserved.*

## CALCUTTA HIGH COURT.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 800 OF 1897.

SALE, J.

1901.

26, July.

MEGRAJ and others,

v.

SEWNAIRAN and another.

*Evidence—Entries in ledger—Admissibility of.**Mr. W. Garth and Mr. Sinha* for the Plaintiffs.*Mr. P. O'Kinealy and Mr. W. H. Knight* for the Defendants Dutt & Co.*Mr. W. Jackson, Mr. R. Mitra and Mr. A. Avetoom* for the Defendants Sewnarain Rampertab.*Mr. Jackson* in course of examining a witness tendered certain translated entries in a ledger.*Mr. Knight* objected.—Is secondary evidence. On its face it purports to be a copy of the cash book: *Burton v. Plumber* (2 A. & E. 341) is the only case reported in which a ledger was regarded as an original. There the circumstances were exceptional.

SALE, J., admitted the ledger entries.

The cash book was subsequently produced by *Mr. Jackson* but were untranslated. Entry was identified with one of the ledger entries previously admitted.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 372 OF 1899.

HILL, J.

TAYLOR, J.

1901.

11, July.

MOHIM CHANDRA GUHA, Plaintiff,

Appellant,

v.

ANNADA CHARAN DUTT and ors.,

Defendants, Respondents.

*Civil Procedure Code (Act XIV of 1882), sec. 108—Ex parte decree, when divisible—Appeal.*

This was an appeal preferred on the 23rd February 1899, against the decree of Babu Jogendra Nath Roy, Sub-Judge of Zillah Chittagong, dated the 10th of October 1898, reversing the decree of Babu Tinowry Chowdhry, Additional Munsif of Chittagong, dated the 25th of February 1898.

The suit, out of which the present appeal arose, was brought by the Plaintiff to recover possession by establishing his *rai-yati* and *dur-rai-yati* title to the land in suit. The suit as against one set of Defendants (referred to here as the Basacks) was for the declaration of the Plaintiff's *rai-yati* title and as against the other Defendant, one Annada, for a declaration of his *dur-rai-yati* title and possession. These two sets of Defendants set up separate and distinct defences.

On the 20th July 1897 the suit was heard *ex parte* by the Munsif, and he made a decree declaring Plaintiff's title both as a *rai-yati* and as a *dur-rai-yati*.

On an application made by Annada under sec. 108, C. P. C., the same was granted, it being recorded expressly by the Munsif that the suit was restored and would be re-heard only with reference to Annada.



Subsequently the Basack Defendants made an application for review of the *ex parte* decree which was refused.

Annada disputed both the *ruiyati* and *dur-raiyati* title of the Plaintiff.

On the 25th February 1898 the Munsif after hearing the case decreed the Plaintiff's suit.

Both the Basack Defendants and Annada appealed against this decree, and the Subordinate Judge dismissed the Plaintiff's suit.

Plaintiff preferred this second appeal. The principal contention, material to this report, on behalf of the special Appellant, was that the Subordinate Judge had no jurisdiction to entertain the appeal of the Basack Defendants because there stood as against them the *ex parte* decree of the Munsif of the 20th July 1897 from which they had preferred no appeal and which they had not taken any legal measures to set aside.

*Held*—That the *ex parte* decree of the Munsif was divisible, and the decree, though in form a single decree, was equivalent to two decrees, one against the Basacks, and the other against Annada, and it remained a good and binding decree as against the Basacks.

That the Basacks were no parties to the rehearing and the Munsif had no jurisdiction to retry the case as against them, and that the appeal as against that decree to the Sub-Judge was not competent.

*Babu Dharendra Lal Kastgir* for the Appellant.

*Babus Lal Mohan Das* and *Sarat Chandra Basack* for Basack Defendants, Respondents.

*Babu Pramatha Nath Sen* for the Defendant, Annada, Respondent.

S. C. S.

*Decree modified.*

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 1835 OF 1899.

MOHESH CHANDRA MUNDLE  
and another,  
Plaintiffs, Appellants,

AMEER ALI, J.  
PRATT, J.  
1901.

26, July. BOYDIA NATH PAITANDI and  
another, Defendants, Respondents.

*Contribution, suit for—Dispossession of one joint-tenant by another—Tortfeasor.*

This was an appeal preferred on the 4th September 1899, against the decree of Babu Sham Chand Roy, Subordinate Judge of Beerbhoom, dated 31st of July 1899, reversing the decree of Babu Doorga Churn Sen, Munsif of Suri, dated the 16th March 1898.

This appeal arose out of a suit for contribution. Plaintiffs' allegations were that Defendants purchased one-third share of some lands contained in two jummas from Bidhumukhi, widow of Plaintiff's brother, and that they did not pay their share of the rent and that Plaintiffs were obliged to pay the rent;

the present suit was therefore brought to recover the amount paid on their behalf to the landlord. The lower Appellate Court found that Defendants had brought a suit against the Plaintiffs for the establishment of right and recovery of possession of  $\frac{1}{3}$  share of 19 bighas odd of lands professing to have purchased from the said Bidhumukhi, widow of Plaintiff's brother, and that they had got a decree for the possession of it during the lifetime of the widow. The lower Appellate Court further found that it was not clear under what circumstances Defendants had been kept out of possession. The Plaintiffs paid the rent of 1298 to 1303, B. S., of the whole lands. The Defendants got decrees for mesne profits of the period against the Plaintiff. The lower Appellate Court held that Plaintiffs were wrong-doers in respect of the share of the Defendants and kept them out of possession during the period for which the payments of rent had been made. The suit was therefore dismissed. Plaintiffs preferred this second appeal.

Their Lordships in remanding the case observed as follows:—

The Defendants had acquired an interest under the conveyance executed in their favour by the widow of the deceased brother, and they were trying to get hold of the property by virtue of that conveyance. The Plaintiffs, so far as can be gathered from the materials upon the record, were disputing the right of the Defendants (the Plaintiffs in that case) to obtain possession of the property under their assignment from Bidhumukhi; and it can hardly be said that they were in the position of *tortfeasors* within the meaning of the expression as used by the learned Chief Justice in the case of *Talak Chand Babu* against *Squadaminee Dasi* (3 C. L. R. 456).

Case remanded for trial as to what amount the Plaintiffs are entitled to recover from Defendants.

*Moulvie Serajul Islam* for the Appellants.

*Babu Nolini Ranjan Chatterjee* for the Respondents.  
S. C. S.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 210 OF 1899.

MACLEAN, C. J.  
BANERJEE, J.

1901.

12, July.

A. CASPERSZ, Plaintiff,  
Appellant,

KEDAR NATH SARBADHIKARI and  
ors., Defendants, Respondents.

*Ejectment, suit for—Origin and nature of tenancy not known—Evidence of mode of dealing with land demised, of acts and conduct of parties—Permanent tenancy, presumption of—Alternative plea of acquiescence by conduct on failure of proof of substantive defence as to evidence of permanent tenancy, if permissible—Acquiescence, whether a question of fact—Facts justifying inference of permanent tenancy.*

This was an appeal preferred on the 20th of January 1899, against the decree of T. W. Richardson, Esq., Additional Judge of 24-Pergunnahs, dated the 30th September 1899, affirming a decree of Babu Sasi Bhusan Chandhuri, Munsif of Alipur, dated the 22nd March 1898.

This appeal arose out of a suit brought by the Plaintiff, the official Receiver to the Bhukailash estate, to eject the Defendants from certain premises in Kidderpur measuring 1 bigha of land and having a *pucca* building upon it, on the ground that the Defendants Nos. 1 and 2 (the Sarbadhikaris), who held the premises were merely tenants-at-will not having a transferable interest; and that Defendant No. 3 (Madhab Karmokar) obtained his rights under his purchase and was a trespasser who was not entitled to remain on the land. The Sarbadhikari Defendants did not appear and the suit was contested by Defendant No. 3, Madhab Karmokar, and on his behalf it was contended that the notice was invalid, that the tenancy of the Sarbadhikaris was a permanent one by express as well as by implied grant; and that the Plaintiff was estopped from asking for *khas* possession.

The Sarbadhikari Defendants held the tenure as successors and heirs of Beni Madhub and Modhu Sudan Sarbadhikari, who, in their turn, inherited it from Jaggan Nath Sarbadhikari. For two generations the Sarbadhikaris had occupied the land as tenants of the estate paying a rent which was increased at irregular intervals. The Sarbadhikaris and their co-sharers had sold their rights to Defendant No. 3 at various dates and the latter had been in possession of the entire tenure since 1295, B. S.

To prove the origin and nature of the tenancy a *patta* was produced by the Defendant No. 3, but it was held to be not genuine but it appeared that a *pucca* house had been built upon the land by the tenant and that the building had been added to from time to time and that it had been standing on the land for a very considerable time.

The second issue framed which is material to this report was as follows:—

“Whether the Adhikaris held the tenure as a permanent one either by express or implied grant; if so, is the suit maintainable?”

The Munsif held that the tenancy was not a permanent one but that the conduct of the parties was such as to debar the landlord from evicting the Sarbadhikaris. That the landlord took *Bharatia kabuliyat* from them but allowed them to erect *pucca* structures on the land, which had been, even after the expiry of the term of the last *kabuliyat*, allowed to stand; and the Munsif, on these findings, dismissed the Plaintiff's suit.

On appeal the Additional District Judge of Alipur held that in the absence of all documentary evidence, the long possession of the vendor Defendants, the Sarbadhikaris, and their ancestors, and the fact that the landlord permitted a *pucca* house to be built

upon the land by the tenant which house had been standing for a considerable time, raised the presumption that the original grant was some kind of permanent building grant; that the Defendant No. 3 could not be evicted from the land and that the suit had been rightly dismissed.

The present appeal was then preferred by the Plaintiff and the same questions as were raised in the Courts below were argued before the Court, and the further question was raised that as the Defendants in the first instance based their case upon a fraudulent *patta*, it was not open to them to set up the alternative case upon which they relied, *viz.*, of long possession and acquiescence and conduct to prove that the tenancy was of a permanent character.

• *Held*—That when parties to a litigation set up a false document, that circumstance may induce the Court to view the evidence which they tender upon some other part of the case, with great care and possibly with some suspicion, but it does not prevent the parties from setting up such alternative case, nor prevent the Court from duly weighing and considering the evidence adduced in support of it.

*Rani Surnojoyee v. Maharaja Satish Chandra Roy Baluador* (10 Moo. 1. A. 123 [149]) referred to.

That the question of acquiescence is not a question of fact but of legal inference from the facts found and upon it the judgments of the Appellate Courts are not final.

*Parsotam Gir v. Narbada Gir* (I. L. R. 21 All. 504) referred to.

That the fact of long possession by the Defendants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, that the house had been built there for a very considerable time, that it had been added to by successive tenants and that the tenure had from time to time been transferred by succession and purchase, in which the landlord was found to have acquiesced or of which he could not have been ignorant are facts sufficient to warrant the Court in presuming that the tenure was of a permanent nature, specially if the origin of the tenancy could not be ascertained.

*Babu Dhanput Singh v. Gossan Singh* (11 Moo. 1. A. 433), *Gangadhar Sikdar v. Ayimuddin Shah Biswas* (I. L. R. 8 Cal. 960), *Prasanno Kumar Chatterjee v. Jagannath Basak and others* (10 C. L. R. 25) and *Ismail Khan Mahomed v. Jaigun Bibi*, (I. L. R. 27 Cal. 570) cited.

That if there were documents, which showed the origin and nature of the tenancy, very different considerations would arise.

*Mr. O'Kinealy*, with him *Babus Umakali Mukerjee* and *Joy Gopal Ghosa*, for the Appellant.

*Babus Nilmadhab Bose* and *Shib Chandra Palit* for the Respondents.

*Appeal dismissed.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, AUGUST 12, 1901.

[No. 38]

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### REPORTS (See Index.)

MR. JUSTICE RAMPINI WILL PRESIDE AT THE NEXT Court of Criminal Sessions which will commence its sittings in the High Court on Wednesday, the 14th of August next.

MR. JUSTICE BRETT HAS BEEN GRANTED PRIVILEGE leave from the 15th of August to the 5th of September. Mr. Justice Pratt has already left for home on leave.

INTIMATION HAS BEEN RECEIVED THAT THEIR LORDSHIPS of the Privy Council have quashed the conviction of Sir S. Subramania Iyer, in the military accounts extortion case, by the Court of Criminal Sessions at Madras, which was upheld by a Full Bench of the Madras High Court. A report of the application for special leave will be found in our issue of the 23rd of July 1900 and that of the hearing in our issue of the 29th of July last. The appeal raised several important questions of criminal law such as, the admissibility of the evidence of an alleged accomplice obtained on the tender of pardon by the Crown: the illegal joinder of charges: the power of the High Court to alter or modify the verdict of a jury or to substitute their own findings in its place: the limitations of the curative effect of sec. 537 of the Code of Criminal Procedure. It is seldom that the decisions of our Criminal Courts are revised by their Lordships of the Judicial Committee; but when they are, we eagerly look forward to them in expectation of

a more liberal construction of the law. As their Lordships endeavour ordinarily to do substantial justice to the aggrieved, their judgment in this case runs little chance of being warped by narrow technicalities.

ALL THE CASES REPORTED IN THIS ISSUE ARE OF special importance. The first one, *Harris v. Brown*, is the decision of the Judicial Committee relating to the construction of a Bengali Will on which we commented in our last issue. The next one is a decision of Maclean, C. J., and Banerjee, J., which settles a moot point of private international law relating to the jurisdiction of the British Courts over British subjects residing in British India and the power of Courts in British India to give effect to or question the merits of judgments of British Courts. The third, which recognises the power of the High Court to transfer proceedings under sec. 145 of the Code of Criminal Procedure from the file of one magistrate to that of another, is a decision of Ghose and Taylor, J.J., which differs very rightly from the view taken by Jenkins, C. J., on the same question in the Bombay High Court.

IN AN EARLIER ISSUE WE VENTURED TO POINT OUT from a constitutional point of view the mistake that the Government had made in conferring on a private association the right to return a representative of the land-holding class to the Bengal Council. Before conferring any such franchise, the Government ought in the first place to determine what should be the qualifications of a voter and as to how the election should be conducted. When, however, the Government does not care to fix any definite qualifications for voters or procedure for them to follow at the election, but leaves it altogether to a private body of men, mixed and miscellaneous in character, and not even incorporated or registered under any statute, there can be no guarantee against their altering or deviating from even such makeshift rules as they may possess for some general purpose or of following any course they please to attain any particular object in view. What has transpired in the public press about the election concerning scandals connected with land-holder's seat, fully confirms our view that the right to elect a member for the local legislature is too valuable and important a right to be given lightly to a private body to play with at their pleasure.

It was inopportune, and we may be permitted to say injudicious, to disfranchise a group of municipal bodies and to put up in their place a private association which has no legal status and is apparently unfit to rank as an electorate. A municipal body has a strictly legal status and a group of municipalities is, perhaps, an ideal electorate. What led the Government to disfranchise them is more than the public can comprehend. The Government had hitherto nominated a land-holder to be a member of the Council, and if the Government desired now to confer a franchise upon the class, the right to elect their own member, the best course would have been and would even now be to adopt the provisions of the Bombay Regulations in this respect.

WE REVERT TO THIS SUBJECT NOT ON ACCOUNT OF THE present electioneering scandals but because it may involve serious legal consequences. We have grave doubts whether the conferment of the franchise by the Government upon a private association, which does not profess to be even an association of land-holders and as such cannot in any way come under Reg. II D of 1899, is not altogether *ultra vires*, and the franchise, so conferred, in whatever manner exercised cannot be called into question in a court of law, as being *ab initio* null and void. It will be disastrous to admit a member to the Bengal Council returned by a body who have no legal status to do so. If such a member takes part in any deliberations of the Council, exception may be taken to them on account of the Council being not properly constituted. We are sure the Government will take note of this and take early steps to prevent the election being either questioned in a court of law or the future proceedings of the Council being in any way challenged, by inadvertently allowing a disqualified member to sit and vote.

### Notes of Cases.

(The important ones to be fully reported hereafter.)

#### PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD HOBHOUSE.	MUSST. BATUL BEGUM, Plaintiff,
LORD DAVEY.	Appellant,
LORD ROBERTSON	
SIR R. COUCH.	SAIFID MANSUR ALI KHAN
1901.	and others, Defendants,
19, June.	Respondents.

*Pre-emption, suit for—Limitation Act (XV of 1877), Sec. 11, Arts. 10, 120 and 144.*

This was an appeal from a decree of the Allahabad High Court confirming a decree of the Sub-Judge of Gorakhpur.

The Appellant's suit was to enforce a right of pre-emption in respect of certain shares in villages named in the plaint.

Of the Defendants-Respondents Bhagwati Pershad alone put in a written defence in which he pleaded *inter alia*, that the suit was barred by the statute of limitations.

Both Courts gave effect to such defence.

The Appellant contends that the suit is not barred by limitation.

The facts are, the Defendant Mansur Ali and his brother Zahur Ali owned 3rds of three villages Patrongwa, Sandhuria and Pipra, in equal shares and the whole of a village named Parsa.

On 14th March 1868 Zahur Ali mortgaged by conditional sale his share on the 4 villages to one Surja Pershad now represented by the Respondent Bhagwati Pershad, the mortgagor remaining in possession.

The mortgage was foreclosed and the period of grace of one year expired on 20th January 1881, (Regulation 17 of 1806).

Zahur Ali died in 1876; and after his death his brother Mansur Ali brought a suit in 1881 for redemption of the mortgaged property. That suit was eventually dismissed by an order of Her Majesty in Council on 13th July 1886, on the ground that the mortgagor had not done what was necessary by the terms of that regulation to entitle him to redeem.

Afterwards the Respondent, Bhagwati Pershad, brought a suit for possession of the mortgaged property and mesne profits.

That suit was decreed finally by the High Court on 6th July 1893. Thereupon Bhagwati Pershad, Respondent, was put in formal possession of the shares of 4 villages, and on 27th November 1893 executed a *dakhilnamah* in the usual manner.

The present Appellant hearing of those proceedings commenced the present suit on 4th July 1894, praying for a decree awarding possession of the property in suit on the basis of pre-emption, the condition of the *wajib-ul-waz*, the custom of the village, and the right of pre-emption under the Mahomedan-law, by setting aside all the proceedings and the foreclosure decree on payment of Rs. 35,000 the consideration-money or such sum as the Court thought proper.

The Sub-Judge following the decision in the case of *Ali Abbas* (I. L. R. 14 All. 405) held that the suit was time-barred as it was instituted long after 6 years from the date of the expiration of the year of grace in the foreclosure proceedings.

The High Court on appeal remanded the cause for trial of issue "Does the property in suit admit of physical possession?"

The Sub-Judge found that it did not.

The Division Bench thereupon referred the matter to a Full Bench.

The Full Bench pointed out that the said judgment in the case of *Ali Abbas* (I. L. R. 14 All. 405) had been misunderstood by the Sub-Judge. They dissented

from the decision in *Nath Pershad's* case (4 All. Series 218). They could not see how a sale was any the less an absolute sale because it was not to take immediate effect and operation, and in their opinion the other conditions being present necessary to make Art. 10 applicable, that article could apply to a sale which in its inception was a mortgage by conditional sale but which either by the operation of Regulation 17 of 1806 or by the operation of Act IV of 1882 had become in effect an absolute sale with the right of redemption gone.

The Judgment concluded as follows:—

"In the present case if the whole of the property sold was capable of physical possession being taken by the mortgagee-vendee, we should hold that Art. 10 of the second schedule of Act XV of 1877 applied. The question really turns, as we have said on what is the meaning of 'physical possession' as that term is used in Art. 10 of the second schedule to Act XV of 1877. It must mean something different from 'actual possession,' and it must mean something different from ordinary possession. In Cl. (1) of sec. (1) of Act XIV of 1859, which was the clause prescribing the limitation in suits for pre-emption, the term used was 'possession,' and limitation ran from the time of possession being obtained by the vendee. In *Goordhan v. Heera Singh* (S. D. A. N. W. P. 1866, 181) a Full Bench of the Sadr Dewani held that the possession of Act No. XIV of 1859 must be an actual and not a constructive possession. In 1868 the question came again before a Full Bench, then of this Court, and in *Ganeshee Lal v. Toola Ram* (N. W. P. H. C. Rep 1868, 376) the Full Bench decided that the possession of Act XIV of 1859 included constructive as well as actual possession. It is probable that that decision led to the alteration of the wording of the article relating to limitation in pre-emption suits in the next succeeding limitation Act. In Art. 10 of the second schedule to Act No. IX of 1871 it was proscribed that limitation should run from the date when actual possession was taken under the sale. Then came a Full Bench of this Court in 1876, *Jageshar Singh v. Jivahar Singh and others* (I. L. R. 1 All. 311), in which a majority of the Full Bench held that the actual possession of Act No. IX of 1871 was the same thing as the possession of Act No. XIV of 1859 and included constructive possession. The then Chief Justice of this Court Sir Robert Stuart, in our opinion, was right in differing from the rest of the Full Bench. He held that the purchaser does not take actual possession of the properties sold to him until he takes physical and tangible possession. The next matter to which we have to refer is that when Act XV of 1877 was passed the legislature, still determined, in our opinion, to exclude constructive possession from the possession from which limitation should run under Art. 10, used the term 'physical possession,' and they added a different terminus of limitation in respect of property which did not admit of physical possession.

As we have said, two of the villages here were of pure zemindari tenure, that is, they were villages in which the zemindars got no shares allotted to them by metes and bounds, but held fractional shares in respect of which fractional shares they received a proportionate amount of the profits of the village. It is said that the mortgagor used to receive direct from the tenants of the zemindari body his proportion of the rents payable by them. That, in our opinion, does not alter the case. In *Unkur Das v. Narain* (I. L. R. 4 All. 24) it was held that a share in an undivided zemindari mahal was not susceptible of physical possession in the sense of Art. 10 of the second schedule to Act No. XV of 1877. We adhere to that decision. The Legislature meant some limitation of the term 'possession' by the use of the term 'physical.' In our opinion, for instance, the owner of a house who has let the house to a tenant cannot be said to be in physical possession of that house so long as the tenancy subsists and his tenant remains in exclusive possession of the demised premises. In such a case the owner has parted with the physical possession to his tenant for the period of his tenancy, and the tenant alone is the person who has physical possession. It appears to us that it would be straining the English language and going contrary to the obvious intention of the legislature to hold otherwise. In this particular case Art. 10 cannot apply, because the whole of the property sold is not capable of physical possession within the meaning of that article, and no instrument of sale has been registered. The result is that Art. 10 not applying Art. 120 must apply in this case. As Art. 120 applies we have got to see when the right to sue accrued to the pre-emptor. That point is concluded by the Full Bench ruling of this Court in *Ali Abbas v. Thakur Parsud* (I. L. R. 17 All. 105) which, in our opinion, was rightly decided, but which must always be regarded as deciding merely the point referred to the Full Bench, and not the question of limitation. This suit was barred by limitation when brought, and we dismiss this appeal with costs which will include fees on the higher scale."

*Mr. Ross* for the Appellant in contending that the above decision is erroneous urged that the suit is not barred by limitation because Art. 10 and not Art. 120 applied to this suit, and if Art. 10 did not, Art. 144 is the proper article to apply. And further that even if Art. 120 should be the governing article, the right to sue did not accrue and time did not begin to run until the final decree for possession was passed in favour of the mortgagee. *Mr. Ross* referred to some of the decisions noticed in the Courts below. He further referred to Starling's Indian Limitation Act, pp. 109 to 111; Directions to revenue officers, N. W. P., Ed. 1858, p. 50; and *Forbes v. Amirunnessa* (10 Moor's I. A. at p. 349).

No one appeared for the Respondents.

LORD ROBERTSON delivered their Lordships' judgment advising His Majesty that the appeal ought to be dismissed. In conclusion after stating the circumstances the judgment states: "It seemed to their Lordships clear that the expiry of the year of grace was the time at which the pre-emptor's right arose. The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession did not affect the question. Their Lordships were satisfied of the soundness of the decision in *Ali Abbas v. Thakur Parshad* (1. L. R. 14 All. 405)."

Appeal dismissed.

C. W. A.

### PRIVY COUNCIL.

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

LORD HOBHOUSE	RAJA PADMANUND SINGH and
LORD DAVEY.	others, Plaintiffs, Appellants.
LORD ROBERTSON.	
SIR R. COUCH.	MR. G. S. HAYES and others,
1901.	Executors to the estate of
Heard, 19, June.	Balm Dharma Chand Lal, the
Judgment,	deceased, Defendants,
13, July.	Respondents.

*Construction Gift Agreement - Estate absolute or conditional Vesting of estate Void or voidable.*

The High Court had in this appeal reversed the decision of the District Judge of Purneah and decreed to Plaintiff only one-half of the village in suit Alagjhari while the District Judge had decreed the whole of it and Plaintiffs had in their amended plaint claimed the whole.

The facts were that that village and others were given by Raja Lilanund Singh, the Appellant's father, to his daughter Jogmaya Dai absolutely.

The Appellant on coming of age disputed the right of his father to make such gift of ancestral property and brought a suit to contest it. That suit was compromised in 1874, a *pattah* was granted of the village in dispute to Jogmaya Dai and she in same terms executed a *kabuliyat*.

The terms of the *pattah* and *kabuliyat* were *mutatis mutandis* as follows:—

I, Kumar Padmanund Singh, also wish that the said Srimati Jogmaya Dai, my sister, and her children should be maintained and supported, and the said Dai also considering the right of me, Kumar Padmanund Singh, and with a view to compromise the suit, consented to relinquish her right which she had acquired under the said deeds sought to be set aside, and a compromise has been effected between us through the intervention of Mr. George Nelson Barlow, C.S.I., Commissioner of Zillah Bhagulpore, to the following effect, viz., the said Srimati Jogmaya Dai shall get an allowance of Rs. 6,000 per annum during her lifetime, and her

descendants who may, under the Hindu law, become her heirs, shall get one-half thereof in perpetuity, and in lieu of the same, whatever profits the mouzahs which are held by the said Mussumat Jogmaya Dai under the deeds sought to be set aside may yield annually over and above Rs. 6,000, being fixed as the *jumma* of those mouzahs, the said mouzahs shall be left in the possession of the said Jogmaya Dai, and on the death of the said Dai one-half of the said mouzahs shall permanently remain in the possession of her descendants, who may be alive at that time and may be (her) heirs according to the *Shastras*, on a *jumma* equal to one-half of the said *jumma*. The person holding possession of the property shall never have any right to alienate, i.e., to effect any sale, gift or mortgage or permanent *mukurari* of the whole or a portion of the said properties. Therefore, we, the declarants, in effecting and enforcing the said compromise have, of our own free-will and accord, granted this *pattah* in respect to the said mouzah Dubri Alagjhari, a permanent jagir mehal in pergunnah Powakhali, Zillah Purneah, and the said mouzah Barapati Rahoia, otherwise called Lalgunge, towzi No. 3524, and sudder *jumma* Rs. 820-3-2 pies within the jurisdiction of the Bhagulpore Collectorate, from 1282 fusi on the annual *jumma* of Rs. 1,234, by taking a *kabuliyat*, to Srimati Jogmaya Dai, daughter of me, Raja Lilanund Singh Bahadoor, and sister of me Kumar Padmanund Singh, on the conditions specified below, by cancelling the former settlement and deeds. It is required that the said lessee and her descendants should permanently remain in possession by carrying out the conditions given below, and that they shall never act contrary to this *pattah*.

"1. Srimati Jogmaya Dai, the lessee, shall remain in possession of the aforesaid properties during her lifetime and pay to us, the declarants and our representatives, Rs. 1,234, the annual *jumma* as per instalments given below, by taking receipts for the same. On the death of the said lessee, her descendants who may, according to the *Shastras*, become her heirs, shall permanently remain in possession of one-half of the properties mentioned in the *pattah* and pay the annual *jumma* of Rs. 617, year after year as per instalments given below, to us the declarants and our heirs and representatives, and take receipts for the same. The remaining one-half of the properties mentioned in the *pattah* shall, from the time of the death of the said Srimati Jogmaya Dai, revert to the Raj, and the descendants of the lessee shall not get possession of the same.

"2. The lessee or her descendants, who may come into possession in the manner specified in the preceding paragraph, shall not have any power to transfer the property mentioned in the *pattah* by sale, gift, mortgage or permanent *mukurari* or in any other way, and such alienation shall not be valid, and the transferee shall not have any right to hold possession under such transfer.

"3. The amount of *jumma* which will have to be paid in the manner specified in paragraph 1, shall never be reduced or increased, and we, the declarants, and our representatives shall never interfere in the possession of the lessee and her heirs, who are or will be entitled under the conditions of this *pattah*; and with the exception of receiving the fixed *jumma* we, the declarants, or our representatives shall have no further right at all.

"4. If there be no descendants of the lessees, *i.e.*, children born of her womb or their children, we, the declarants and our representatives, have and shall have power to resume and take possession of the remaining one-half of the said mouzals which have been permanently settled for maintenance, and the properties mentioned in the *pattah* shall revert to the Raj. Be it known that this maintenance has been fixed only for the lessee and her al-aolad (descendants, *i.e.*, children born of her womb) and their descendants, and that the husband of the lessee or stepson or step-daughter of the lessee and other persons, who are not included in the category of the descendants of the lessee as stated above, shall not be entitled to get the said mouzah. But those persons are included in the category of al-aolad (descendants) who are not even the descendants in the first degree, *i.e.*, the descendants of children born of womb also are included in this category, and when there are several descendants, such one or more of them who may be the nearest in relation, according to the *Shastras* anyone among them whom the lessee or the person holding possession may declare to be the rightful heir, shall be entitled to succeed. But the adopted son or *kartaputra* is not and shall not be included in the category of descendants.

In June 1885 Jogmaya Dai executed a mortgage of the village in suit to Defendant, Dharm Chand, for an advance of Rs. 20,000 and gave him a lease for 10 years so as to secure to him possession. The lease was benami in the name of two of Dharm Chand's servants.

In 1877 the Respondent, a minor grandson, (daughter's son) Bholanath Jha was born.

Jogmaya Dai died in April 1889. Raja Lilanund Singh died in 1883.

In 1890 the Appellant gave directions to his Patwari that he was to collect rents of  $\frac{1}{2}$  the mouzah which on the death of Jogmaya reverted to the Raj of Banali, that is, the Plaintiffs' Raj.

In 1892 notices were served on the mortgagee intimating that Plaintiffs had come to hear of the said mortgage and lease to Dharm Chand, that they were invalid and informing the mortgagee that they had no right to hold the village under such transfers by Jogmaya Dai. Not receiving satisfaction the present suit was instituted.

The Courts held that the lady had no power to execute those documents and the Plaintiffs were not bound by them.

The High Court on the Defendant Dharm Chand's appeal referring to the said notice issued to the Patwari said:—

"It will be seen from this document that the present Plaintiffs then declared that they were entitled to only eight annas of the rent of the village, and that the remaining eight annas belonged to the descendants of the lady who were bound to hold under the conditions of the lease entered into at the time when the family settlement took place, and to pay their rent into the Plaintiffs' cutchery. The Plaintiffs in that *perenna* to the Patwari pointed out clearly that from the month of Bysack of the current year, that is, from the beginning of the year, the Patwari should only collect eight annas of the rent due to them, and they directed the Patwari to remit that to the cutchery. They also pointed out how the rent was to be entered in the receipts given to all raiyats, so as to show that the other eight annas belonged to the lady's descendants. This clearly shews that from Bysack, 1297, the Plaintiffs treated the old lease given by them to the lady as an existing lease under which they were entitled to have only eight annas of the rents of the village, and the remainder eight annas remained in possession of her descendants on payment of rent. The Plaintiffs have not contended that they have since then received any conveyance or lease of the remaining eight annas from the descendant of the lady then entitled under the lease."

And they conclude their judgment, which is virtually based on that document, as follows:—

"The Judge in the Court below gave the Plaintiffs possession of the whole village with mesne profits.

"It was argued at the Bar for the Appellant that as the Plaintiffs by their own conduct determined on carrying out the lease, and did carry it out so far as they could, Bholanath should receive eight annas of the rents; and the Plaintiffs not having based their claim on anything done since that year, the Judge in the Court below was wrong in giving them possession and *masilat* of the whole 16 annas of the village. It was also argued that as Bholanath was admittedly entitled to eight annas share of the rent, the Plaintiffs could only get possession of the remaining eight annas share.

"On the other hand, the Respondents replied by stating that the *pattah* and *kabuliyat* entered up in terms of the decree between the three relatives, could not, according to the Hindu law, pass the estate.

"The Respondents did not, nor could they, we think, deny that Bholanath had not in terms of the agreement, an equity against the Plaintiffs to carry out the arrangement.

"We are of opinion that Bholanath, under the terms of the family settlement and the decree passed thereon, had a right to specific performance of the agreement, and to compel the Plaintiffs to give him a legal title, if they refused. But instead of refusing,

the Plaintiffs acquiesced in Bholanath's right, treated him as legal owner and gave him possession, so far as they could, by the intimation they gave to the raiyats and servants in 1297. We think, therefore, that the Plaintiffs cannot succeed in getting a declaration that Bholanath cannot now hold the property as the legal owner or that they can dispossess him from his eight annas share.

"We, therefore, cannot agree with the Judge in the Court below in holding that the Plaintiffs are entitled to possession and *wasilat* of the whole sixteen annas of the property as against Bholanath and the persons connected with the mortgage transaction. We think, however, that they have a right to a declaration that, as against them, the mortgage made by the lady is not binding; and in modification of the decree of the lower Court, we direct that the Plaintiffs be put in possession of eight annas share of the property, with *wasilat*, according to the amount fixed by the lower Court. Each party to pay his own costs in both Courts."

In this appeal *Mr. Mayne* and *Mr. C. W. Arathoon* for the Appellants contended that such decision was erroneous, that on the death of Jogmaya Dai there was no one capable of taking having regard to the terms of the *pattah* and *kubuliyat*. The donee must be a person in existence capable of taking when the gift took effect, that condition was not fulfilled in this case. There was no vested interest conferred on anyone of Jogmaya's descendants until her death. Jogmaya Dai was only given a life interest, and there could be no ratification of what was void and not voidable, *Maharani Beni Pershad v. Dudnath Roy* (26 I. A., p. 16).

*Mr. Cowell* for the Respondents contended that upon a proper construction of those documents, so long as a lineal descendant of Jogmaya Dai was alive, the Appellants have no right to possession of one moiety of the village, she took an absolute estate of inheritance in that moiety defeasible only on the happening of events which did not occur.

He read passages from the *Tagore case* (I. A. Supp. Vol., p. 65), cited *Bhoban Moy's case* (5 I. A., p. 138) and *Rao Balwant Singh v. Rani Kishore* (25 I. A. at p. 66).

LORD HOBHOUSE to *Mr. Cowell*.—Is there any reason given by the High Court for disregarding the objection to Bholanath not taking because he was not alive in 1874. I can find none.

*Mr. Cowell*.—No. Bholanath has a legal title or nothing.

*Mr. Mayne* replied.

SIR RICHARD COUCH delivered their Lordships' judgment and advised His Majesty to reverse the decree of the High Court and restore that of the District Judge; the Appellants to have the costs in the High Court and of this appeal.

*Appeal allowed with costs.*

C. W. A.

## CALCUTTA HIGH COURT.

### [CIVIL REVISIONAL JURISDICTION.]

#### Full Bench Reference.

RULE No 2780 OF 1900,

MACLEAN, C. J.

BANERJEE, J.

AMBER ALI, J.

RAMPINI, J.

PRATT, J.

1901.

31, July.

PARESH NATH SINGHA and anr.,  
Petitioners,

v.  
NOBBOGOPAL CHATTOPADHYA and  
ors., Opposite Party.

*Civil Procedure Code (Act XIV of 1882), sec. 310A—Right of simple mortgagee to apply under sec. 310A to have a sale set aside in execution of a decree for rent—Mortgagee, whether a person whose immoveable property may be said to have been sold.*

This case was referred to a Full Bench by Maclean, C. J., and Banerjee, J., on the 8th of March 1901, with the following opinion:—

"One of the questions arising in this rule is, whether a mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it, is entitled to make an application under sec. 310A of the Code of Civil Procedure as being a "person whose immoveable property has been sold" within the meaning of that section.

"Upon that question there is, we think, a conflict between the cases of *Hamedul Huq v. Matangini Dasi* (2 C. W. N., short notes, p. 258), and *Nityananda Patra v. Hira Lal Karmakar* (5 C. W. N. 63). In our opinion it makes no difference whether the mortgage is a simple mortgage or is one by conditional sale, the real point for consideration being, whether the mortgagee is a person whose immoveable property has been sold, within the meaning of the section.

"There being this conflict of decisions, the question stated above must be referred for determination to a Full Bench; and as the question arises in a rule the whole rule must be so referred:

*Held*—(RAMPINI, J., dissenting)—That a simple mortgagee of a tenure or holding sold for arrears of rent under the Bengal Tenancy Act can come in and apply under sec. 310A of the Code of Civil Procedure to have the sale set aside.

*Babu Dwarka Nath Chakravarti* for the Petitioners.

*Babu Nalin Ranjan Chatterjee* for the Opposite Party.

H. P. C.



## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 236 OF 1899.

HILL, J. } METHURAM DASS, Plaintiff, Appellant,  
 HARRINGTON, J. }  
 1901. }  
 26, July. } JAGGAN NATH DASS, Defendant,  
 Respondent.

*Defamation—Suit for damages—Privilege—Words spoken at a Police investigation held under the Criminal Procedure Code.*

"This was an appeal preferred on the 24th of January 1899, against the decree of Babu Sarbessur Mazumdar, Additional Subordinate Judge of Zillah Julpauri, dated the 10th October 1898, reversing the decree of Babu Kanti Chunder Mukerjee, Munsif of Julpauri, dated the 11th of February 1898.

The question which arose in this appeal was whether the Defendant who, in answer to a question put to him by a police-officer conducting an investigation under the provisions of Act X of 1882, (Criminal Procedure Code), stated that the Plaintiff was concerned in the commission of the crime then being investigated, can be made liable in an action for damages for words so spoken.

The lower Appellate Court held on the authority of *Queen-Empress v. Gobinda Pillai* (1. L. R. 15 Mad. 235), that no action would under such circumstances lie. Plaintiff preferred this second appeal.

*Held*—That the Defendant could not be made liable in an action for damages for words so spoken by him and that the suit was not maintainable.

*Babu Sharat Chandra Roy Chowdhury* for the Appellant.

*Moulvie Sirajul Islam Khan Bahadur* for the Respondent.

*Appeal dismissed.*

S. C. S.

## [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM APPELLATE DECREE

No. 1328 OF 1899.

RAMPINI, J. } RAM RATTAN PERSHAD,  
 GUPTA, J. } Plaintiff, Appellant,  
 1901. }  
 26, July. } SHEO NANDAN SINGH and others,  
 Defendants, Respondents.

*Estoppel—Infant representing to be of age—Minor, payment to—Right of minor to recover a sum already paid.*

This was an appeal preferred on the 7th of July 1899, against the decree of F. H. Harding, Esq., Judge of Shahabad, dated the 10th April 1899, modifying the decree of Babu Janendra Chunder Banerjee, Munsif of Arrah, Second Court, dated the 16th of July 1898.

The Plaintiff, a minor, sued by his guardian and next friend to recover arrears of rent for the years 1301 to 1303 F. amounting with interest to Rs. 765-4 ans. The Defendants pleaded payment of a great portion of the claim. The first Court found a *jurkati* (acquittance), purported to have been granted by the late guardian of the Plaintiff for the rent of the year 1301 filed by the Defendants, to be genuine and disallowed the Plaintiff's claim for that year. The first Court also found other receipts filed by the Defendants and alleged by them to have been granted by the Plaintiff for rent paid by them to be genuine, but being of opinion that they could not be regarded as valid receipts, in consequence of the Plaintiff being a minor, it gave the Plaintiff a decree for the full amount of his claim for the other years in suit. Both parties appealed to the lower Appellate Court. As regards Plaintiff's appeal, the lower Appellate Court agreeing with the first Court dismissed it. In the appeal by the Defendants the lower Appellate Court found that the Defendants had succeeded in proving two receipts as being granted by the Plaintiff and that the Plaintiff was in the habit of collecting his own rents. This fact was further supported by the petition which the Plaintiff had filed before the District Judge in which describing himself as over 18 he complained of his guardian, alleging that he took no interest in his affairs including the collections of rent, and asked that he might be allowed to assume the management of his own affairs. The lower Appellate in modifying the decree of the first Court observed as follows:—

"It is highly improbable, if the Plaintiff does not know how to write, that receipts purporting to have been signed by him would have been forged. I have no doubt that the Plaintiff Respondent granted the two receipts mentioned above. I do not agree with the Munsif in his opinion that effect should not be given to the payments acknowledged in these receipts. The plea of minority may be used to protect a minor but not to injure third parties.

"In this case we have a minor, whose guardian resides in Gaya and, according to his own showing, as I have stated above, takes but little interest in his affairs, allowed to go about collecting rent and to grant receipts for the same. Looking to the circumstances of the case, and more particularly the fact that the minor is sufficiently advanced in years to know what he is about, I consider that it would be most inequitable to make the Defendants pay these sums over again.

"The Munsif has rightly excluded Ex. B5 in consequence of it not being stamped and Exs. B6 and C are only *chittas* and not receipts.

"The sums of Rs. 125 and 99 mentioned above will be deducted from the Plaintiff's claim, and the Plaintiff will get a decree for the balance due for the years 1302 and 1303 F. only."

Plaintiff preferred this second appeal.

*Held*—That the Plaintiff who is a minor, suing through his guardian was not entitled to recover again from the Defendants the money paid by the Defendants to the minor himself and that there was an estoppel by his conduct to prevent the minor, even through his guardian, to recover the sums which clearly were paid to him by the Defendants.

Their LORDSHIPS in delivering judgment remarked as follows:—

The guardian chose to neglect his duty, and the minor went about collecting rent and representing himself to the Court to be over eighteen years of age and competent to manage his own affairs. This amounted to a virtual representation on his part that he was of full age and entitled to collect rent; and it would be very inequitable in these circumstances to allow the Plaintiff to recover the above sums again.

*Moulvie Mahomed Yuseof Khan Bahadur* for the Appellant.

*Babu Suligram Singh* for the Respondents.

*Appeal dismissed.*

S. C. S.

# [CIVIL APPELLATE JURISDICTION.]

## APPEAL FROM ORDER

\*Nos. 267 and 291 to 295 of 1900.

MACLEAN, C. J. KEDAR NATH CHATTERJEE,  
BANERJEE, J. Judgment-debtor, Appellant,  
1901. v.  
31. July. ARDHA CHANDRA ROY CHOWDHURY,  
Decree-holder, Respondent.

*Bengal Tenancy Act, Sch. III, Art. 6—Limitation—Execution of decree for arrears of rent by a co-sharer landlord—Limitation Act (XV of 1877), Sch. II, Art. 179.*

This was an appeal preferred on the 16th of July 1900, against an order of F. E. Largeter, Esq., District Judge of Zillah 24-Pergunnahs, dated the 15th May 1900, affirming an order of Babu Amrita Lal Mukerjee, Munsif, 3rd Court at Alipur, dated the 14th February 1900.

The principal question which arose for decision in these appeals was as follows:—

Whether an application for the execution of a decree obtained by one of two or more joint landlords for his share of the rent, is governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act, or by the general law of limitation, namely, Art. 179 of the second schedule of Act XV of 1877.

For the Appellant it was mainly contended that a suit by one of several joint landlords for his share of the rent, being a suit between landlord and tenant, is a suit under the Bengal Tenancy Act, and a decree made in such a suit is a decree under that Act, although certain provisions of the Act,

namely, those relating to the sale of tenures and holding in execution of rent decrees, may not apply to such a decree. It was contended that if the special law of limitation did not apply anomalous results would follow, such as this, that whereas a rent decree for a sum not exceeding 500 rupees obtained by all the landlords jointly must be completely executed within three years, a co-sharer landlord obtaining such a decree could keep it alive for 12 years. Secs. 143 and 144 of the Bengal Tenancy Act were relied upon. The following cases were cited:—

*Prem Chand v. Mukhoda* (I. L. R. 14 Cal. 201), *Narain Makton v. Manaji Patil* (I. L. R. 17 Cal. 489), and *Parameshvara v. Kali Mohan* (4 C. W. N. 801 : s. c. I. L. R. 28 Cal. 127).

On the other hand on behalf of the Respondent it was contended that the only rent decrees which could be treated as decrees under the Bengal Tenancy Act were decrees obtained by the entire body of landlords; that a decree obtained by one of several joint landlords for his share in the rent was one obtained independently of that Act; and that the anomaly pointed out by the other side might be explained by the fact that a co-sharer landlord cannot obtain satisfaction of his rent decree by the sale of the tenure or holding in arrear, and the Legislature might in consideration of that fact have thought it fit to allow him a longer time for realising the amount of his decree. Sec. 188 of the Bengal Tenancy Act was also relied upon.

The following cases were cited:—

*Beni Madhub v. Jodu Lal* (I. L. R. 17 Cal. 390), *Durga Churn v. Kuli Prasanna* (3 C. W. N. 586 : s. c. I. L. R. 26 Cal. 727), and *Sudagor v. Kristo Chunder* (3 C. W. N. 742 : s. c. I. L. R. 26 Cal. 937).

*Held*—That an application for the execution of a decree obtained by one of two or more joint landlords for his share of the rent, is not governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act, but by the general law of limitation, namely, Art. 179 of Sch. II of Act XV of 1877.

*Prem Chand v. Mukhoda* (I. L. R. 14 Cal. 201), *Jugobundhu v. Jadu Ghosh* (I. L. R. 15 Cal. 47), *Beni Madhub v. Jodu Lal* (I. L. R. 17 Cal. 390), *Durga Churn v. Kuli Prasanna* (3 C. W. N. 586 : s. c. I. L. R. 26 Cal. 727), and *Parameshvara v. Kali Mohan* (4 C. W. N. 801 : s. c. I. L. R. 28 Cal. 127) referred to.

*Babus Suroda Churn Mitter and Sharosi Churn Mitter* for the Appellant in No. 267.

*Babus Nilmadhub Bose and Benode Behary Mukerji* for the Respondent.

*Babu Shurosi Churn Mitter* for the Appellant in Nos 291 to 295.

*Babu Benode Behari Mukerjee* for Respondent.

*Appeal dismissed.*

S. C. S.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, AUGUST 19, 1901.

[No. 39]

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### REPORTS (See Index.)

The constitution of the Division Courts, taking effect on and from Monday, the 19th August 1901, and until further orders, is as follows:—

**PRESIDENCY GROUP.**—The Hon'ble the Chief Justice and Mr. Justice Banerjee.

**RAJSHAHY GROUP.**—Mr. Justice Hill and Mr. Justice Taylor.

**PATNA AND BURDWAN GROUPS.**—Mr. Justice Rampini and Mr. Justice Gupta.

**CRIMINAL BUSINESS.**—Mr. Justice Ghose and Mr. Justice Harington.

**PRIVY COUNCIL DEPARTMENT.**—The Hon'ble the Chief Justice and Mr. Justice Banerjee.

Mr. Justice Ameer Ali and Mr. Justice Sale will sit singly on the Original Side.

WE VERY MUCH REGRET THAT AN ERROR IN RESPECT of the name of the successful Appellant to His Majesty in Council in the Military Account Extortion case crept into the last issue of our Journal from the columns of a contemporary to whom we are indebted for the telegraphic message. In all our previous issues the Appellant is correctly described as N. A. Subramania Iyer (see notes 5 C. W. N. 269 and C. W. N., pp. 209, 212).

IT WILL APPEAR FROM A LETTER WHICH WE PUBLISH IN another column that Sir V. Bhashyam Iyengar took his seat on the Bench at the Madras High Court on the very day that a telegraphic message was received by the Madras Government from the Secretary of State of India announcing that the letters patent of his office had been issued. Before that Sir Bhashyam

could not surely take his seat on the Bench or give up his practice on the strength of newspaper announcements. We understand also that Lord Davey practised at the Bar for a short time after his appointment as a Lord Justice.

WE HAVE BEEN ASKED BY A CORRESPONDENT TO CITE the authority on which we made the statement that judges in former times used sometimes to revert to the Bar. A note on this point will be found in Fitz James Stephen's History of Criminal Law, Vol. 1, p. 452. He goes so far as to say that he knows of no legal reasons why a judge should not revert to the Bar if he liked. There can be no legal objections to such a course but still it may be questioned how far it would be consistent with the dignity of the Bench or the prestige of a judge that he should after a long judicial career come back to the Bar in expectation of professional gains. But when a judge is improperly dismissed or resigns of account of any difference with the Government or his colleagues, there can be no objection to his joining the Bar. Nor can there be any objection to a member of the Bar reverting to the ranks of the profession after officiating on the Bench for a short time. At the Calcutta Bar, Sir Charles Paul and Mr. Kennedy both reverted to the Bar although at the close of their temporary terms of office they were offered permanent judgeships.

IT WILL BE AN IRREPARABLE LOSS TO THE JUDICIAL Committee and to us, who are deeply interested in the efficiency of the final Court of Appeal from India, if it be true that Lord Hobhouse intends to retire from next term. His Lordship's judgments may be taken as the very model of what Appeal Court judgments should be. They review both facts and law on broad lines and the conclusions to which they arrive commend themselves both to the legal and the lay mind. In pointing out the error of lower Courts, his Lordship never forgets the dignity of the Board or of his position there and takes care not to make use of any expression likely to compromise the judges below before the public.

WE HOPE THAT THE GAP OCCASIONED BY THE RETIREMENT of Lord Hobhouse will not be filled by Sir John Edge. Sir John is said to be a *persona grata* with the India Office and judging from the manner in which the councillors of our Secretary of State have been playing with judicial appointments in India nothing would

seem to be impossible for them. But they would be surpassing themselves if, as rumour has it, they should really entertain the idea of putting Sir John Edge in the Judicial Committee. We have seldom come across a member of the legal profession who relies on any of Sir John Edge's decisions. The very mention of a judgment coming from such a source raises almost a legal presumption in India that it is erroneous, unless the contrary is shown. There has never been a Chief Justice in India whose decisions have been so often upset by the Judicial Committee and treated with such scant courtesy. For handy reference we may refer to *Mathura Das v. Raja Narindra* (1 C. W. N. 52: s. c. L. R. 23 I. A. 138) and in particular to the observation of their Lordships of the Privy Council made therein. One peculiarity of the errors by the Ex-chief Justice was that they used to contravene often the most elementary propositions of law. It was not only the Judicial Committee that had to nullify the 'evil effects' of his decisions but the Indian Legislature had also sometimes to step in and rectify its absurd results by express legislation. In view of such facts we cannot but treat the rumour, that has found currency in this country owing no doubt to Sir John Edge being appointed to represent India in the Colonial Commission for the Imperial Court of Appeal, that he may be chosen to represent India in the Final Court of Appeal as utterly absurd.

WE FEEL AS IF THE VACATION HAD COMMENCED. Two of the judges on the Appellate Side have gone home on privilege leave. Mr. Justice Stanley also left Calcutta last Thursday to take his seat as the Chief Justice of the Allahabad High Court. During the better part of last week only one judge sat on the Original Side. During the present, although there may be two Courts sitting on the Original Side yet none but urgent and short matters are likely to be taken up before the long vacation. The business on the Appellate Side in the absence of two judges on leave and one engaged in the Court of Sessions is hardly likely to be more brisk.

THE CASE OF *Kazi Zeanuddin*, REPORTED IN THIS issue at p. 772, is of great moment to the landholders. It decides in fact that an absentee landholder may be fined under sec. 154 of the Penal Code for any riot committed by his agent even in the absence of any proof, evidence or presumption that it was done to his knowledge. The decision seems to be based on a misconception of the scope of sec. 154. The object of the section is to secure information of a riot at the earliest moment with a view to prevent or suppress it. Sec. 154 attaches a liability to fine of an absentee landlord for any default of his local agent in this respect. But when the local agent is himself charged with having caused a riot and absconded and it is not alleged that his master living at a distance of two days' journey by foot had any knowledge of it, we may doubt whether sec. 154 can have any application.

The view taken by Mr. Justice Ameer Ali, that when the agent is himself accused of a crime his principal cannot be made liable but for its abetment, commends itself to us. It is a fundamental principle of criminal law that no agent can be presumed to have authority of his principle for the commission of an offence and that for the former's criminal acts the latter cannot be made liable except on a charge of abetment. The hardship in this case seems to us to be all the greater as it appears from the facts of the case that the object of the agent in creating this riot was to punish a tenant who had complained to his landlord against the agent and that the latter had some other personal grievance against the tenant to retaliate. Both in point of fact as also of law, sec. 154 seems to us to have no bearing on cases of this kind.

## Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

SIR,—Will you permit me to point out that the letter of "Lawyer" published by you in your issue of the 29th ultimo proceeds on an entire misconception of the facts in regard to the appointment of Sir V. Bhashyam Iyengar as a judge of the High Court. "Lawyer" assumes that Sir V. Bhashyam Iyengar had been appointed a judge of the High Court and that he could have taken his seat on the Bench on the reopening of the Court, but that he deferred doing so in order to fulfil certain professional engagements at the Bar. But the real facts are otherwise. It is true that in the newspapers it was announced that Sir V. Bhashyam Iyengar has been appointed a judge, and it was also expected that he would be appointed. But "Lawyer" ought to know that a newspaper announcement possesses no legal value whatever and that in the case of judges of the High Court the appointment has to be made by Letters Patent and that it does not take effect until the issue of the Letters Patent is duly notified in this country. In the case of the preceding appointment to the Madras High Court, so far as my memory goes, this provision of law appears to have been altogether overlooked and I do not remember that in the case of any previous appointment to the High Court the issue of the Letters Patent was duly notified. In the case of Sir V. Bhashyam Iyengar, however, it was only by a Gazette Extraordinary issued on the 1st instant that the Local Government notified that intimation was received from the Secretary of State that Letters Patent had been issued. If the ordinary course of things it would have taken some weeks at least for the Letters Patent to arrive in this country and thereafter to be notified here; but to expedite matters the Local Government appears to have, at the instance of Sir Bhashyam Iyengar himself, obtained telegraphic intimation of the issue of the Letters Patent from the Secretary of State and acted upon such intimation.

Under these circumstances it must be clear that it was not, until the 1st instant, that Sir V. Bhashyam Iyengar was in a position to assume charge of his office and he did so on that very day. The query as to the propriety of his practising at the Bar after the appointment, meaning thereby the announcement in the newspapers, was therefore altogether uncalled for. So long as a judge elect cannot legally assume charge of his office, it is difficult to comprehend why he should not continue to fulfil his professional engagements at the Bar. The fact that Sir V. Bhashyam Iyengar did not actually appear in any case in Court was due to the circumstance that no important case of his was posted in the cause-list after the reopening of the Court.

MADRAS,  
10th August 1901.

"ANOTHER LAWYER."

## English Notes.

HOUSE OF LORDS.—THE TAFF VALE RAILWAY COMPANY *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS AND OTHERS. Before the LORD CHANCELLOR, LORDS MACNAGHTEN, SHAND, BRAMPTON and LINDLEY. 22nd July 1901.

*Trades union—Rights and liabilities.*

The facts of this case are stated at pp. lviii and lix of Vol. 5, C. W. N.

Their Lordships to-day delivered their judgment unanimously agreeing to allow the appeal, reverse the decision of the Court of Appeal and restore that of Mr. Justice Farwell. In delivering judgment the Lord Chancellor said he found no satisfactory answer given by the Court of Appeal to the judgment of Mr. Justice Farwell "with which his Lordship entirely concurred. "If the legislature has created a thing which can own property, which can employ servants, which can inflict injury, it must be taken I think to have impliedly given the power to make it sueable in a Court of law for injuries purposely done by its authority and procurement."

Mr. Williams, Q. C., and Mr. Gregory for the Plaintiffs.

Mr. Napier and Mr. Evans for the Defendants.  
*Appeal allowed with costs.*

C. W. A.

HOUSE OF LORDS.—THE GREAT WESTERN RAILWAY COMPANY *v.* LONDON AND COUNTY BANKING CO. Before the LORD CHANCELLOR, LORDS SHAND, DAVEY, BRAMPTON and LINDLEY. 22nd July 1901.

*Bill of Exchange Act, 1882, secs. 81 and 82—Cheques crossed "not negotiable."*

For the facts of this case, see 5 C. W. N., p. ccix.

This was the appeal of the Railway Co. against the decision of the Court of Appeal made in favour of the Bank.

The LORD CHANCELLOR in delivering judgment, moving their Lordships to allow the appeal, rested his decision on the true construction of the above statute, although his Lordship said that there was another and quite a distinct ground for deciding against the Bank. Every one, his Lordship said, should know that people who take a cheque marked "not negotiable" and treat it as a negotiable security, do so taking the risk of the person, for whom they negotiate it, having no title to it, and in this case it cannot be pretended that Huggins had any title to it. Their Lordships *inter alia* held that the argument that although the Bank had a defective title to the cheque, they have a good title to the money paid to them as holders of it, was opposed to the meaning of the above-mentioned sections of the Act and would destroy the utility of sec. 81. The language of the statute would be defeated by deciding that a fraudulent holder of the cheque could give a title either to the cheque or the money.

Huggins was not a customer of the Bank, and the transaction was not a banking transaction within the meaning of the sec. 82, and it was not correct to say that the Banker is here sought to be made liable by reason of his having received payment for a customer. The Bank obtained payment of the cheque for themselves and not for Huggins.

Mr. Greene, K. C., Mr. Asquith, K. C., and Mr. P. Goff for the Appellants.

Mr. Lawrence, K. C., and Mr. Lushington for the Respondents.

*Appeal allowed with all costs.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

## PRIVY COUNCIL.

[APPEAL FROM THE MADRAS HIGH COURT.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR R. COUCH.

1901.

Heard, 18, June.

Judgment, 13, July.

RUNGAYYA GOUNDAN & Co.,  
Plaintiffs, Appellants,

*v.*  
NANJAPPA RAO and others,  
Defendants, Respondents.

*Contract—Specific performance—Res judicata—Secs. 13, 43, Civil Procedure Code.*

This was an appeal against a decree of the Madras High Court which reversed the decree of the Sub-Judge of Ootacamund.

The undisputed facts are:—

Before 23rd March 1891 the Respondents (who are brothers and members of a joint Hindu family subject to the Mitakshara law of which family the first Defendant is the manager) were the owners of a coffee estate in the Nilgiri Hills known as "The Tudor Valley Estate" which they had mortgaged to Sir E. Gore Langton by two mortgages for the sums of Rs. 25,000 and 10,000 respectively.

On the 23rd of March 1891 the Appellants and the Respondents entered into an agreement for the sale of the said estate by the Respondents to the Appellants for the sum of Rs. 77,500 upon the terms following:—

Rs.

The agreement recited that the Appellants had already paid to the Respondents in advance the sum of ...

7,500 0 0

That the Respondents guaranteed a crop for the then current season of 30 tons of coffee, and agreed that the Appellants should retain in their hands as a guarantee for such crop the sum of ...

10,000 0 0

That the Appellants should pay the said mortgagee ...

25,000 0 0

	Rs.	
Making a total in all of the sum		
of ... ..	42,500	0 0
And should pay the remaining		
balance of ... ..	35,000	0 0
Making up the full consideration		
of ... ..	77,500	0 0
between the 1st of April 1891 and the 31st of July 1891.		

There were further conditions fixing penalties on either side in case of default and providing that the expenditure upon the estate should be provided by the Appellants, but that possession of the said estate should in order to protect the said two mortgages continue until the 31st July 1891 with the Respondents whose manager was, however, to be subject to the directions and control of the Appellants and to carry out their orders.

The Appellants accordingly entered upon what was practically the full possession of the said estate and by their own servants cultivated and managed the same, provided and made all necessary expenditure and gathered the said guaranteed crop.

Some delay in completing the said transaction arose by reason of difficulties in obtaining the title-deeds of the said property which were with the said mortgagee. Eventually, however, towards the latter part of August 1891 the said mortgages were paid off and other payments were made bringing the total payments made by the Appellants to the Respondents or as they directed to Rs. 44,420 and leaving a balance of Rs. 33,080 payable by the Appellants to the Respondents in respect of the price of the said estate.

On the 22nd or 23rd of August the Appellants having had the necessary conveyance prepared submitted the same to the first Respondent who is found to have been as aforesaid the managing member of the Respondents' family and the same was by him signed on behalf of himself and the other Respondents in token of his approval.

The said conveyance was then after engrossment forwarded to the Respondents for execution and was retained by them but they did not execute the same.

On the 5th September 1891 the first Respondent wrote to the Appellants as follows "Within five days from this date you should according to agreement complete the document, attend the Registrar's Office with money, get the registration effected and take over possession of the estate. If you fail I hereby positively make known to you that we will make (you) liable to the penalty as per stipulations mentioned in the agreement."

Further correspondence passed between the respective parties and the Respondents while still retaining possession of the conveyance which had been presented to them for execution wrote on the 11th of September 1891 a letter to the Appellants as follows :—

"Dear Sirs,

*Re TUDOR VALLEY ESTATE.*

"As you have not completed this business within the further time given you in my letter of the 5th instant, I have decided to act in accordance with the agreement between us dated the 23rd March last. I am giving instructions to my Superintendent for the carrying on of the estate work and write to request you or your people not to interfere with the property."

On the same date the Appellants wrote to the Respondents maintaining that the conveyance which they had forwarded for execution and which the Respondents had retained correctly carried out the terms of the said agreement and asking that the same should be returned to them and proposing that the same should be compared with the draft conveyance which had as aforesaid been approved by the Respondents in the presence of "four respectable parties two on each side" and requiring the Respondents to carry out the terms of the said agreement.

On the said 11th of September the first Respondent proceeded to the said estate and reaching the same at night ejected the Appellants' servants who reported such proceedings to the Appellants who took proceedings before the Magistrate against the first Respondent.

Pending such criminal proceedings the following litigation upon which this appeal turns took place between the parties.

The Respondents filed on the 21st September 1891 Suit No. 55 of 1891 against the Appellants.

In the plaint in such suit the present Respondents after reciting the said agreement of the 23rd March 1891 and their contention that the present Appellants had failed to carry out the terms of the said agreement stated that on the 11th of September 1891 they had written the letter of that date hereinbefore set out, that on the 15th of the said month of September these Appellants had instituted a criminal charge for trespass and rioting against the first Respondent and had on the 16th September re-entered upon the said estate and ejected the Respondents therefrom and had then and there taken possession of the said estate which possession they had ever since retained well knowing that they had "no right or excuse for so doing" and the Respondents prayed that the Court would be pleased "to put them into possession" of the said estate and grant them such further and other relief as the circumstances of the case might justify.

The Respondents immediately upon the filing of the said plaint applied for an interim injunction which was granted *ex parte* but was afterwards dissolved.

The Appellants filed in due course their written statement in the said case No. 55 of 1891 in which after setting out the facts of the case down to the ouster of these Appellants by the Respondents on the 11th of September as aforesaid they proceeded as follows: the words within brackets being written in pencil in the original.

"11. Defendants are willing to abide by the terms of the said agreement which provide that Plaintiffs' Superintendent or writer shall continue on the said estate as well as in other respects and submit that as the said agreement between the parties amply provides for matters of possession and inspection of crop there is no necessity whatever for any intervention by the Court on those matters and (further urges that) the Court cannot in this suit set aside or supersede any such provisions between the parties.

"12. The letter, dated the 11th day of September 1891, from first Plaintiff to Defendants received by Defendants on the 12th September 1891 shows that Plaintiffs were not on the 11th of September working the estate but that Defendants were working and were in possession of the estate (and that the Plaintiffs intended to interrupt the *status quo* which they subsequently did).

"13. (The Defendants do not allege that they were) in complete possession as they were not clothed with the title nor had they received the conveyance agreed to be given by the Plaintiffs nor had the former writer withdrawn from the estate (or the question of the crop been settled).

"14. Defendants have sustained expense and injury by reason of Plaintiffs' wrongful application for (and obtaining an) injunction (as their enjoyment and working of the estate and disposal of the crop has been interfered with whilst their credit and reputation has to some extent been damaged and the time of themselves and their servants has been taken up at a critical juncture in attending Court proceedings) and Defendants pray that the Court will award them Rs. 1,000 as compensation on account thereof."

The Appellants further on the 23rd of September 1891 filed their plaint in the Court of the Subordinate Judge of the Nilgiris in original Suit 73 of 1891 against the Respondents seeking damages for the said trespass and ouster and asking for restoration to possession and for an injunction.

On the 16th December 1891 the Respondents filed their written statement in the said suit denying the Appellants' right to any damages and setting up their own rights.

On the 7th March 1892 the Appellants filed a further written statement in the said case.

Upon such pleadings the following issues were settled for trial in the respective cases. In Suit No. 55 of 1891 the issues were:—

1. What possession of the plaint land are either of the parties in this suit entitled to by reason of the terms of the agreement of March 23rd 1891?

2. Have the terms of the agreement of March 31st 1891 as to the right of possession which it conferred on either party hereto been subsequently varied in any way, if so how?

3. Whether Defendants have unlawfully dispossessed Plaintiffs of the plaint property.

4. Whether Plaintiffs are entitled to possession of the plaint property.

5. Whether Defendants are entitled to the whole or any portion of the compensation they claim.

In Suit No. 73 of 1891 in which the Appellants were Plaintiffs the issues settled were—

1. Whether Plaintiffs can obtain compensation in this case, if so to what extent?

2. Whether the Plaintiffs were in possession of plaint premises at the time of filing their suit and if so how and to what extent their prayer for possession in this suit can be granted?

3. Whether for any reason Plaintiffs are entitled to the injunction they ask.

By agreement both the said suits were tried upon the same evidence.

On the 10th day of August 1893 the Subordinate Judge who tried both the said cases delivered a separate judgment in each.

In Suit 55 of 1891, he held upon the first issue that the Plaintiffs, the present Respondents, were entitled to have possession of the said estate until the sale agreed upon in the agreement of 23rd March 1891 should be carried out and effected; upon the second issue, that the terms of the said agreement so far as they related to the right of possession of the said estate had not been subsequently varied; upon the third issue, that these Appellants had unlawfully dispossessed the Respondents; upon the fourth issue, that the Respondents were entitled to possession; and upon the fifth issue he held that these Appellants were entitled to the costs of resisting the Respondents' application for an injunction which they had made in the said suit.

By his judgment in the Suit No. 73 of 1891 in which these Appellants were the Plaintiffs he held upon the issues as follows:—

On the first issue, that the Plaintiffs, these Appellants, were not entitled to any compensation; on the second issue, that as these Appellants were in fact in possession and also because they were not entitled to possession they were not entitled to a decree for possession; and on the third issue, that these Appellants were entitled to a temporary injunction restraining the Respondents from interfering with their management of the said estate.

The decrees of the Subordinate Judge giving effect to his said judgments are dated the said 10th day of August 1892.

Against such decree the Appellants appealed to the Court of the District Judge, the appeal in Suit No. 55 of 1891 being numbered as Appeal Suit 837 and the Appeal in No. 73 of 1891 being numbered as Appeal Suit No. 838 both of 1892.

One judgment was delivered by the District Judge in both the said appeals on the 11th of October 1893.

He agreed with the findings of fact arrived at by the first Court and upheld the decrees of the lower Court in both suits save that he altered the terms of the injunction issued in Suit No. 73 of 1891. He held that the said injunction went beyond the terms of the Agreement of the 23rd of March 1891 and he accordingly altered it so, as in his

opinion, would carry into effect the terms of the said Agreement making it an injunction restraining the vendors, the present Respondents, from working the said estate otherwise than as the vendees might appoint unless and until the said Agreement of the 23rd March 1891 should be rescinded or superseded by agreement of the parties or should be declared or should become invalid by due course of law.

The decrees in the said appeals are dated the said 11th day of October 1893.

Against such decrees an appeal, it would appear, had been preferred by these Appellants to the High Court of Madras but nothing seems to have been done in the same.

#### THE PRESENT SUIT.

On the 14th November 1893, the vendees instituted O. S. 107 of 1893 in the Subordinate Court of the Nilgiris against the vendors. They claimed specific performance of the contract of 23rd May, 1891, for sale of the Tudor Valley Coffee Estate, and also damages for its breach, or in the alternatives damages for breach of contract and cancellation of the agreement and a return of the sums paid in anticipation of its fulfilment, with all these securities and remedies for the repayment of such money as are provided by the Transfer of Property Act, IV of 1882.

The Defendants filed a written statement in which they denied the Plaintiffs' right to specific performance or to damages, and attributed the non-completion of the agreement to their own dilatory and wrongful conduct, and asserted that they had improperly taken possession of the estate without tendering the draft agreement asked for or payment of the balance of the purchase-money. They also relied on the decisions given in their favour in the suits above stated.

The issues raised numerous questions of law and fact arising out of the allegations on either side.

On the 28th April, 1894, the Original Court directed that the Plaintiffs should pay into Court Rs. 28,050, being the balance of the purchase-money after deducting Rs. 5,000 awarded as damages, and that they should submit to the Court a conveyance which upon approval by the Court the Defendants were to execute.

In the judgment the Judge first dealt with and rejected a plea based on the effect of the decision in O. S. 73 of 1891 as a bar to the present suit under s. 43 of the Civil Procedure Code. He then decided that the insertion of penalties payable by either party on breach of the contract did not prevent the grant of specific performance.

In dealing with the question of revocation he considered that both parties were willing to go on with the agreement up to the 5th September, and that the notice given by the Defendants on that day requiring completion on the 10th was unreasonable and insufficient. He held that the Defendants were not justified in revoking the contract, and that it was not revoked by the judgments in Appeal Suits 837 and 838 above referred to.

He then proceeded to consider the question of damages which he fixed at the sum of Rs. 5,000.

The Defendants appealed against this decree and judgment to the High Court, which pronounced its judgment on the 21st October, 1895. It agreed with the Subordinate Judge in holding that up to the 5th September any delay on the Defendants' part was waived and said as to the letter of that date: "We do not think this can be treated as a notice to rescind or that, if it could be so read, the Defendants were then, on account of delay on the Plaintiffs' part, entitled to give suit notice." The decision of the Court which was given against the Plaintiffs was based upon their conduct in the suits of 1891, and the effect of those decrees as resulting from that conduct. They say:—

"In our opinion, however, the omission of the Plaintiffs to insist on their right under the contract when attacked by the Defendants in the suit of 1891 is fatal to the present claim.

"The Suit No. 55 was brought by Nanjappa and his partner to recover possession of the estate.

"It was in effect alleged in the plaint that the contract of sale had gone off owing to the default of the purchasers. The purchasers in their written statement rightly insisted on the existence of the contract, and alleged their possession in pursuance of it.

"The finding was that the purchasers had previously to the 11th September, 1891, when their servants were ejected by the vendors, practically been in possession of the estate. This is what the Plaintiffs themselves say in their present plaint, and there is no doubt that it was the fact. Their possession, whether joint with the vendors or exclusive, was possession granted to them as purchasers, and it is immaterial that the written contract did not provide for it. This being so, the answer which the Plaintiffs made to the claim as against them in the suit of 1891 was a good answer. Being thus entitled to specific performance of the contract on payment of the balance due, they were entitled to say that their possession was lawful. They could not say they actually had a good title to the property, but they could say that it was owing to the default of the vendors in not executing a conveyance that their title was not completed. The existence of the contract was a matter which might and ought to have been made a ground of defence in the suit of 1891. It makes no difference that the defence was raised and was overruled, for presumably it would not have been overruled if the facts had been established by proper evidence. It follows, therefore, that the question of the contract must be held to be *res judicata*, and the suit so far as it seeks specific performance must fail.

"Another and independent ground on which, we think, the Plaintiffs' suit must fail is that the cause of action on which their suit is based is identical with that on which they based their suit in 1891. The Subordinate Judge considers that this latter suit was simply a suit for disturbance of possession,



but, looking at the plaint and comparing it with the plaint in the present suit, we find that the material allegations in the two plaints are alike. In both the Plaintiffs assert the existence of the contract and possession taken by them under it.

"In support of their claim in 1891 the Plaintiffs had to adduce, and did adduce, the evidence relating to the contract which they have adduced in the present suit."

"Thus another test of the identity of the causes of action is satisfied (see cases cited in *Brunsdan v. Humphreys* (14 Q. B. D., p. 145). Possibly, the Plaintiffs might, in the former suit, have relied on the mere fact of their possession and might not then have been precluded from bringing the present suit, but they did not reserve the contract as a ground for another suit. They put it in issue in 1891 and founded upon it their claim for possession. In the present suit they seek to put it in issue again and found upon it a claim for specific performance. The relief which they ask for is different, but the fundamental facts giving them a cause of action are identical in the two cases."

The Court then proceeded to say that the decree for specific performance must be set aside, but that the Plaintiffs were entitled to recover all sums paid by them as purchase-money with interest. Against this, however, were to be set the profits received by them during their possession. To ascertain these the Judge was directed to take an account and record a finding.

Upon the account the Sub-Judge found that the Defendants owed the Plaintiffs nothing. That finding was accepted by the High Court, and the present Appellants have for the purposes of the appeal to His Majesty agreed that no objection shall be taken to it.

The result was that the appeal to the High Court was allowed and the suit was dismissed with costs.

Since the decision of the High Court the present Appellants have sued the Respondents in O. S. 74 of 1896 and obtained a decree against them for the amount of the mortgage held by Sir Gore Langton with interest and costs.

*Mr. Branson* for the Appellants contended that the High Court was wrong in deciding that this suit was barred by sec. 13 of the Civil Procedure Code, and they were further wrong in holding that the suit was barred under the provisions of sec. 43 of that Code.

He referred to the following authorities, *Parvatum Gir's* case (26 I. A. 175 at p. 183), *Sheo Sojan Singh* (24 I. A. 50 at p. 58), *Brunsdan v. Humphreys*, (14 Q. B. D. (1884), p. 141).

*Mr. Mayne* for the Respondents urged that the High Court was right in the view it took of the effect of the litigation of 1891 and that by the subsequent proceedings taken in 1896 the Appellants had disabled themselves from carrying out the contract which they were now claiming to enforce.

In this case the High Court of Madras had held that the suit was not maintainable on two grounds: first, because the matter was *res judicata*, and second-

ly, because the case fell within sec. 43 of the Civil Procedure Code.

*LORD HOBHOUSE* in delivering their Lordships' judgment stated that as to the first ground there was great difficulty looking to the frame of the suits of 1891 and at the judgments by which they were concluded; and as their Lordships were in entire accord with the High Court on the 2nd point, they need not arrive at any decision on the first point.

It was on the 2nd ground, viz., that of bar under sec. 43, C. P. C., that His Majesty was advised to dismiss the appeal with costs.

*Mr. Branson* for the Appellants.

*Mr. Mayne* for the Respondents.

C. W. A. Appeal dismissed with costs.

## CALCUTTA HIGH COURT.

### [CIVIL APPELLATE JURISDICTION.]

#### APPEAL FROM APPELLATE DECREE

NO. 1433 OF 1898.

RAMPINI, J.

GUTTA, J.

1901.

2, August.

BABU JANKI DAS, Plaintiff,  
Appellant,

RAM GOLAM SAHA and others,  
Defendants, Respondents.

*Public Demands Recovery Act (I of 1895, B. C.), sec. 10, 21, before amendment by Act I of 1897—Right of suit—Suit to set aside sale—Notice, non service of—Irregularity—Civil Procedure Code (Act XIV of 1882), sec. 244.*

This appeal arose out of a suit to set aside a sale held in execution of a certificate issued by the Collector. Plaintiff alleged that he was a co-sharer along with Defendants Nos. 1 and 3 in a certain garden which had been sold at a very inadequate price in execution of a certificate for arrears of cesses, and had been purchased by Defendant No. 1 in the name of his gomastha and son-in-law, Defendant No. 2. It was stated that no notice under sec. 10 of the Act was issued to the Plaintiff, that the proceedings connected with the sale were irregular, that Defendant No. 1 who was the real purchaser and who along with Defendant No. 3 was jointly liable with the Plaintiff for the debt, was bound in equity to reconvey to the Plaintiff the Plaintiff's share in it which was sold.

Both the lower Courts decided that the suit was not maintainable, as the suit was not one to set aside the certificate and as the certificate had become absolute, no steps having been taken to cancel it within the time prescribed by the law for the purpose; they held the sale could not be set aside.

Plaintiff preferred this second appeal.

On behalf of the Appellant it was contended (1) that the suit was maintainable as the allegation was that no notice under sec. 10 of the Act was served, and that this question ought to have been enquired into; (2) that there were irregularities in the sale, and (3) that if the Defendant No. 2 is the *benamidar* of the Defendant No. 1, the latter was bound to reconvey the property sold to the Plaintiff.

The argument on behalf of the Respondent material to this report was that the suit was barred by sec. 244 which was applicable to the case under sec. 21 of Act I of 1895, B. C.

*Held*—That the law applicable in this case is Act I of 1895 and the wording of sec. 10 in this Act and Act VII of 1880, B. C., is almost identical, and there was therefore no ground for distinguishing the present case from those of *Chandra Kumar Mukherjee v. Secretary of State* (I. L. R. 27 Cal. 698) and *Ram Tarak Hazra v. Dilwar Ali* (5 C. W. N. 521) which no doubt were cases under Act VII of 1880, B. C., and therefore the suit was maintainable.

That the law applicable is sec. 21 of Act I of 1895 before its amendment by Act I of 1897 and therefore sec. 244 applied only so far as the procedure to be followed in execution proceedings to enforce the certificate and realise the amount thereunder is concerned, and that it was not applicable in its entirety and did not apply so as to bar a separate suit for setting aside the sale.

*Ram Tarak Hazra v. Dilwar Ali* (5 C. W. N. 521) relied upon.

*Dr. Asutosh Mukherjee* for the Appellant.

*Babu Shoroshi Charan Mitter* for the Respondent.

S. C. S.

Case remanded.

#### [CIVIL APPELLATE JURISDICTION.]

##### APPEAL FROM APPELLATE DECREE

No. 887 of 1899.

RADHA RAMAN CHOWDHURY,

minor, by Saradindu Debi,

Plaintiff, Appellant,

RAMINI, J.

GUPTA, J.

1901.

9, AUGUST

BHOWANI PRASAD BHOWMIK,

Defendant, Respondent.

*Evidence Act (I of 1872), sec. 92—Contemporaneous oral agreement—Registered document, terms of, whether can be proved to have been varied or altered by oral agreement—Acts and conduct of parties—Rate of rent, reduction of—Subsequent acceptance at low rates—Waiver.*

This was an appeal preferred on the 8th of May 1899, against the decree of A. F. Steinberg, Esq., District Judge of Zillah Rajshahye, dated the 13th of January 1899, reversing the decree of Babu Mohim Chandra Sarkar, Munsif of Boalia, dated the 9th of September 1898.

The facts of the case as stated in the judgment of the Munsif were as follows:—

The plaint states that one Krishna Prosanna Chowdhury, proprietor of 1 anna 4 gundas and 11 kags share of Mouzah Chinashore, of which the Towzi Nos. are 325 and 326 and proprietor of 1 anna and 12 gundas share of Mouzah Raghunathpur, granted a *putni* lease of his above shares in the above *moahs* to Plaintiff's father by a registered *putna*, dated 6th Bhadra 1284, at an annual rental of Rs. 111-0-3½ gundas; that at the time of the *putni* settlement there was an oral agreement to the effect that if by testing the *jamas* of the tenants there be any decrease, then the *jama* fixed in the lease will also be reduced; that after testing the *jamas* of the tenants there was found a decrease of Rs. 11-15 annas 6 gundas and accordingly the lessor Krishna Prosanna reduced the *jama* to Rs. 99-0-13½ gundas; that after the death of Krishna Prosanna, his widow, Annapurna, sold her right to the Defendant,

to whom the Plaintiff paid his *putni* rent at the reduced *jama*; that subsequently in 1301, 1302, 1303 and 1304, the Defendant filed petitions before the Collector under Regulation VIII of 1819 and compelled the Plaintiff to pay the rent at the rate fixed in the lease, and thereby exacted a certain sum in excess of the rent lawfully payable by him (Plaintiff). The Plaintiff therefore now prays for a declaration that the *jama* of the *putni mahal* is Rs. 99-0-13½ gundas per annum and not Rs. 111-0-13½ gundas, and further seeks to recover Rs. 151-15 annas 10 gundas exacted by the Defendant in excess of the rent lawfully payable by him (Plaintiff). The defence is that the claim is barred by limitation; that there was never any oral agreement to reduce the *jama* fixed in the lease; that he (Defendant) never exacted anything in excess of the amount legally recoverable by him; and that the Plaintiff is not entitled to recover the amount claimed.

The Munsif found for the Plaintiff in all points and gave the relief asked for. On Defendant's appeal to the District Judge it was argued mainly that proviso 2 to sec. 92 of the Evidence Act did not apply, as the elaborate and formal deed expressly mentions that the rent should on no account be altered.

The District Judge relied on the cases of *Kashi Nath Chakravarti v. Chandi Charan Banerjee* (5 W. R. 66), and *Ramjibun Seroney v. Aghore Nath Chatterjee* (I. L. R. 25 Cal. 401), and allowed the appeal holding that the contemporaneous oral agreement relied upon could not be proved and dismissed the suit.

The Plaintiff thereupon preferred this appeal, and on his behalf it was argued that the Plaintiff was entitled to give oral evidence of the subsequent acts and conduct of the parties, and reliance was placed on the cases of *Satyesh Chander Sarkar v. Dhanput Singh* (I. L. R. 24 Cal. 20), *Preo Nath Saha v. Madhu Sudan Bhuiya* (I. L. R. 25 Cal. 603), and *Khandkar Abdur Rahman v. Ali Hafez* (I. L. R. 28 Cal. 256).

On behalf of the Respondent reliance was placed on the case of *Mayandi Chetti v. Oliver* (I. L. R. 22 Mad. 261).

*Held*—Sec. 92 of the Evidence Act precludes the Plaintiff from proving the contemporaneous oral agreement which he has set up in para. 3 of his plaint.

That the acts and conduct of the parties can only be proof (1) either of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by sec. 92, and in the latter case by proviso 4 to sec. 92, and by the fact that the Plaintiff in his plaint set up no subsequent oral agreement but a contemporaneous oral agreement.

*Mayandi Chetti v. Oliver* (I. L. R. 22 Mad 261) referred to.

*Satyesh Chander Sarkar v. Dhanput Singh* (I. L. R. 24 Cal. 20) *Preo Nath Saha v. Madhu Sudan Bhuiya* (I. L. R. 25 Cal. 603) and *Khandkar Abdur Rahman v. Ali Hafez* (I. L. R. 28 Cal. 256) explained and distinguished.

*Babus Nilmadhab Bose and Mohini Mohan Chatterbutty* for the Appellant.

*Babu Kisori Lal Sarkar* for the Respondent.

H. P. C.

Appeal dismissed.

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### REPORTS (See Index.)

## NOTICE.

The Meeting of the Legislative Council, which was fixed for Friday, the 23rd instant, is postponed, by order of His Excellency the Viceroy. The date fixed for the next meeting will be intimated hereafter.

H. W. C. CARNDUFF,

Secy., Secy. to the Govt. of India, Legislative Department.

WE REGRET TO NOTICE LORD HOBHOUSE'S RETIREMENT, although it be at the age of 81 and after 20 years' unpaid service on the Judicial Committee.

MR. JUSTICE HARRINGTON AND MR. JUSTICE GUPTA will sit as Vacation Judges this year.

WE DRAW ATTENTION TO THE DECISION OF RAMJINI and Gupta, JJ., in *Uned v. Anath*, noted this issue at p. 304, by which Rule 33, framed by the Board of Revenue under sec. 106 of the Road Cess Act, has been declared *ultra vires*.

THE FOLLOWING IMPORTANT NOTIFICATION AFFECTING the residence clause in the Regulations of the Government of India, under the Indian Councils Act of 1892, relating to the election of members to local Councils, was published in the *Gazette of India* of 17th August 1901:—

In exercise of the power conferred by sec. 1, sub-sec. (4), of the Indian Councils Act, 1892 (55 and 56 Vict., c. 14), and with the approval of the Secretary of State for India in

Council, the Governor General in Council is pleased to modify, to the extent set forth below, the regulations published with the Notification of the Government of India in the Home Department, No. 359, dated the 17th March 1893, as to the conditions under which nominations of Additional Members of Council are to be made by the Governors of Madras and Bombay, and nominations of Councillors by the Lieutenant-Governors of the Bengal Division of the Presidency of Fort William and of the North-Western Provinces and Oudh, respectively, for their assistance in making Laws and Regulations:

In Regulation VI, the word "ordinarily" shall be omitted, and the following explanation shall be added, namely:

'Explanation. - A person is "not "resident" within the meaning of this Rule unless he has a place of residence in the locality concerned and such practical connection with that locality as qualifies him to represent the inhabitants thereof.'

'If at any time the question is raised whether a person proposed for election is "resident" within the meaning of this Rule, the question shall be referred to and decided by the Local Government, whose decision shall be final.'

The residence clause in Reg. VI came up for construction in Bengal on several occasions. Latterly it was settled that if a person had a place of residence within his electoral division and had local connections and interest, he might be regarded as a resident of that division. The word "ordinarily" made the rule more stringent and now that it has been removed we expect that there will be less scope for a disappointed candidate to fight over the residence clause. The cleverest men do not always stay at home. To make the residence clause compulsory or stringent is to unduly fetter the choice of the most capable candidates and it is because of this that since the days of Elizabethan elections the residence clause has been removed from the English Statute books.

THE JUDGMENT ON APPEAL FROM AN ORDER OF Stanley, J., in the *Goods of Luchminarain Bogla*, reported in this issue at p. 781, holding that the order of a single judge refusing to stay the issue of probate is a "judgment" within the meaning of sec. 15 of the Letters Patent and is therefore appealable and that a stay of execution against a decree directing the issue of a probate may be ordered by the Appellate Court, is deserving of special attention, especially, as it differs from the view recently taken by the Madras High Court in *Durga Prasada v. Mallikarjuna* and reported at p. 358 of the current Madras Series of the Indian Law Reports.

THE EDITOR OF THE *Globe* WAS LATELY SUMMONED before the Bar of the House of Commons, for

having libelled the Irish members, and was let off after an expression of regret. We are not admirers of up-to-date journalism but neither are we any the more partial to such out-of-date privileges as entitle either the House of Commons or a High Court of Justice to commit people summarily for contempt. There was a time when fishing in the tank of a member of Parliament was considered a breach of Parliamentary privilege, or the holding of a judge by his dangling leg when in the act of getting into his carriage by a distressed suitor was construed into contempt. We have seen, however, in recent years how the superior Courts have been loath to avail themselves of such powers and the forbearance recently shown in Parliament to the Editors of the *Globe* and the *Daily Mail* surely indicate that even the all-powerful House of Commons is none the more zealous of its arbitrary privileges. The law of libel and regular judicial proceeding in a Court of law seem in public opinion to be more satisfactory to both the maligner and the maligned.

MASTER MACDONELL'S LAST SUMMARY OF CRIMINAL Judicial Statistics of England and Wales has its bright as well as its dark side. It is indeed gratifying to observe that in 1857, with a population of twenty-two millions, crimes amounted to 101,000 while in 1899 with a population of thirty-two millions crimes went down to 76,000. This marked improvement is, no doubt, attributable to enlightened legislative measures and progressive social schemes that have in a manner revolutionized the status, the environment, the habits and conditions of life of the lower classes during the last half century. This downward criminal tendency having been steadily maintained in spite of the growth of a more humane view of criminal law and its administration, it may be taken as conclusive that the better method of meeting crime is to endeavour always to elevate the people socially, mentally, morally and materially rather than to misdirect all our energy and ingenuity in combating human depravity by the degrading influence of prison-life and punishment.

NOTWITHSTANDING THE DECREASE IN CRIMES GENERALLY and as against property in particular, it is very deplorable indeed that crimes against morals instead of being on the decrease since 1857 seems to be on the increase. As is to be expected, Master Macdonell finds that crimes of this variety are closely connected with the growth of material and physical comforts of the community. For instance offences of this character reached the maximum in 1893 and 1894, which were also periods of great commercial prosperity. Of other vices of civilization, such as gambling and drunkenness, it is but natural that they would be more pronounced in years of prosperity. But prosecutions under these heads seem to vary according to the temper of the police and the

public and it will be interesting to know if Master Macdonell, C. B., will have anything to say as to the license of the Mafeking-day or of the war fever in his summary of Criminal Statistics of 1900.

### English Notes.

HOUSE OF LORDS.—*CARR v. FRANCIS TIMES AND CO.* Before THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD BRAMPTON and LORD LINDLEY. 8th July 1901.

*International law—Action in tort for acts committed within the dominion of an Independent Sovereign.*

The Respondents are merchants carrying on business in London, Beshire and Muscat. The Appellant is an officer in the British Navy and was, at the time the act complained of was committed, in command of H. M. S. "Lapwing" stationed in the Persian Gulf. The action was brought against him in that capacity to recover damages for wrongfully depriving the Plaintiffs, the Respondents Francis Times and Co., of 25 cases of cartridges which were on board the "Baluchistan" on its way to Bahrein *via* Beshire, in the ordinary course of their trade. Those goods were seized on 24th January 1898 by the Appellant as such officer while the vessel was making for Muscat and was within the territorial waters of His Highness the Sultan of Muscat. The Appellant acting in consonance with a previous proclamation of the Sultan, dated the 13th January 1898 boarded the "Baluchistan," took possession of those cases of ammunition, informing the master thereof that the cargo was under arrest, and subsequently landed same at Muscat.

The matter came before the Court constituted by the Sultan which, by its order, dated the 15th April 1898, *inter alia*, found that the seizure was in all respects legal and in accordance with the permission given by His Highness the Sultan to British Men-of-War in pursuance of the request of the British and Persian Governments.

To that judgment approval was signified by the Sultan under his own handwriting. Mr. Justice Guthrie at the trial with a jury gave judgment for the Defendant the present Appellant Captain Carr. The Court of Appeal reversed that decision; hence the present appeal to the House of Lords by Captain Carr.

Their Lordships allowed the appeal. The judgments state, *inter alia*, that the Sultan had declared what was his own law. His authority was supreme within the territorial waters of Muscat, which were for this purpose, as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway. His declaration was an act of State which could not be impugned in this country. See *Dobree v. Napier* (5 L. J. C. P. N. S., 273). That was an *a fortiori* case because the act instead of being done against the law of this country as in *Dobree v. Napier*, the act in the

present case was done by order of the British Crown. The law of the Sultan of Muscat was his will and pleasure and no British tribunal was competent to go beyond the Sultan's declaration. It was well settled law (*Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1) that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled, *first*, the wrong must be of such a character that it would have been actionable if committed in England, and, *secondly*, the act must have been justifiable by the law of the place where it was committed. The present case turns on the 2nd proposition. The true meaning of the said proclamation under which the Appellant had acted, and of the said report of the Sultan's High Court confirmed by His Highness, was that the act, if done was to be done under his authority as his act. The seizure complained of by the Plaintiffs the Respondents being lawful by the law of the State in which it was effected, was a sufficient answer in refutation of the claim made by Francis Times & Co.

*The Attorney-General, The Solicitor-General and Mr. Acland for the Appellant.*

*Sir Robert Reed, K. C., and Mr. Joseph Walton, K. C., and Mr. Hollams for the Respondents.*

*Appeal allowed with costs.*

C. W. A.

HOUSE OF LORDS.—*EARL COWLEY v. VIOLET COUNTESS COWLEY*. Before the LORD CHANCELLOR, LORDS MACNAGHTEN, JAMES OF HEREFORD, BRADTON, and LINDLEY. 30th July 1901.

*Property in title.*

The facts of this case which was commenced by Lord Cowley are given in 4 C. W. N. clxiv, cclx.

This was Lord Cowley's appeal from the decision of the Court of Appeal. Their Lordships delivered their judgment, which had been reserved, today and were unanimous in dismissing the appeal with costs.

It has been held that the present was a controversy in which no Court of law has any concern. What jurisdiction had any Court of law to determine a question of dignity. If there was a claim for such a right that jurisdiction would be vested in that House as a Committee of Privileges not as a Court of law. No jurisdiction arose in the Divorce Court simply on the ground that there had been a divorce suit between the parties. There was no precedent for such a claim. Although by her second marriage the Countess Cowley ceased to be a peeress, the usages of society were such as to entitle her by courtesy to her old name. The case of *Lady Dacre* (Journals of the House of Lords, 1661, p. 298) showed the recognition of such usage by the Committee of Privileges. For these reasons besides those given by the Court of Appeal, Earl Cowley's claim for an injunction was rightly dismissed.

*Mr. Haldane, K. C., Mr. B. Deane, K. C., and Mr. Willock in support of Earl Cowley's contention.*

*Mr. Lawson Walton, K. C., and Mr. Mark Romer for the Countess.*

*Appeal dismissed with costs.*

C. W. A.

COURT OF APPEAL.—*FARQUHARSON BROTHERS & Co. v. KING & Co.* Before the MASTER OF THE ROLLS, LORDS JUSTICES VAUGHAN WILLIAMS and STERLING. 20th July 1901.

*Law regarding innocent persons suffering by the acts of a third party—Equity.*

The Appellants were Defendants in the litigation; they are packing-case manufacturers; they sought in this appeal an order for judgment in their favour or a new trial of this litigation which had ended before Mr. Justice Mithew and a special jury in a verdict being entered in favour of the Respondents who are timber-merchants carrying on a timber importing business. The prayer in their statement of claim was that the Defendants had for some four years detained from them several lots of timber.

The Plaintiffs imported timber used to be stocked at the Surrey Commercial Docks, and on delivery-orders signed by themselves the timbers they required were made over to them.

The question for determination in this litigation arose owing to Plaintiffs having altered the method of delivery. In January 1895, Plaintiffs wrote to that Dock Company advising them to accept all transfers or delivery orders signed on their behalf by one Capon, who was their confidential clerk. A similar communication was sent to the Directors of that Dock Company. Full powers were thus conceded to Capon for getting the timber stored out of the Docks. Capon acted dishonestly. He signed delivery orders for a certain quantity of timber and then sold them to the Defendants. From 1896 to 1900 Capon perpetrated a series of frauds. Acting in the name of Brown he sold, writing from a false address, to the Defendants several lots of timber from time to time. It was admitted throughout the litigation that the Defendants had acted *bona fide* in the belief that Capon, who was acting in the name of Brown, had authority to sell, and Defendants had paid invariably a fair price to Capon.

The MASTER OF THE ROLLS and LORD JUSTICE VAUGHAN WILLIAMS thought that the learned Judges ought to have asked the jury, whether the Plaintiffs by their conduct enabled Capon to hold himself out as the owner of the goods so as to enable him to dispose of them. The answer to that question should have been given in the affirmative and on such answer judgment should have been entered for the Defendants.

It had been decided that, whenever one of two innocent persons must suffer from the acts of a third party, the person who has enabled such third person to occasion the loss must be responsible for it. The act which enabled the third person to occasion the loss must be one connected with the

fraud, the cause of the loss. Here the authority given to Capon was very large; armed with such authority Capon obtained delivery, by signing delivery orders to the Dock Company to transfer parcels of timber to the order of Brown, next in the name of Brown directed the Company to transfer the timber to Defendants' order, who thereupon took delivery, and paid Capon for same. The Plaintiffs had consequently by their conduct enabled Capon to hold himself out as the owner of the goods able to dispose of them.

LORD JUSTICE STERLING *per contra* thought that Plaintiffs knew nothing of the transfer of the goods into the name of Brown, nor of the sale of the goods. They gave the Dock Company notice to accept Capon's delivery orders, but they did not authorize the Dock Company to communicate that to anyone. They did not authorize Capon to hold himself out as having authority to deal with the goods at all. The case was the same as if Capon had transferred the goods into his own name, got delivery and sold them. As regards negligence it had been decided that even if Plaintiffs' negligence had brought on the loss to Defendants, Plaintiffs owed no duty to Defendants which the law recognized, either as individuals or as members of the general public, and in his Lordship's opinion the application should be dismissed.

JUDGMENT OF MAJORITY of Court was that judgment should be entered for Defendants.

*Mr. Lawson Walton, K. C., and Mr. Cababe* for the Defendants.

*Mr. Joseph Walton, K. C., and Mr. Whately* for the Plaintiffs.

C. W. A.

• Appeal allowed.

CHANCERY DIVISION.—JEFFREYS v. JEFFREYS.  
Before MR. JUSTICE FARWELL. 15th March 1901.

*Will—Codicil—Forfeiture clause—Conditions void for uncertainty.*

A life estate in a trust estate was left to his daughter by the testator. There was a condition attached to the bequest on the happening of which the life estate was to be forfeited. It was as follows:—"I expressly direct my trustees and declare that if my daughter shall in any way associate, correspond or visit with any of my present wife's nephews or nieces, or if she shall to the knowledge of my trustees entertain or exercise hospitality to any of them, or contribute to their support, then all the estate and interest of my daughter shall be forfeited, cease and determine."

No breach of condition was alleged but the Plaintiff asked by this summons for adjudication whether the codicil was not void for uncertainty.

After overruling the preliminary objection that the matter cannot be decided now, because there had been no breach of condition, the learned Judge held that the conditions were so vague that the daughter could not predicate with any certainty what was that she was forbidden to do. The general

principle applicable to such cases was definitely laid down in *Clavering v. Ellison* (7 H. L. C. 707) and *Pillingham v. Bromby* (1 Turner & Russel, 530); to suffer forfeiture one must be able to predicate with certainty. The condition was therefore declared void.

*Mr. Upjohn, K. C., and Mr. Clare* for the Plaintiff.  
*Mr. Balcher, K. C., and Mr. Yelverton* for the Defendants, the testator's other children.

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL. *Re HENDERSON'S PATENT.*  
13th July 1901.

*Prolongation of patent—Account of remuneration already gained by inventor.*

LORD DAWEY to-day delivered their Lordships' judgment in the petition of the British Aluminium Company, giving the reasons for refusing to prolong Mr. A. C. Henderson's patent for manufacturing Aluminium by electrolysis. The judgment concludes as follows:—

"Persons who applied to the Board for the prolongation of Letters Patent could not be too frequently reminded of the law as laid down by Lord Cairns in 'Laxby's patent' (L. R. 3 P. C. 292):— 'It is the duty of every patentee who comes for the prolongation of his patent to take upon himself the onus of satisfying this committee, in a manner which admits of no controversy, what has been the amount of remuneration which in every point of view the invention has brought to him, in order that their Lordships may be able to come to a conclusion whether that remuneration may fairly be considered as a sufficient reward for his invention, or not. It is not for this committee to send back the accounts for further particulars, nor to dissect the accounts for the purpose of surmising what might be their real outcome if they were differently cast; it is for the applicant to bring his accounts before the committee in a shape which will leave no doubt as to what the remuneration has been which he has received.' The words of Lord Cairns were equally applicable where, as in the present case, the Petitioners were bound to prove that the inventor had not been adequately remunerated. It might be surmised, from the materials before their Lordships, that the inventor had received or became entitled to receive something like 600,000*l.*, or say, £24,000 for his patent rights, besides other advantages in the form of shares which might or might not be of value. But whether that be so or not, it was sufficient for the present purpose to say that the accounts were not before their Lordships in a shape which enabled them to form any clear opinion on the subject. What had been said rendered it unnecessary to consider the other points mentioned by the Attorney-General. Their Lordships would

only say that the failure of the patentee to push the patented invention in this country for seven years and the circumstance of the expiration of the foreign patents were also serious obstacles to the success of the present application. Neither of those circumstances would be in itself conclusive against the Petitioners. But it would require a very strong case to induce their Lordships to recommend a prolongation of the patent where those circumstances occurred. The principle upon which objections of that class should be dealt with were explained in the judgments of the Board in 'Semet and Solway's Patent' (1895, A. C. 78) where the extension was granted and 'Peepers Patent' (12 Pat. Ca., 292) where it was refused. For those reasons their Lordships had humbly advised His Majesty that the petition should be dismissed. The Petitioners would pay one set of costs to the two objectors.

*Mr. Fletcher Moulton, K. C., Mr. R. Wallace and Mr. J. C. Graham for the Petitioners.*

*Mr. Cripps, K. C., Mr. Waggott and Mr. A. J. Walter for the Opposition.*

*The Attorney-General and Mr. Sutton for the Crown.*

C. W. A. *Petition dismissed.*

PRIVY COUNCIL.—Appeal from the Royal Court of St. Lucia. *QUINLAN v. QUINLAN*. 13th July 1901.

*Leave to appeal in forma pauperis, discharge of.*

In this matter the judgment of their Lordships, discharging an order in Council of 29th June 1900 whereby leave to appeal was given to the Respondent *Mr. Quinlan* (see 5 C. W. N. cclxxvii), which was delivered by Lord Davey, *inter alia*, states:—

"The present application was based on grounds that the former petition contained misleading statements and that material facts were withheld. It was fair to the Respondent to say that his petition did not appear to have contained any actual misrepresentation of any material facts, though many of the allegations in it were irrelevant, but it was said that it did not fairly state the effect of the evidence in the two suits, and, that if their Lordships' attention had been called to the proceedings at the trial, it would have at once appeared that there was no foundation for the proposed appeals and that in fact the appeals in both suits were frivolous."

Then after commenting on the character of the suits and the pleadings, evidence and decisions thereon, the judgment concludes as follows:—

"Their Lordships had come to the conclusion that no substantial point was raised in the appeal either in the separation suit or in the mortgage suit. Leave to appeal to the King in Council in *forma pauperis* was not, of course; and in the opinion of their Lordships it ought not to be granted where it was made apparent that the proposed appeal was idle and frivolous. It would be wrong to put parties to the expense of opposing such an appeal in a case where they could not recover any

costs if successful. But in saying that, their Lordships did not intend to invite a premature discussion of the merits of the case on a petition to discharge an order to appeal in *forma pauperis*, nor would they entertain an application of that character. Usually the statement of counsel showing that there was a real question to be argued should be received, and it was enough if there be such a question, although the success of the proposed Appellant might be doubtful. In the present case their Lordships were satisfied on the materials before them that there was no question to be tried in either suit, and if the facts had been as fully before them when they advised the Crown to make the order as they were now the order would not have been made. They had, therefore, humbly advised His Majesty that the order in Council of 29th June 1900 should be discharged. The Petitioner did not ask for costs. The Respondent suggested that their Lordships might grant a new trial on the ground of the bias said to have been exhibited against him by the Chief Justice. They could, of course, after hearing the appeals, direct a remand if they considered that justice required that course. But it would have to be shown that there had been a serious miscarriage of justice. In the present case nothing of the kind appeared. The question in each suit was purely one of fact, and there were no grounds for saying that the judgments were wrong on the materials before the Court, or that the Respondent was prevented from adducing further evidence if he had been so minded."

C. W. A.

PRIVY COUNCIL.—Appeal from Oudh. *MURLI DHUR v. BACHURAJ SINGH*. 19th July 1901. (See 4 C. W. N. cclxxviii).

LORD HOBHOUSE to-day delivered their Lordships' judgment advising His Majesty to dismiss the appeal with costs.

*Mr. Mayne for the Appellant.*

*Mr. Degrayther for the Respondent.*

C. W. A.

PRIVY COUNCIL.—On appeal from Allahabad. *ASGHAR ALI KHAN v. KURSHED ALI KHAN*. 27th July 1901.

*Agency Limitation.*

LORD ROBERTSON delivered their Lordships' considered judgment in this litigation between two brothers in which it became necessary to ascertain the relations of one to the other out of which the disputes had arisen. Their Lordships advised His Majesty to dismiss these consolidated appeals with costs, being of opinion that the several actions had been disposed of by the High Court in an appropriate manner. In the course of their judgment their Lordships say:—"Their Lordships are of opinion that the 89th article of the 2nd schedule of the Limitation Act, 1877, applied, for they hold that the words "moveable property" include

money. The evidence of Asghar Ali showed that the relation of agency continued down to the institution of the suit and accordingly the plea of limitation failed."

*Mr. Mayne* for the Appellant.

*Mr. Cowell* and *Mr. Colvin* for the Respondent.

C. W. A. *Appeal dismissed with costs.*

#### [PRIVY COUNCIL.]

[APPEAL FROM THE CONSULAR COURT OF  
CONSTANTINOPLE.]

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON. THE BAKU STANDARD STEAMSHIP

LORD LINDLEY.

SIR FORD NORTH. THE AUGILE STEAMSHIP.

1901.

15, June.

*Salvage services and damages—Calculation—Practice of Privy Council—Dispute only as to amount.*

In concluding their Lordships' judgment SIR FORD NORTH as regards above considerations said:—

"It was clearly settled that when the vessel of a salvor had, without default on his part, been injured in the performance of salvage services, compensation might be awarded to him in respect of the injury so sustained, and damages consequent thereon. It was laid down in the *De Bay* case, *Ried v. Gibb* (L. R. 8 App. Cas. 559) that it was always justifiable and sometimes important—if it could be done—to ascertain what damages and losses the salvor vessel had sustained in rendering salvage services. It was often difficult and expensive, and sometimes impossible to ascertain exactly the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner, upon so liberal a scale as to cover the loss and to afford also an adequate reward for the services rendered. It was also laid down in the case of *Blyth* (Lushington's Reports, p. 16) that when the vessel of a salvor was injured or lost while engaged in a salvage service, the presumption was that the injury or loss was caused by the necessities of the service, and not by the default of the salvors; and that the burden of proof lay upon the parties who alleged that the loss was caused by the salvors' own acts. Adopting the principles thus laid down and in the absence of any evidence that the damage to the *Augile* was caused by negligence or default on the part of the master or crew of the vessel, their Lordships were of opinion that the damage assessed by the Registrar was rightly awarded against the Appellants. That being so, the compensation to be given for salvage services, as distinguished from compensation for damage ought, to be calculated on a less liberal scale than if the sum given for salvage was intended to cover compensation for damage also. Their Lordships considering the evidence and that the compensation for damage was dealt with separately, are of opinion that full justice would have been done by an award of less than £1,000 for salvage. But that was a question

of amount only and it was not the custom of the Committee to vary the decision of a Court below on a question of amount merely because they were of opinion, that if the case had come before them in the first instance, they might have awarded a smaller sum. It had been laid down in the said case of *Bird v. Gibb* and other cases that they would only do so if the amount awarded appeared to them to be grossly in excess of what was right, which was not the case here."

*Mr. Aspinall*, K. C., and *Mr. Scrutton*, K. C., for the Appellants.

*Mr. Joseph Walton*, K. C., and *Dr. Stubbs* for the Respondents.

C. W. A.

*Appeal dismissed with costs.*

#### PRIVY COUNCIL.

[ON APPEAL FROM THE SUPREME COURT OF  
BRITISH COLUMBIA.]

LORD DAVEY.

LORD JAMES OF HEREFORD.

LORD ROBERTSON.

SIR R. COUCE.

1901.

27, July.

THE COLLECTOR OF  
VOTERS OF BRITISH  
COLUMBIA

TOMAI HOMMA.

*British Columbia—Local legislature, power of to deny full citizenship to naturalised British subjects—Local franchise—Register of voters—Special leave to appeal—Costs.*

This was an application by the Collector of Voters, who is a Government official, to be allowed to appeal from a decision of the Supreme Court of British Columbia, which had supported the decision of the County Court Judge of the electoral district of Vancouver. These decisions were passed in favour of the abovenamed Tomai Homma, a Japanese by birth and nationality, but a naturalized British subject. They were opposed to the decision of the Petitioner, the Collector of Voters, who had refused to register the name of Tomai Homma under the authority of a local statute. That statute prohibited the registration of the name of any Kinkamen, Japanese or Indians on the register of voters. The question was whether his decision was correct or that of the two Courts who decided the matter on appeal, whether it was within the powers of a provincial legislature, to refuse to admit to full citizenship natives of India, China or Japan.

*Mr. C. A. Russell*, K. C., appeared in support of the application.

*The Hon'ble Edward Blake*, K. C., for the Respondent, Tomai Homma, did not oppose the application but asked for terms as to costs as directed by their Lordships in the *Queen v. Stewart* in 1890 in a British Columbian appeal. He asked in accordance therewith that the Appellant should pay the costs in any event.

THEIR LORDSHIPS gave leave to appeal on the understanding that the Petitioner would pay the costs whether he succeeded or failed in the appeal for which leave to appeal was granted.



It was conceded that it was a burning question in British Columbia.

LORD DAVEY said the question was one of importance, and their Lordships would advise His Majesty to grant leave to appeal, on the understanding that the Attorney-General for British Columbia and also for the Dominion of Canada should be at liberty to intervene.

C. W. A.

*Appeal allowed.*

#### PRIVY COUNCIL.

[APPEAL FROM THE ISLE OF MAN.

THE LORD CHANCELLOR.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1901.

24, July.

*Er parte* HAROLD VINCENT  
ALFRED.

*Special leave to appeal from the determination of a Judge and jury.*

The Petitioner, a member of a Manchester firm of accountants, petitioned for special leave to appeal against the finding of the acting Deemster of the Isle of Man and a jury. He was prosecuted with others last year for being a party to the issue of false balance-sheets in connection with the failure of the Dumbell Banking Company of the Isle of Man. Convicted with a recommendation to mercy he was sentenced to 6 months' imprisonment with hard labour which he has undergone. He complained that most violent language was expressed in the press against him during the trial. That no fraudulent intention was proved at the trial, and there was no evidence to support the charge against him and there had been misdirection by the Judge.

His object in seeking special leave in order that his conviction might be set aside was to protect his being expelled by the Institute of Chartered Accountants of which he was a member.

The LORD CHANCELLOR said their Lordships had come to the conclusion that there was nothing shown which would justify their setting aside the conviction. The conduct of the press was very reprehensible, but there was nothing to point to the jury having been influenced by the statements complained of. There was no fact established sufficient to counter-veil the solemn determination of Judge and jury, which was based on evidence. Whether their Lordships would have formed the same opinion on the evidence as the jury had done was outside the question, that was not enough to justify their setting aside the verdict of the jury.

Mr. Muir Mackenzie argued in support of the petition.

Mr. Charles Mathews and Mr. Carrington for the Government of the Isle of Man were not called on.

THEIR LORDSHIPS declined to advise His Majesty to grant leave to appeal.

C. W. A.

*Application refused.*

## CALCUTTA HIGH COURT.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2044 of 1899.

NANDA LAL GOSWAMI and ors.,

Defendants Nos. 1, 2 and 5,

Appellants,

AMEER ALI, J.

PRATT, J.

1901.

2, August.

JAJENSWAR HALDAR and ors.,

Plaintiffs, Respondents.

*Suit for possession of land and tree and for damages—Possession, absence of evidence of—Opus—Claim to property by Plaintiff as being within his putni—Allegation by Defendant that property is within his mokurari mautasi-tenure—Admissum of title of Defendant, absence of—Trespasser—Long possession—Presumption.*

This was an appeal preferred on the 6th of November 1899, against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Zillah Burdwan, dated the 21st August 1899, reversing the decree of Babu Basanta Kumar Bose, Munsif of Kulna, dated the 13th July 1898.

This appeal arose out of a suit for possession of an *aswatha* (Banian) tree and its site, the Plaintiffs claiming them as their *khas* properties included in their *putni* melhal Jaluidanga to which the road on the side of which the tree stood appertained. The Plaintiffs also claimed the value of the tree said to have been cut by the Defendants.

The Defendant No. 2 claimed the road and the tree as included in his *mokurari mautasi* tenure under the Plaintiffs, while the Defendants Nos. 1, 3 and 4 disclaimed all concern with them. The contesting Defendant also pleaded limitation and objected to the damages claimed.

The first Court found the evidence of possession on both sides to be untrustworthy and being of opinion that possession must therefore follow title to the land and that in this case the onus lay on the Plaintiffs to prove that the disputed tree and land were not included in the Defendants' tenure, which the Plaintiffs could not discharge, dismissed the Plaintiffs' claim. The Munsif relied on the case of *Rhedoy Kristo Mistry v. Nobin Chandra Sen* (12 C. L. R. 457).

Against that decree the Plaintiffs appealed, and it was argued on their behalf that the first Court had wrongly thrown the onus on the Plaintiffs in this case and that their possession had been satisfactorily proved. The Subordinate Judge agreed with the first Court that there was no satisfactory evidence as to the possession of the tree and its site; but he held that in the facts and circumstances of the case, there being no admission in the plaint of the Defendants' tenure, and the Plaintiffs having described and treated the Defendants as trespassers, the case of *Rhedoy Kristo Mistry v. Nobin Chandra Sen* (12 C. L. R. 457) relied upon by the first Court did not apply to the facts of the present case. On the

contrary the Subordinate Judge held that the cases of *Balai Ahir v. Bhuggobutty Kber* (11 C. L. R. 476), *Ram Moni v. Alimuddin* and *Rajkrishna Mukherjee v. Peari Mohan Mukherjee* (20 W. R. pp. 374 and 421) governed the present case and that the Plaintiffs were entitled to a decree.

Against that decree the Defendants Nos. 1, 2 and 5 preferred this appeal, and it was argued that the case of *Rhedoy Kristo Mistry v. Nobin Chandra Sen* (12 C. L. R. 457) which was followed in *Rajendra Kumar Bose v. Mohim Chandra Ghose* (3 C. W. N. 763) applied to the present case and that the onus lay upon the landlord to prove his own title in order to disturb a possession of very long duration.

*Held*—That the possession by the Defendant of a tenure of limited extent within the Plaintiffs' *putni* raises no presumption of title upon his seizure of a piece of land and claiming it as part of his tenure.

That the onus lay upon the Defendants to prove that the land was included in their *mokurani* holding and not upon the Plaintiffs to shew that it was not.

*Rajendra Kumar Bose v. Mohim Chandra Ghose* (3 C. W. N. 763) and *Rhedoy Kristo Mistry v. Nobin Chandra Sen* (12 C. L. R. 457) explained and distinguished.

That when a tenant has been in long and peaceable occupation of land as part of an admitted tenure, it lies upon the landlord in a suit for ejectment to prove in the first instance that the land is his *khas* property and not the tenants'.

*Babu Shib Chandra Palit* for the Appellants.

*Dr. Ashutosh Mukherjee* and *Babus Nalini Nath Sen* and *Bisra Nath Bose* for the Respondents.

*Appeal dismissed.*

H. P. C.

## [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 721 OF 1899.

UMED RASUL SAHA and others,  
Principal Defendants, Appellants,

1901.  
7, August. } ANATH BANDHU CHOWDHURY and anr.,  
Plaintiffs, Respondents.

*Income Tax Act (II of 1884, B. C.), sec. 5—Profits of a mela held on land let for agricultural purposes—Mela held when there would be no crops on such land—Liability to pay road-cess—Tenure-holder—Board's manual—Rule 33, framed by the Board—Road-cess Act (IX of 1880, B. C.), Ch. II, Ch. I, secs. 79, 106—Board's cess proceedings (of 12th November 1898, No. 2, Collection 10, File 96, of 1897)—Income-tax and road-cess, liability to pay—Jurisdiction of Collector to assess road-cess—Ultra vires.*

This was an appeal preferred on the 18th of April 1899, against the decree of Babu Gopal Chandra Banerjee, Subordinate Judge of Rungpur, dated the 23rd of January 1899, modifying the

decree of Babu Rajendra Lal Ghose, Munsif of Nelphamari, dated the 30th June 1898.

The facts of the case are shortly these:—The Appellants-Defendants held a *mokurari jama* under the Plaintiffs and the *pro forma* Defendant of Rs. 12-8 per annum which they had agreed to pay for the right to hold a *mela* on a certain land, in the month of Falgun every year, when there would be no crops on the land. According to their *pattah*, dated the 12th Magh 1267, they were to pay this sum to their landlords from the profits of the *mela*. They were called upon by the Collector to submit a valuation roll under the Road-cess Act (IX of 1889, B. C.), with regard to the profits of this *mela* and submitted it. The Collector then fixed a certain amount of road-cess on the profits of the *mela* which he realized from the Plaintiffs. The Plaintiffs now sued to recover this road-cess from the Defendants as well as the rent due under the lease.

The first Court disallowed the Plaintiffs' claim for road-cess. The Subordinate Judge, on appeal, allowed it holding that the Defendants were tenure-holders within the definition of tenure-holder contained in the Road-cess Act.

The Defendants preferred this appeal, and on their behalf it was argued that inasmuch as they had to pay income-tax on the profits of the *mela* they ought not to be held liable for both income-tax and road-cess, that no road-cess was payable on account of the profits of the *mela* held on the land when it is not held for purposes of agriculture, and that the mere fact that the Collector assessed cesses under the Road-cess Act was not sufficient to make them liable to the Plaintiffs for the road-cess, as the Collector had acted without jurisdiction.

*Held*—That the land on which the *mela* is held is no doubt land used for purposes of agriculture when it is not being used for the purposes of the *melq*, but when it is being used for the purposes of the *mela* it is not being used for purposes of agriculture and the profits of the *mela* are not incomes which would be exempted from income-tax under sec. 5 of Act II of 1886.

That the Defendants would be liable to pay income-tax and consequently not road-cess.

That it was not intended by the legislature to assess with road-cess tax land from which profits subject to income-tax are derived, except when such land is used for agricultural purposes.

That the rule (Rule 33 at pp. 74 and 75 of the Road-cess Manual) framed by the Board of Revenue under sec. 106 of the Road-cess Act to the effect that the profits derived from land used for the purposes of a *mela* are assessable with road-cess is *ultra vires* and the Board is not authorized to make such a rule under the provisions of sec. 106 of Act IX of 1880, B. C.

*Babus Saroda Charan Mittra* and *Soroshi Charan Mittra* for the Appellants.

*Babu Mohini Mohan Chakravarty* for the Respondent.

H. P. C.

*Appeal allowed.*

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, SEPTEMBER 2, 1901.

[No. 41]

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### REPORTS (See Index.)

## High Court Notices.

The Hon'ble Mr. Justice Harington will sit on Friday, the 6th, and on Saturday the 7th September next, at 11 A. M., for the purpose of hearing urgent applications.

From and after the 7th September next only matters which are really urgent will be taken.

Special appointments to hear such matters may be obtained through the Vacation Officer.

The application for such appointment must state the grounds of urgency.

HIGH COURT, O. S. } J. H. HECHLE,  
The 26th August 1901. } Deputy Registrar.

The High Court, Original Side, will be closed for the annual vacation (including Mohalaya, Durga, Laksni, Kali, pujahs, Bhadriddiya and Kartick pujah) on and from Thursday, the 5th day of September, to Saturday, the 16th day of November 1901, both days inclusive, and will resume its sittings on Monday, the 18th day of November 1901.

The Insolvent Court will sit on Tuesday, the 1st day of October 1901.

The Offices of the Court, Original Side, will be closed for general business for the annual vacation on and from Wednesday, the 18th day of September, to Wednesday, the 13th day of November 1901, both days inclusive, and for Kartick pujah on Saturday, the 16th day of November next.

One Judge will remain in Town for urgent business, and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

HIGH COURT, O. S. }  
The 26th August 1901. }  
By order,  
W. R. FINK,  
Registrar, Original Side.

The under-mentioned principal officers will be on duty during the vacation.

Application for special appointments for the hearing of urgent matters should be made in writing.

From 7th September next up to 13th October next.

To  
G. RYPER, Esq.,  
1, Royd Street.

From 14th October to end of Vacation.

To  
J. H. HECHLE, Esq.,  
28, Lower Circular Road.

W. R. FINK,  
Registrar, Original Side.

HIGH COURT, O. S. }  
The 26th August 1901. }

It is hereby notified that the High Court, Appellate Side, will be closed for the annual vacation from Friday, the 6th September, to Saturday, the 16th November 1901, both days inclusive.

The Hon'ble Mr. Justice Harington and the Hon'ble Mr. Justice Gupta will sit as the Vacation Judges, except, during the following Court and Gazetted (Executive) holidays, viz. :—

Gazetted holiday on account of Mohalaya .. Saturday, the 12th October 1901.

Gazetted holidays on account of Durga and Lakhji Pujahs .. Thursday, the 17th October, to Monday, the 28th October 1901.

Gazetted holidays on account of Kali Pujah .. Sunday and Monday, the 10th and 11th November 1901.

Court holiday on account of Bhadriddiya .. Wednesday, the 13th November 1901.

Court holidays on account of Kartick Pujah .. Saturday and Sunday, the 16th and 17th November 1901.

Motions and cases in which Vakils are engaged will be heard on Tuesdays and Thursdays, and such other days as may from time to time be fixed, at 10 o'clock A. M.

The Office of the Appellate Side will be closed for the vacation from Saturday, the 12th October, to Wednesday, the 13th November 1901, both days inclusive.

Such Translators, Examiners, Copyists and Assistants of the Record Department as may be required, will attend office throughout the vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

R. SHEEPSHANKS,  
HIGH COURT, }  
The 27th August 1901. }  
Registrar, Appellate Side.

The constitution of the Division Courts, taking effect on and from Monday, the 2nd September 1901, will be as follows :—

PRESIDENCY GROUP, BURDWAN GROUP AND PRIVY COUNCIL DEPARTMENT.—The Hon'ble the Chief Justice and Mr. Justice Gupta.

RAJSHAHYE GROUP AND PATNA GROUP.—Mr. Justice Hill and Mr. Justice Rampini.

ORDINARY CRIMINAL BUSINESS.—Mr. Justice Banerjee and Mr. Justice Harington.

Part-heard criminal cases and reviews. —Mr. Justice Ghose and Mr. Justice Taylor.

Arrangements on the Original Side as before.

ALTHOUGH WE CANNOT GRUDGE LORD HOBHOUSE his well-merited retirement yet we cannot help feeling a deep sense of loss on our being so suddenly deprived of the benefit of his mature experience, deep insight, profound learning and sober judgment in matters of vital importance to many in this country. It was exceedingly self-denying on his part to have served on the Judicial Committee for twenty years without any pay. He was our Law Member in the Supreme Council from 1872 to 1877. He had before that been a Queen's Council having taken silk in 1862 and as a leader, he was in great requisition before the Privy Council Bar. Not very long after his retirement from India he was sworn in as a Privy Councillor and was appointed one of the two members who, may, under the Statute 3 and 4, William IV, c. 41, sec. 1, be empowered to sit on the Judicial Committee; the other member at the time was Sir Richard Couch and is at present, Lord James of Hereford. Since Lord Hobhouse took his seat in the Judicial Committee in 1881, we have owed to him many valuable interpretations in the region of Hindu, Mahomedan, customary and the codified laws of India. Gifted with a rare judicial mind he succeeded in solving the most complicated questions of fact and law in a manner which carried immediate conviction and commanded universal confidence. The width of his views and the depth of his sympathy was not confined to the regions of law but travelled outside the scope of his self-imposed judicial duties and made him take interest in all questions affecting the welfare of India. We shall be wanting in our duty if we did not give expression to the deep sense of obligation in which he has placed the people of this country by his self-depriving services on their behalf even after the mature age of sixty and for a continuous period of twenty years when an ordinary man would be longing for rest in the seclusion of a retired life. We think that some steps should be taken by the public and the profession to make known our appreciation of his singular services on behalf of this country and the great esteem in which he is held by all in consequence. It is a pity that the Courts are closing now but we hope this call to duty will be remembered when we meet after the long vacation. It will not be too late then, for it is never too late to honour a good and a great man.

IN ANSWER TO MR. BRYCE'S QUESTIONS Mr. Chamberlain made the following announcement in the House of Commons regarding the result of the

recent conference on the subject of a final Court of Appeal for the Empire.

The majority of the delegates, after several private meetings, submitted resolutions to the effect that appeals should continue to lie from the colonies and from India to his Majesty in Council, and that appointments to the Judicial Committee should from time to time be made from the Dominion of Canada and Newfoundland, the Commonwealth of Australia, New Zealand, South Africa, the Crown colonies, and India, that the persons so appointed should, if judges, vacate any judicial office held at the time of such appointment, should hold office for life or a term of years, and should be paid an adequate salary. It was further suggested that arrangements should be made for securing a larger attendance of Lords of Appeal at sittings of the Judicial Committee, and that the colonies should suggest such alterations of procedure as might tend to the avoidance of delay, the simplification of procedure, and the lessening of costs.

The great majority of the delegates were opposed to any drastic changes in the present Court of Appeal; and, accordingly, his Majesty's Government do not propose to suggest such changes, although they will, in accordance with the resolutions of the conference, ask the various Governments concerned to suggest such alterations of procedure as may seem to them desirable.

We consider it time that the Home and the Indian Government should take steps to give effect to the recommendations made by the majority of delegates. We offer some suggestions below.

THE LAW INTERPRETATION THAT WAS BEING PUT ON sec. 537 of the Code of Criminal Procedure by the High Courts in India did not, as we had anticipated, find favour with their Lordships of the Privy Council. In the recent criminal appeal by special leave from Madras, namely, that of *N. A. Subramanya Iyer*, (see Notes *ante*, p. 269 and *post*, p. 309) their Lordships observed:—

"The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the code comes within the description of error, omission, or irregularity."

Further:

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity."

THE SO-CALLED IRREGULARITY SOUGHT TO BE CURED under sec. 537 by a Full Bench of the Madras High Court consisted in the trial of the Appellant by the Court of Sessions on an indictment in which he was charged with no less than 41 acts, these acts extending over a period of two years. As to the propriety of such a course their Lordships observe:—

"This was plainly in contravention of the Code of Criminal Procedure, sec. 234, which provided that a person may only be tried for three

offences of the same kind if committed within a period of 12 months."

As to the policy and purpose of sec. 331 their Lordships say:—

"The reason of such a provision, which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability, and the consequent embarrassment both to judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest, and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure."

WHAT FOLLOWS IS NOT MERELY APPLICABLE TO THE facts of this particular case but has a bearing on the practice, sometimes resorted to in our Superior Courts, of disregarding even serious irregularities in the mode of conducting trials in the Courts below and of proceeding to dispose of the case on the facts in the record and thus in a manner usurping the functions of the jury.

"Their Lordships think that the course pursued, and which was plainly illegal, cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury. Upon the assumption that the trial was illegally conducted it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the statute has been done. The effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury. It would in the first place leave to the Court the functions of the jury, and the accused would never have really been tried at all upon the charge arranged afterwards by the Court. Their Lordships cannot regard this as cured by sec. 537."

This gives the death blow to the plea on which convictions are often upheld by our Courts of Revision even when an accused has not had a fair trial. Another very significant fact in this case is the quashing of the conviction instead of sending it on remand or for retrial. The principles of English criminal law, which surely governs our codes, do not permit an accused to be tried more than once on the same charges and their Lordships, no doubt, set aside the conviction on that account. There is much to be said in favour of this practice and not the least is that, if it is followed, as it is bound to be,

the lower Courts will be less lax in the holding of criminal trials and the Police or the prosecution will have no more opportunities of supplying just what was lacking to secure a valid conviction at a subsequent trial.

#### REPRESENTATION OF INDIA IN THE JUDICIAL COMMITTEE.

The decision of the conference on the subject of an Imperial Court of Appeal and the retirement of Lord Hobhouse call for an adequate representation of India in the Judicial Committee. The only Indian expert that there is now in the Committee is Sir Richard Couch. But Sir Richard is now in his eighty-fifth year and has not of late been in good health. Fortunately, neither of these has stood in his way of taking upon himself a very large share of the work of the Judicial Committee. His judgments, which we have recently reported, shew that neither age nor health has to any degree impaired his judicial insight or his power of close reasoning and clear exposition. But it is doubtful whether he will be able to stand the severe strain of his duties for very much longer. Therefore, the question of the appointment of some more experts in Indian law has assumed some urgency. We understand from Mr. Chamberlain's announcement in the House of Commons that the opinion of the Government of India will be asked on the question. We would therefore urge both on the Home and the Indian Government the importance of selecting only such men as would command the confidence of the people of this country and maintain the high reputation that the Judicial Committee has established amongst them.

But the question of getting the best men is not free from difficulty. Sir Richard Couch is the only member of the Judicial Committee who gets any compensation, and that a very inadequate one, for the discharge of his arduous and highly responsible duties. The Statute 3 and 4, William IV, which established the Judicial Committee, makes provision under sec. 30, for the payment of £100 a year each to two Indian or Colonial judges who may be appointed by the Crown to attend the sittings of the Committee. This is hardly any inducement to any judge of any eminence to forego his rest and resume judicial duties of the most intricate and responsible character late in life.

In 1887 this was felt and by an Act of Parliament, 50 and 51 Vic., c. 70, sec. 4, it was provided that when there was but one Indian or Colonial judge in the Committee, who attended under 3 and 4 Will., c. 41, sec. 30, he might draw the two sums of £400. A sum of £800 a year is hardly an allowance befitting the position or responsibility of a member of the Judicial Committee. But as Sir Richard Couch had, even before Lord Hobhouse, accepted an unpaid membership in 1881,

six years later when he was offered a compensation of £800 annually for his services he saw no reason to refuse it. But that this allowance is no inducement to men of his merit to accept a seat on the Judicial Committee, is sufficiently evident from the case of the first Chief Justice of Bengal. Sir Barnes Peacock, we believe, refused the offer of an unpaid membership as also that of compensation under 3 and 4, Will. IV, c. 41, sec. 30. The fact that the allowance of £400 or £800 is meant to be in addition to what an Indian or Colonial judge got for his pension, makes no difference; for, as Sir Barnes Peacock said, the judge did not get his pension for nothing but he had to earn it.

It was because of such difficulties that a statute was passed in 1871, 34 and 35 Vic, c. 91, empowering Her Majesty to appoint four members to the Committee on an annual salary of £5,000 each from amongst persons who had at any time occupied the position of judges in the Superior Courts in England or that of Chief Justices in Madras, Bombay or Bengal. Four members were accordingly appointed and out of them Sir Barnes Peacock and Sir James Colville represented India. This statute, however, provided that the appointments were to be made within twelve months and any vacancies to be filled, that might occur within two years. This statutory power was not revived after two years and with the death of Sir Barnes Peacock in 1894 the last of the paid members of the Committee disappeared.

Having regard to the present constitution of the Judicial Committee and to the recommendations of the conference held at the Colonial office we are of opinion that no time should be lost in strengthening the Indian representation in the Committee by the appointment of really competent members on a salary befitting their position. But India should no more be burdened with any additional charges on this account than are the colonies, especially, having regard to the fact that we already pay very heavy Home Charges whereas the colonies pay none. But since the appointment of some Indian experts to the Committee, on the same status and salary as the Lords of Appeals in Ordinary, cannot be made before a special statute can be got through both Houses of Parliament, no delay should be made on that account to appoint some suitable successor to Lord Hobhouse. We would venture to suggest that if either Sir Arthur Wilson or Sir Raymond West can be persuaded to become a member of the Committee under 3 and 4, Will. IV, c. 41, sec. 1, for the present, that will remove the scare that has been caused in India by the mention of the name of Sir John Edge in this connection. Having restored confidence in the Judicial Committee in this manner the Government might proceed to consider what further steps should be taken to secure a more adequate representation of India in its final court of appeal.

## Review.

THE LAW RELATING TO HINDU WILLS. By Arthur Phillips, M. A., and E. J. Trevelyan, B. C. L., M. A. Publishers—W. Thacker & Co., 2, Creed Lane, London E. C. Thacker, Spink & Co., Calcutta (1901).

This work is divided into three parts. In the first part the learned authors, have discussed the principles of law applicable to Hindu Wills; while the second and third parts consist of annotated editions of the Hindu Wills Act and the Probate and Administration Act. As a book of reference it will be found highly useful, for all the leading cases dealing with Hindu Wills have been collected under various headings. In fact it may almost claim to be a digest of cases relating to Hindu Wills. Looking at the work in this light, the first chapter of the book dealing with the testamentary powers of Hindus seems to us to be somewhat superfluous. There the learned authors begin by stating that "the testamentary power of Hindus is now firmly established, apart from legislation" and then proceed to discuss very briefly the rise of testamentary power amongst Hindus. They do not, however, throw any fresh light on the subject. Having regard to the scope of the work, it also seems to us that some of the cases have been cited at somewhat unnecessary length and in consequence the work has become at places slightly cumbersome. It supplies however a long-felt want, for not only are the sections of the Succession Act that have been incorporated into the Hindu Wills Act printed in *extenso* but the leading cases dealing with the subject so far as Hindu Wills are concerned have been given in the notes appended to the various sections. The book shows great research and ought to prove a useful adjunct to the practitioner's library.

## English Notes.

HOUSE OF LORDS.—*DEVEY v. JOHN CORY*. Before the LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY and LORD BRAMFON. 1st August 1901.

*Director acting bona fide, but misled by the officials of the company—Heavy losses—Payment of dividends out of capital—Question of his liability.*

The question in this case was between one of the directors of the National Bank of Wales, the Respondent, John Cory, and his fellow-shareholders.

The Appellant was the liquidator of that Bank. He had succeeded in obtaining an order from Mr. Justice Wright awarding against Mr. John Cory £54,000, for payments made during several years of dividends out of capital. Mr. John Cory was a director from 1883 to 1890. The Court of Appeal reversed that decision.

This was the liquidator's appeal from that decision releasing the Respondent from any liability. It

was admitted before the House of Lords that no charge of fraud or moral obliquity was made against the Respondent, but the case against him and his liability was put on the ground of grave negligence as a director. It was argued that though he may not have known the true state of facts, he ought to have known them and his breach of duty in that respect rendered him liable. It was made the test of his responsibility that he did not find out what was fraudulently withheld from his knowledge. It was shown that he was in a network of conspiracy and fraud; warning letters of auditors had been kept back from his knowledge. He made enquiries from time to time but was deceived.

Their Lordships in their judgment were guarded as to laying down precise rules for the guidance or embarrassment of businessmen in their conduct of business affairs, and disclaimed assent to some of the propositions laid down by the Court of Appeal.

The LORD CHANCELLOR, *inter alia*, in a lengthy judgment said "Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out auditors, managing directors and chairman were all alike deceiving him. That the letters from the auditors were kept from him is clear, that he was assured that provision had been made for bad debts and that he believed such assurance is involved in the admission that he was guilty of no moral fraud; so that it comes to this that he ought to have discovered a network of conspiracy and fraud by which he was surrounded and found out that his own brother and the managing director (who have since been made criminally responsible) were inducing him to make representations as to the prospects of the concern and the dividends properly payable, which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching the inferior officers of the bank, or verifying the calculations of the auditors themselves. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers there appears to me to be no case against him at all."

Sir Robert Reid, K. C., Mr. Ingpen, K. C., and Mr. Evans for the Liquidator.

Mr. Swinfen Eady, K. C., Mr. Isaac, K. C., and Mr. Hart for the Respondent.

Decision in favour of Mr. Cory, the Director.

C. W. A. Appeal dismissed with costs.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

PRIVY COUNCIL. Appeal from Madras. N. A. SUBRAMANYA IYER v. THE KING EMPEROR. 2nd August 1901. For facts and arguments refer to 5 C. W. N. cclxix.

*Criminal Procedure Code, secs. 537, 234.*

The LORD CHANCELLOR delivered their Lordships' judgment to-day wherein it is stated that the Petitioner had been tried upon an indictment in which he was charged with no less than 11 acts running over a period of two years; that was directly opposed to the express terms of sec. 234 of the Code of Criminal Procedure. That Code had provided that a person may only be tried for 3 offences of the same kind if committed within a period of twelve months. The course pursued was plainly illegal and such illegality cannot be amended by arranging afterwards what might or might not have been left to the jury. Disobedience to an express provision as to the mode of trial cannot be regarded as a mere irregularity.

The judgment then refers to certain observations of Lord Herschell and Lord Russell of Killowen in 1 Law Rep. App. Cases, 1891, p. 494, as regards the constitution of a suit not warranted by law with approval and concludes as follows:—

"With all respect to Sir Francis Maclean and the other Judges who agreed with him in the case of *Abdur Rahman v. Keramat* (L. R. 27 Cal. 839; s. c. 4 C. W. N. 656), he appears to have fallen into a very manifest logical error in arguing that because all irregularities are illegal, that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike. But this trial was prohibited in the mode in which it was conducted, and their Lordships will humbly advise His Majesty that the conviction should be set aside."

Mr. Mayne for the Petitioner.

Mr. Phillips for the Respondent.

C. W. A. Conviction set aside: No order for costs.

## PRIVY COUNCIL.

[APPEAL FROM THE SPECIAL COURT OF NATAL.]

THE LORD CHANCELLOR.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

1901.

24, July.

*Ex parte* IAN LOBEWYK  
MARAIS.

High treason—Construction of laws "repugnant to England"—Colonial Laws Validity Act, 1865—Constitution of Court—Acting Judge.

This was a petition of Marais for special leave to appeal from an order of the special Court at

Natal convicting him for high treason and sentencing him to 12 months' imprisonment, which he was undergoing, and to a fine of £200, which he had paid. He was found guilty of having joined the Boer invading forces in the Klip River district of Natal, taken up arms for them, and accompanied and assisted them in the furtherance of the war.

His case was that soon after Ladysmith was invested by the Boer forces, Klip River district where he resided as a farmer was abandoned by the British forces; that he was left at the mercy of the Republican troops, they having taken complete control of the district and proclaimed Martial law. That he was commandeered by them and had to unwillingly perform police duty for them, but when the British re-occupied the place he refused to accompany the invaders in their retreat northwards.

He complained that he was tried by a Court wrongly constituted; he claimed the right of being tried by the English law and urged that he was wrongly tried by the Roman Dutch law.

The special tribunal which tried the Petitioner was one constituted under a Special Local Act 14 of 1900. That Act was passed under the then existing circumstances of the Colony to try persons charged with high treason. It provided for a special Court consisting of three Commissioners to sit at Natal.

*Lord Coleridge, K. C., (Mr. W. Stocken and Mr. Renard with him)* referred to the provisions of that Act, also of the Supreme Court Act, 1896, and submitted that the Court which tried the Petitioner was not properly constituted owing to there not being a member of the Supreme Court of the Colony on the commission; he urged that there was a marked distinction between an acting Judge and a permanent Judge of the Supreme Court. Lord Coleridge further argued that the Petitioner as an original settler in Natal carried with him the law of England, a right to a trial by a jury; that right he now claimed. Roman Dutch law was made applicable to the Colony at a much later date by a Colonial Statute, and it was not within the power of the Colonial Legislature to pass an act so repugnant to the law of England so as to deprive a person living in that Colony of the right to a jury trial. He referred to the Colonial Laws Validity Act, 1865, and to memorandum 9th August 1722 of a determination of the Privy Council reported in 2 Peere Williams, p. 74.

*The Hon'ble J. W. Leonard, K. C.,* (with whom was *Mr. Colfax*) for the Natal Government was heard only on the question of the constitution of the Court.

The LORD CHANCELLOR said their Lordships were agreed that this application should be refused.

On the 2nd point his Lordship's judgment was mainly based on the Colonial Laws Validity Act, 1865, which his Lordship said was passed for the very purpose of getting rid of the difficulty suggested by Lord Coleridge.

The judgment then proceeded "referring to the

Statute of 1865 which they had to construe and the words 'repugnant to the laws of England' were not to be construed in their bald sense, but with the new qualifications introduced in the interpretation clause. What was to be repugnant to the law of England within the meaning of those words, was a repugnancy to some Act of Parliament extending to the Colony to which such Colonial law might relate, or to any order or regulation made under such Act. The obvious purpose and meaning of the statute was to preserve the right of the Imperial Legislature to legislate for a Colony, although a local legislature had been given to it, and to make it impossible, when an Imperial Statute had been passed expressly for the purposes of a Colony, for a Colonial legislature in that sense to enact anything repugnant to what was an express law applied to the Colony by the Imperial legislature itself. As to the other argument with reference to legislation by a Colony which in some respects might run counter to or be repugnant to some law of the United Kingdom, that, if it were construed in a wide sense as Lord Coleridge suggested, would render the Colonial legislature illusory altogether, because it was hardly possible to deal with the right of any British subject by a local legislature which should not in some way or another run counter to some provision in this country which was enacted for a different purpose having no special reference to the circumstances of a particular Colony. That statement reconciled the principle of giving a local legislature, but nevertheless leaving it still open to the Imperial Legislature by express legislative provisions to do something in a Colony."

With regard to the first point his Lordship's judgment concludes as follows:—

"The Governor could not of his own motion appoint a person as an acting Judge. By the 28th section it must be at the request of the Chief Justice so that in order to preside or be one of the Commissioners they must have a person qualified to be a Judge, and the acting Judge must be appointed at the request of the Chief Justice. It was admitted that the Petitioner was tried by a person who was an acting Judge, and their Lordships were called upon to say that the Court was not properly constituted because one of the members of it was not permanently a Judge of the superior Court, but only an acting Judge within the meaning of the Act of Parliament. Their Lordships were not able to say that that prevented his being a Judge of the Supreme Court; and if he was a Judge the provisions of the statute were satisfied and the commission was properly constituted. For these reasons their Lordships would humbly advise His Majesty that no leave to appeal should be granted."

*Leave refused.*

C. W. A.



## PRIVY COUNCIL.

[APPEAL FROM THE SUPERIOR COURT OF CEYLON.]

LORD DAVEY.

LORD JAMES OF HEREFORD.

LORD ROBERTSON.

SIR R. COUCH.

AITKEN SPENCE &amp; CO.

M. SIMON FERNANDO.

1901.

27, July.

*Petition for special leave to appeal—Arbitration—Final decree.*

The Appellant was the Petitioner and the Plaintiff in the suit, which he had instituted in the District Court of Colombo, against the abovenamed Fernando, to recover Rs. 43,317 as damages for breach of contract to deliver certain quantities of plumbago within a certain time. The Defendant denied that the plumbago in question should have been delivered within the dates alleged by Plaintiff; asserted that the contract had been cancelled by mutual agreement, and also denied that Plaintiffs had sustained the damages alleged by them.

Just previous to the date fixed for the hearing of the action and at the Defendant's suggestion the parties agreed to refer to the sole arbitration of the Hon'ble H. L. Wendt their whole dispute. The District Judge thereupon in accordance with the written agreement of the parties referred the matter in dispute to that gentleman for final decision as sole arbitrator.

Later on the District Judge extended, by an order of his, the time for the making of the award until the 15th March 1900; this was done on the joint motion of the parties.

And the first sitting of the arbitrator was fixed in communication with both parties for 28th February 1900.

On that day Plaintiff's representative heard from Defendant's representative that he would not attend the sitting, and on the same date the arbitrator heard from Defendant that on his counsel's advice he was unwilling to go to arbitration and desired withdrew from it.

Several sittings were held by the arbitrator, upon each occasion after due notice to Defendant, and evidence was taken by him.

On the 19th March 1900 the arbitrator filed his award in the Court of the District Judge deciding in favour of the Plaintiff.

Thereupon the Defendant petitioned that Court to set aside the award on the ground that he was under the *bond fide* impression when he arranged to let the matter be decided by arbitration that what was being referred to Mr. Wendt was for Mr. Wendt to suggest terms of settlement, which would be open to the parties to accept or reject.

That petition was dismissed by the District Judge on the 1st May 1900.

The Defendant thereupon appealed to the Supreme Court against such dismissal, and refusal to set aside the award.

While that appeal was pending on the 18th May 1900 the District Judge passed a decree in terms of the award.

The Defendant then put in an appeal against that order of the District Judge.

A Division Bench of the Supreme Court (The Chief Justice and another Judge) on the 4th July 1900 set aside the order of the District Judge of the 1st May 1900, and declaring the award a nullity, they remanded the cause for further proceedings. At the same time they dismissed the Defendant's appeal against the decree of the District Judge of the 18th May, on the ground that sec. 692 of the Civil Procedure Code, 1889, did not allow an appeal from such a decree; nevertheless the Court intimated that in their opinion the decree should not have been entered pending the appeal to them.

Plaintiffs thereupon prayed for leave to appeal to Her late Majesty in Council from such decision of the Supreme Court, and further prayed that upon the granting of such certificate the judgment of the Supreme Court might be brought up on review under sec. 782 of the Civil Procedure Code before the Supreme Court sitting collectively preparatory to that appeal.

On the 19th September 1900 that Divisional Bench after hearing both parties granted the certificate.

On the same day on motion of Defendant's counsel the same Court set aside the decree of the District Judge of 18th May; which as aforesaid had given effect to the award.

The case then came on before the Full Bench of the Supreme Court on 29th March 1901 for argument in review preliminary to the intended appeal to Her Majesty in Council.

And it was decided that the Court had no power to grant leave to appeal where the judgment decree or sentence sought to be appealed from was not a final decree or one having the effect of a final decree or definite sentence, and being of opinion that the certificate issued was *per incuriam* recalled the same declining to hear the review.

Petitioner submitted, *inter alia*, that the term *per incuriam* was wholly inapplicable here for the issue of the certificate was the deliberate act of two Judges after due notice to parties and hearing counsel on both sides and on motion expressly made for it.

That the collective Court had no power to recall the certificate at all events not without formal proceedings *ad hoc*, and therefore had no power to refuse to hear the case in review.

That if Petitioner was not entitled as of right to appeal from the several orders of the Supreme Court, that special leave should be granted because a question of law of great importance to the commercial community was involved in this case regarding reference to arbitration and the rendering nugatory of the submission made.

And Petitioners prayed for special leave to appeal from the orders of the Supreme Court of 4th July 1900, 19th September 1900, and 29th March 1901.

The *Hon'ble J. W. Leonard, K. C.*, (with whom was *Mr. F. H. M. Corbett*) submitted that he was seeking leave to appeal from what was a final judgment, and was proceeding to explain the various orders made subsequent to the award when Lord Davey intimated that their Lordships were agreed that leave to appeal should be given.

*Leave to appeal granted.*

C. W. A.

## CALCUTTA HIGH COURT.

### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 784 of 1899.

RAMPINI, J. } ASHUTOSH NATH ROY, Defendant,  
GUPTA, J. } Appellant,  
1901. }  
6, August. } SHEIKH ABDUL, Plaintiff, Respondent.

*Bengal Tenancy Act (VIII of 1885), Ch. X (former)—Settlement officer, rent recorded by, on application by zemindar for settlement of rents of raiyats—Ex parte order—Order, if binding on tenant who never objected—Res judicata—Limitation Act (XV of 1877), Arts. 14, 120, Sch. II—Suit for alteration of rent recorded—Certificate issued under Act I of 1895, cancellation or modification of, suit for.*

This was an appeal preferred on the 26th April 1899, against the decree of Babu Kartik Chandra Pal, Subordinate Judge, 2nd Court, of Zillah Tipperah, dated the 11th January 1899, affirming the decree of Babu Girish Chandra Sen, Officiating Munsif of Brahmanberia, dated the 28th June 1898.

The facts of the case were as follows:—

There was a settlement of the Plaintiff's rent by a Settlement officer in May 1891. The Defendant applied for a settlement of his tenants' rents including that of the Plaintiff. The Plaintiff was found to be in possession of excess lands and the Settlement officer accordingly increased the Plaintiff's rent from Rs. 7 odd to Rs. 9-12. The Plaintiff raised no objection under sec. 105 of the old Chapter X of the Bengal Tenancy Act. He preferred no appeal to the Special Judge, but remained perfectly quiet. The Defendant's estates being, under the management of the Court of Wards, a certificate of the amount due for the rent of 1303 and 1304, B. S., due from the Plaintiff was issued in 1895-96. The Plaintiff then objected to this certificate but his objection was disallowed on the 25th January 1897. Plaintiff accordingly instituted the present suit on the 7th July 1897 for cancellation or modification of the certificate issued

under Act I of 1895, which he pleaded was issued for an excessive amount and for recovery of a certain sum of money said to have been paid in excess of what was really payable by him.

Both the lower Courts held that the Plaintiff was not bound by the proceedings of the Settlement officer, that the latter had no right to raise the Plaintiff's rent and accordingly modified the certificate and gave the Plaintiff a decree for the recovery of a sum of Rs. 19-12.

The Defendant then preferred this appeal, and on his behalf it was contended (1) that the order of the Settlement officer, dated May 1891, had the effect of *res judicata* and (2) that the Plaintiff's suit for the alteration of his rent was barred by limitation.

On behalf of the Plaintiff it was contended that the order of the Settlement officer of May 1891 was an *ex parte* order, was passed without notice to him; that the order was not executed and that it could not have the effect of *res judicata* and that the suit was not barred by limitation inasmuch as it was a suit for cancellation of the certificate.

THE COURT *held*—That the decision of the Settlement officer in a proceeding in which the Defendant and the present Plaintiff were arrayed against each other, as Plaintiff and Defendant, and in which the officer took evidence and decided the question of Plaintiff's rent along with those of other tenants, had, under sec. 107 of the Bengal Tenancy Act, the force of a decree.

That it was an *ex parte* decree, the present Plaintiff not having appeared in the proceedings, and though it might not make the question of the Plaintiff's rent *res judicata* it was admissible in evidence and was good evidence as to the Plaintiff's rent.

That the period of limitation applicable for a suit for the alteration of Plaintiff's rent after a record of rights was finally published, is either Art. 14, Sch. II of the Limitation Act, which allows one year for the setting aside of the act of a Government officer in his official capacity not expressly provided for, or Art. 120, which prescribes six years as the period of limitation for a suit for which no period of limitation is prescribed elsewhere.

That the present suit having been instituted more than six years after the Plaintiff's rent was settled, the suit was barred by limitation, and that the Plaintiff ought not to be allowed to bring a suit for the alteration of his rent under the specious guise of a suit for the amendment of a certificate.

*Babus Baidya Nath Dutt and Bepin Behary Ghose* for the Appellant.

*Mr. Rasool and Babu Jadu Nath Kanjilal* for the Respondent.

*Appeal allowed.*

H. P. C.

# THE Calcutta Weekly Notes.

Vol. V.]

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[No. 42

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#### REPORTS (See Index.)

IT WILL BE NOTICED THAT THE DECISION OF THE FULL Bench in the case of *Paresh Nath v. Nobogopal*, reported at p. 821 of this issue, considerably enlarges the scope of sec. 310A of the Civil Procedure Code.

THE DECISION OF BANERJEE, J., IN THE CASE OF *Shama Prosad Ghose v. Taki Mallick and ors.*, reported in our last issue (5 C. W. N. 816), where his Lordship held that the appointment of a pleader must be in writing and filed in Court but his acceptance of the *vakalatnama* need not be in writing, is worthy of note. We are sure that this decision will be found of considerable service in the mofussil.

DR. SCHRUSTER'S REMARKS, IN THE PAGES OF THE *Journal of the Society of Comparative Legislation*, with regard to the offence of *lèse majesté* and prosecutions on that account, apply with equal force, to the altered definition of sedition and prosecutions for the same.

The somewhat vague definition of the offence to which I have referred gives rise to another regrettable circumstance. The distinction between acts or utterances justified by law and those which are threatened with punishment is of a very subtle and delicate kind, and the Courts who have to administer the law find it very difficult in many cases to come to a conclusion which does not expose them to violent criticism. If they err on the side of severity, they are accused of currying favour with the authorities, upon whom the

promotion of the judges to higher appointments depends. If, on the other hand, they acquit the accused in a doubtful case, they are said to be moved by the desire of obtaining cheap popularity with the masses. There is no doubt whatever that such accusations are, in nearly every case, idle calumnies; but the very fact of their existence shakes that confidence in the administration of justice on which the welfare of the community so largely depends.

WITH REGARD TO THE IMPOLICY OF PROSECUTIONS for such offences and the futility of punishments on such account, he further adds:—

Whenever acts criminally punishable do not shock the moral sense of the people among whom they are committed, persons suffering in respect of the commission of such acts are looked upon as martyrs, and no disgrace whatever attaches to the punishment which they suffer. The most loyal subjects of the Crown cannot view a person who refuses to rise when the King's health is proposed, or who, in criticising some Royal utterance, uses language more forcible than refined, as belonging to the same class as thieves and cardsharps, and if such a person receives punishment similar to that imposed upon real criminals, his bad manners or coarse utterances are forgotten in view of the exaggerated punishment, and he is apt to receive so much glorification on his departure from prison that the whole incident is subsequently looked upon with pleasure rather than with regret. Many of the deterrent effects of the punishment of *lèse majesté* are thus neutralised.

THE RECEIPTS OF GOVERNMENT IN STAMPS FOR FEES levied on law-suits during the past year, in Bengal alone, amounted to over 1½ crores of rupees.

Court Fee Stamps	1,23,14,310
Stamp for copies	6,91,470
Paper	2,73,275

TOTAL RS. . . . . 1,33,09,055

The net profit of Government from litigation from the Presidency of Bengal alone, amounts, we believe, to more than half a crore of rupees. It is a settled principle that the administration of justice should never be made a source of revenue. For, the heavier the taxation on justice the more inaccessible does it become to the people at large. It is but just that any surplus derived from such sources should be appropriated either in securing greater efficiency in the judicial or ministerial staff or in allowing the latter a more liberal scale of pay and last but not the least in reducing the fees levied on law-suits. We showed some years back, quoting the facts and figures published by the Society of Comparative Legislation, that the scale of fees in continental countries is much less

than they are in India and that India, which is one of the poorest countries in the world, ranks with the richest—the United States and Great Britain—in this respect. We wish the Government would take note of this and revise the scale of fees and bring it within the means of the people of this country.

DR. RATHENAU OPENS HIS ARTICLE ON THE Education of Neglected Children in Germany, in the Journal of the Society of Comparative Legislation, with the following observations.

The opinion is more and more gaining ground that the most effective means of combating crime is not in subjecting children to treatment as criminals. More and more it is recognised that the real question is not how to improve youthful criminals after they have got within the meshes of the law, but to prevent them from becoming criminals. How little can be accomplished by the former method is shown by the increasing juvenile criminality in Germany.

According to the official Criminal Statistics for 1896, in the German Empire in the year 1882, 30,697, and in the year 1896, 43,982, "young persons"—i.e., between twelve and eighteen years—were punished for crimes and offences against the laws of the Empire (all minor offences are excepted). This means an increase of 43·2 per cent., and in relation to population an increase of 22 per cent. Crimes by adults increased during the same period only 34·1 per cent., or 16 per cent. relatively to population. A very considerable part of this increase is in convictions for dangerous injuries to the person (112·5 per cent.), for injuries to property (48 per cent.), and for using compulsion and threats (about 300 per cent.).

The figures are alarming! Happily we are better off. It is significant, however, that Germany is substituting educational in the place of punitive methods. Conviction, or punishment often deprives youths of self-respect and the sympathy of fellow-beings and they practically become social outcasts. In the continental countries experiments have for a long time been made, to treat juvenile offenders as merely truant children of the State. Regarded in that light they are put, until they come of age, under the guardianship-control of approved private families or in educational institutions kept by private individuals for the purpose and the results are said to be highly satisfactory. With such youths the authorities take even the care to obliterate from the records their names so that they may not in any way be prejudiced in their life's career on account of their past acts of indiscretion. Many such youths have been known in after-life to distinguish themselves in public service or in the army or navy, who but for such tender care of the State would have, perhaps, degenerated into hardened criminals. Germany being now convinced of the superiority of the educative method over the punitive, has recently had recourse to legislation for the reformation of youths by an elaborate system of guardianship education under State control. Juvenile offenders are not common in this country and there is no occasion for the State to adopt such measures

here. It would be enough if our magistrates understood the spirit of the recent provisions of law in respect of youthful and first offenders. Whether the magistrates have taken advantage of these provisions will appear from our review of a recent resolution by the Bengal Government in this connection.

#### THE PROVISIONS OF LAW AS TO JUVENIL AND FIRST OFFENDERS AND THE TARDINESS OF OUR MAGISTRATES IN GIVING EFFECT TO THEM.

Seven weeks ago we noticed how with the growth of knowledge about crime and criminals, the idea and character of punishment had undergone change in the course of the last century. In no other direction is this change more marked than in the treatment of youthful and juvenile offender in Europe and America. The wave of this reform reached us from these distant shores only towards the close of the last century. It was to a certain extent at our instance that the retrograde legislation which marked both the Reformatory School Act (VIII of 1897) and the Criminal Procedure Code (V of 1898) was somewhat compensated by the introduction of some belated provisions in respect of youthful and first offenders. The Reformatory Schools Act, which sought in an unprecedented manner to shut out appeals to superior courts against magisterial orders for detention in Reformatory Schools, met with most uncompromising criticism in these columns, and by way of compromising Mr. Chalmers introduced sec. 31 for counteracting this evil by empowering, amongst others, the superior courts to nullify such magisterial orders by discharging youthful offenders after due admonition or by making them over to parents or guardians on executing a bond for their good behaviour for twelve months. Thus came some good out of evil. Similarly when our Penal Code and Code of Criminal Procedure underwent revision curtailing the liberty of speech and freedom of thought and augmenting the powers of the magistrate and the police, there was a general outcry against such retrograde measures and as a sop from the same source came sec. 562 of the Code of Criminal Procedure embodying the principles of the English First Offenders Act.

Such is the history of progressive legislation in British India in recent times. But yet it is so very inconsistent with the spirit of the administrators of criminal law in this country that it has failed to make any impression upon them. They are trained in a school where they are taught that the object of a trial is conviction, and that every conviction should be followed by punishment. To them the provisions of law which offer to an offender, youthful or mature in years and understanding, an opportunity for reformation seem meaningless. We have year after year tried to explain the policy of

the new law and sought to draw the attention of the lower judiciary to it, but it seems to no purpose.

We had also drawn the attention of the Bengal Government in reviewing its Resolution of 1898 to the Reformatory Schools Act (3 C. W. N. xcxlvii) and the Government in its turn called for statistics relating to cases dealt with under the new revision of law, but we regret to notice that though three years have elapsed since then, yet no information is forthcoming. The Government of Bengal does not evidently appreciate the disregard with which its instructions have apparently been treated by its subordinates. In its recent Resolution to the Reformatory Schools dated the 6th of July 1901 we find,

"The Lieutenant-Governor notices with surprise that the recent report is silent as to whether the Commissioners of divisions have submitted reports showing how far the provisions of sec. 31 of Act VIII of 1897 and of sec. 562, Criminal Procedure Code, were utilised by trying magistrates. His information was expressly required in the orders on the reformatory Report for 1898."

The reticence of the Divisional Commissioner may be due to the fact that no figures are forthcoming, but the mofussil magistrates consider it perhaps a necessity of a trial to release an accused for his being a first offender, or to discharge a youth with admonition for any act of indiscretion or to make him over to his parents or relatives for being of good behaviour instead of sending him to prison for subjecting him to lashes in vindication of their authority. It is not merely that many magistrates ignore the sections, but we have come to know in the course of reporting cases, that there are others who are altogether ignorant of their very existence. When many of them do not care to follow the changes in the law, we doubt whether their attention can be directed to the policy and purpose of it by the observations made in a Government Resolution, published in the rarely read pages of the *Gazette*. If, however, the Government issued a circular drawing the attention of the mofussil magistracy to the revision of law, we might expect better results.

It is all the same, a matter for congratulation that the record of crime amongst us continues to be low as compared with other countries and that juvenile criminality still stands at a figure that is almost negligible. In this province of over 70 millions of soul the total number of admission of youthful offenders to Reformatory Schools during the past year was only 128. This unfortunately shows, however, an upward tendency, the admission during the previous year being only 99. But the Lieutenant-Governor suspects that, perhaps, this increase may be due to the fact of the magistrates not having availed themselves of sec. 31 of the Reformatory Schools Act and sec. 562 of the Code of Criminal Procedure.

If, however, we compare these figures with the figures of juvenile criminality in Germany, which we publish in another column, we may justly feel

proud of our boys and girls. Yet how striking is the contrast between the treatment they receive here and in the continental countries. There they do not so much punish as endeavour to reclaim their youths from an evil course. This solicitude for their well-being is said to have produced most excellent results. Our Government is not wanting in this solicitude, but our magistrates will want a great deal of persuasion to recognise the principle that the prevention of crime is by far preferable to the indiscriminate infliction of punishment.

## Reviews.

AN EPITOME OF LEADING CASES IN EQUITY, founded on White and Tudor's selection. By W. H. Hastings Kelke, M. A. Published by Sweet and Maxwell, Ltd., 3, Chancery Lane, Law Publishers, 1901.

Mr. Kelke's little books have proved very useful and we welcome this addition to our Library. The author has succeeded in his aim, namely, that of giving the student an outline of Equity as settled or illustrated by selected leading cases. The arrangement is not alphabetical as in White and Tudor, but the author has grouped the subject under different heads, such as Trusts, Administration, Mortgages, Partnership, Infants, Waste, &c., &c. The leading principles have been clearly enunciated but in some cases the notes may have been made more copious. It is somewhat difficult for a beginner to understand the full effect or value of principles when they take the shape of formulae. The author has throughout tried to compress what he had to say within a small compass. Abbreviations are sometimes useful, but "Ejy" for "Equity" hardly economises any space and in a printed work seems to be somewhat out of place. We should like to see this book in an enlarged form.

\* A PRACTICAL AND CONCISE MANUAL OF THE LAW RELATING TO PRIVATE TRUSTS AND TRUSTEES. By Arthur Underhill, M. A., LL. D. Published by Butterworth & Co., 12, Bell-yard, Temple Bar, W. C., Law Publishers, 1901.

This is the Fifth Edition of Dr. Underhill's work. Mr. Lewin's elaborate treatise on the subject is well-known to the profession, but its bulk is not ordinarily very inviting. A concise treatise on the subject has always been a great want, and the present work in which the principles of the law have been extracted and formulated, has met that want. The author has rightly preferred modern cases to ancient ones, following Sir George Jessel's dictum in *re Hallet*. The present edition contains fewer pages than the last, but as the author explains, the change is due partly to an alteration in the type and size of the page and partly to increased brevity in the statement of the illustrations. Some

idea of the labour of producing such a work can be gathered from the fact that the table of cases cited, extends in small print over forty-four pages. We recommend the work to our readers as a practical treatise and as particularly useful both for study and reference.

INDIAN ARBITRATION ACT (IX of 1899). *By H. N. Morison, Esq., Bar-at-Law. Published by Thacker, Spink & Co., 1901.*

This is a neat little work and nicely got up. Mr. Morison has incorporated in it all the Statute Law in force in British India upon the subject of arbitration, and the rules framed by the High Courts of Calcutta and Bombay. The author has not been able to include the rules of the Madras High Court and the Chief Court of Burmah, as they were under consideration when the work was published. The references given will prove helpful to the profession. There has been some confusion owing to the recent amendments in the law relating to arbitration, as contained in the Civil Procedure Code, but when it is remembered that the present Arbitration Act (IX of 1899) only relates to arbitration by agreement without the intervention of a Court of Justice, much of the confusion should disappear. Mr. Morison's book should also prove useful to mercantile firms, as it is not burdened with technicalities.

A HAND-BOOK OF CIVIL LAW. *By N. K. Ramasami Aiyar, B. A., B. L., Fakil, High Court, Madras. Printed by P. C. Kalliyasundara Nadar and published by G. A. Natesan & Co., Madras. Price Re. 1.*

This is the Second Edition of the work, which is in the form of questions and answers. We find the Law of Property, Contracts, Equity, Torts, Evidence, and Civil Procedure, all treated in the same way as also the subject of Hindu Law. The author has evidently been at great pains in preparing the work, but the form is unsatisfactory, except for students going up for their examinations, who will no doubt find it of assistance.

THE INDIAN REGISTRATION ACT. *By Desai Narotam, Pleader, High Court, Bombay. Printed at the Tatwa-Vivechaka Press. Price Rs. 4. 2nd Edition, 1901.*

In spite of several works on the subject, we welcome this one as a valuable addition to them. The arrangement is very praiseworthy and the appendices will be found useful. The notes have been carefully arranged and cases followed by, distinguished or dissented from, in any subsequent case have been specially referred to. We find the book very convenient for reference, as the head-notes of cases have been given in full and arranged under

separate headings printed in clear, bold, black type. It is handy in every way. We note that the case law has been brought up to the end of December 1900. The get-up and printing are also excellent.

### Madras Notes.

In the case of *Rec. v. Veeraperumal Pillai and another*, tried at the last August Sessions of the High Court at Madras, the learned Chief Justice (Sir Arnold White) passed decision on three points of considerable importance. The *first* related to sec 408 of the Indian Penal Code. The *second* to sec 477 of the same and the *third* to the value legally to be attached to averments in statements made by the accused at the close of the prosecution before the committing Magistrate.

The facts of the case bearing on these points as stated by the prosecution were as follows:—

The complainant (the first witness on behalf of the prosecution) and the first accused were co-executors of an estate. The second accused—a nephew of the first accused—kept the accounts of the estate for a remuneration and under the direction of the first accused. On 16th October last, a sum of Rs. 65 and odd was received by the first accused from one Mr. Martin, a vacating tenant of the estate for the broken period of 19 days of the month. The second accused, in making entries on the 18th idem, entered only Rs. 32 and odd and as rent received for 10 days. On this being discovered by the complainant on 20th idem, the figure 32 and odd and the words "ten days" were erased and the correct figure and words were substituted in the handwriting of second accused. The first accused was a party to it.

On these allegations, the first accused was charged among other things, with the offences under secs 408 and 477A, the prosecution contending (1) that an executor came under sec. 408 as a servant of the estate and (2) that he fell within the term "officer" in sec. 477A, as every executor is an officer of Court to which he has to render accounts.

The learned Chief Justice in disapproval of these contentions held (1) that an executor is not a servant within the meaning of sec. 408 and (2) that, as he cannot be said to be employed by Court to keep accounts and as he had no other "employer" as contemplated by the section, the first accused was not rightly charged under sec. 477A.

The third point arose in consequence of the accused having stated before the committing Magistrate that the wrong figure originally entered was, not Rs. 32 and odd as rent for 10 days, but Rs. 56 and odd as rent for 17 days. This statement as to the entry being for Rs. "56 and odd for 17 days" was repudiated before the Sessions Court as incorrect and it was also found to be manifestly false.

It was contended for the prosecution that the

accused were bound by their original statement and that the question reduced itself to whether the original figure was Rs. 32 and odd or Rs. 56 and odd. It was further contended that, inasmuch as it appeared conclusively that the figures Rs. "56 and odd" were not there, the only conclusion that could be arrived at was that the prosecution had established their case that Rs. "32 and odd" was originally entered.

The learned CHIEF JUSTICE held on this point that, though the averments in the statements of the accused might be taken into consideration, they were not legal evidence. That the proved falsity of Rs. "56 and odd" having been in the accounts, did not take away from the prosecution the onus of proving affirmatively and by reliable evidence that the figure Rs. "32 and odd" was originally entered which is the gist of the offence of falsification of account books.

### English Notes.

HOUSE OF LORDS.—GEORGE WHITECHURCH, LIMITED v. CAVANAGH. Before the LORD CHANCELLOR, LORDS MACNAGHTEN, SHAND, JAMES OF HEREFORD, BRAMPTON and ROBERTSON.

*Estoppel—Company law—Certification and certificate—Representations of secretary and of managing director.*

The Respondent, Cavanagh, sued for damages from the Appellant Company for refusal to place him on its register of shareholders. The question for determination was whether the Company was bound by the representations made by those appeals. The Court of Appeal held that the Company was estopped. The Company appealed.

The alleged estoppels were distinct and were separately dealt with in the judgment of their Lordships. That relating to the secretary Wells arose under the following circumstances: One Raymond had undertaken to transfer to the Respondent certain preference and certain ordinary shares in the Appellant Company. The transfers made by Raymond were certified by Wells in the usual way; they containing under his signature as secretary that the coupons or certificates of the shares purporting to be dealt with were at the Company's office, as a matter of fact no certificate whatever had been lodged at the office to meet the sales nor were any certificates forthcoming to meet the transfers executed by Raymond. Wells was Raymond's servant and was aware that Raymond's dealings were fraudulent. He was in conspiracy with Raymond.

LORD MACNAGHTEN's judgment which was accepted by the Lord Chancellor on such facts proceeds:—

"Is the Company bound by the representation of their secretary. That must depend upon what authority the secretary had or was held out as having. Now the duties of the secretary of a

Company are well understood. They are of a limited and of a somewhat humble character. 'A secretary,' said Lord Esher, is a mere servant. His position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all (*Barret v. South London Tramway Co.*, 18 Q. B. D. 817). In the present case the secretary was not even on the pay of the Company, at least not directly. The Company it seems was provided with an office and a secretary by another Company which appears to have been under Raymond's control. No doubt the practice of certifying transfers is a convenient one. It facilitates dealings in shares in the stock exchange and so facilitates indirectly to increase the value of the shares as a marketable commodity. But in permitting its secretary to certify transfers, it cannot be supposed that a Company authorises the secretary to do more than to give a receipt for certificates which are actually lodged in the office. I cannot think that a Company is estopped by the certification of its secretary if he gives an acknowledgment for certificates which have not been lodged with him". . . . . There is a marked difference between a certificate and a certification, a certificate is under the seal of the Company. By the Company's Act 1862 a certificate is *prima facie* evidence of title. A certification stands on a different footing altogether. Transfers are never certified under the Company's seal there is no obligation on a Company to certify transfers at all, the certification is not passed by the directors or brought before the Board. A certification is only required for temporary purposes to meet the exigencies of business of the stock exchange . . . . . It seems to me that it would be most unreasonable, in any case, whether the transaction takes place on the stock exchange or not, to hold a Company estopped by the certification of its secretary, if the secretary certifies a transfer without having received certificates. The supposed estoppel, therefore, founded on Wells' certification fails altogether, and for the same reason the case founded on alleged misrepresentation by the Company fails also."

As regards the alleged estoppel by the representations of the managing director the facts are complicated but the following portion of the judgment of that noble Lord is sufficient to indicate the salient facts and explains the grounds of his decision "I must confess I am utterly at a loss to see any ground upon which an estoppel can be raised against the Company. To begin with what authority had George Whitechurch, to make any representation in regard to those certified transfers which could bind the company. He was no doubt the managing director. The commercial business of the Company was entrusted to him. But no body can suppose that this was commercial business. I put that aside. Then I have always understood that a

representation to bind anybody as an estoppel, must be a representation of an existing fact, or rather a representation as to some fact alleged to be in existence, and not to promises *de futuro*. What was it that Whitechurch represented as an existing fact? That Wells was the secretary of the Company and that the certification on the certificate was signed by him; well that was perfectly true. That Wells had actually received the necessary certificates? It is absurd to suppose that Whitechurch was asked to guarantee that. He had no reason to doubt Wells' honesty, and naturally took it for granted that Wells would not have given a receipt for that which he had not received. The Master of the Rolls seems to think that the representation attributed to Whitechurch was a representation to the effect that the Company, or the board of directors would act on the certified transfer without requiring more. That is not a representation of an existing fact. If it is anything it is a promise *de futuro* which cannot be an estoppel. The doctrine of estoppel by representation is a very old head of equity. It has been discussed not unfrequently in this house—notably in the case of *Jordan v. Money*, to which Lord Selborne was constantly in the habit of referring. It is founded on a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the case of *Carr v. L. & N. W. Railway Company*. Perhaps some of the difficulty which have gathered round the present case have come from clinging to rules rather than attending to principles."

The other Lords concurred.

*Mr. Lawson Walton, K. C., Mr. Swinfen Eady, K. C., and Mr. Wells* for the Company.

*Mr. Rufus Isaacs, K. C., and Mr. Ryland* for the Respondent.

C. W. A.

*Appeal allowed with costs.*

COURT OF APPEAL.—*STACY v. HILL*. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and ROMER. 1st March 1901.

*Bankruptcy Act, 1883, sec. 55—Lessee becoming bankrupt—Disclaimer—Determination of his interest, sub-sec. 2.*

*In re FINLEY* (21 Q. B. D. at p. 482 quoted) followed.

One Thomas Chapman was the lessee of a house in Sheffield which Plaintiff had let to him for 5 years from X'mas day 1898. The Defendant for such lease to Chapman gave to Plaintiff a guarantee regarding "the payment of so much rent as may be from time to time in arrear for 21 days to a sum not exceeding £140. This guarantee to remain concurrently in force with the lease for a period of 5 years from X'mas 1898."

The rent stipulated in the lease was £280 a year, some months after taking such lease Chapman was adjudicated a bankrupt, and a trustee was thereupon appointed. On February 15th, 1900, the trustee disclaimed the lease. The Plaintiff's agent had received the key of the premises and had advertised it for sale, that was all the evidence there was of Plaintiff resuming possession thereof.

The action was commenced to recover rent for one quarter to Lady day 1900. The question for determination was the effect of the disclaimer. Mr. Justice Phillimore after deciding that Plaintiff had not resumed possession had held that by such disclaimer the lessee was released from liability to pay rent, that as the Defendant's guarantee only extended to the payment of rent in arrear, there was no liability under the guarantee for any rent after the disclaimer.

The Plaintiff having failed presented this appeal.

THE COURT OF APPEAL following the above-mentioned case supported the decision of Mr. Justice Phillimore. The Legislature intended as between the lessor and lessee to draw the line at the date of the disclaimer; and the incidental result of discharging the lessee, was to discharge the surety, leaving the lessor to prove against the bankrupt's estate for any damage which he might have been put to, owing, for instance, to his inability to let the premises on as good a rent as previously.

*Mr. Sylram Mayer* for the Appellant.

*Mr. Montagu Lush* for the Respondent.

C. W. A.

*Appeal dismissed with costs.*

COURT OF APPEAL.—*KLANBER v. WEILL*. Before the MASTER OF THE ROLLS, LORDS JUSTICES COLLINS and ROMER. 12th March 1901.

*Execution of garnishee order—Company in voluntary liquidation.*

The Plaintiff had obtained in January 1899 judgment for £67 against the Defendant Weill. A limited liability company called Tenter and Company owed Weill £400. Previous to Plaintiff securing his judgment against Weill that company had resolved to voluntarily wind up. At the end of January 1899 the Plaintiff attached all debts due from the company to the Defendant Weill, obtaining a garnishee order *nisi*. This order was made subsequently absolute. The liquidator of the company at that time did not raise the objection that a garnishee order could not be made against a company in liquidation; on his objection, which was allowed, it was ruled that "execution was not to issue without further order."

Plaintiff thereafter being advised that the liquidator had a certain sum of money to distribute as dividend to the Defendant Weill applied for leave to issue execution on the garnishee order. Mr. Justice Day granted that application and on this appeal on behalf of the said company it was contended that there



was no power to allow execution of such an order against a company in voluntary liquidation.

THE COURT refused to accede to such contention; it was clear that the company had been properly garnished by the judgment-creditor in this case. When the Plaintiff called upon the company to show cause why they should not pay to him the debt due from them to the Defendant, the liquidator did not raise the objection now raised on behalf of the company. If the liquidator at that time had taken such an objection possibly it might have prevailed, but it was not necessary to decide that point. In what the Plaintiff was doing he was not interfering with the liquidation. Mr. Justice Day was right under the circumstances in taking off the stay of execution and allowing Plaintiff the money in the hands of the liquidator. The liquidator was not the debtor and therefore no order could be made against him, but execution should issue against the company unless the dividend be paid within 14 days by the liquidator to Plaintiff.

*Mr. Dobb* for the Company in support of the appeal.

*Mr. Solomon* for the Plaintiff.

*Appeal failed and was dismissed with costs.*

C. W. A.

COURT OF APPEAL.—WHITBOURNE v. WILLIAMS. Before the MASTER OF THE ROLLS and LORDS JUSTICES VAUGHAN WILLIAMS and STIRLING. 24th July 1901.

*Seduction—Foundation for action—Loss of service—Girl in Defendant's service—Seduced by him in his premises—Regularly visiting her parents and doing some service there.*

THOMPSON v. ROSS (5 H. and N. 16, 29) followed.

The Plaintiff's daughter entered the Defendant's service in June 1900 to assist him at the bar and also do household work. The Defendant was a publican and seduced the girl at his own premises; the girl used to receive weekly wages, and was allowed under agreement with the publican to go out twice in each week. She used to spend such time at her parent's house, and assisted them at home on looking after the children during those visits. She left Defendant's service in September. The father brought this action for damages for the seduction of his daughter.

Mr. Justice Darling and a common jury had held that no loss of service was established and gave judgment for Defendant. This was the Plaintiff's application for a new trial.

THE COURT OF APPEAL held that Mr. Justice Darling was right: *Thompson v. Ross* (5 H. and N. 16, 29) was conclusive of this case. The question really came to this, did a household servant when she went out on leave ceased to be the servant of her master, the answer was she did not; that was really expressly decided in the above case.

*Mr. Stephen Lynch* in support of the application for new trial.

*Mr. Charles Stempson* opposing.

C. W. A. *Application refused with costs.*

CHANCERY DIVISION.—*Re HENRY LOVIBOND AND SONS (1900), LIMITED.* Before MR. JUSTICE JOYCE. 1st March 1901.

*Company law—Removal of name from list of shareholders—Abortive amalgamation.*

The above company was incorporated on July 20th, 1900. It took over the old company Henry Lovibond and Son, Limited, and the Phoenix Companies properties. Mr. Robert Hicks was a mortgagee of several public houses belonging to the said Phoenix Company. These were also taken over by the new company abovenamed. In pursuance of an agreement with this new company, Mr. Hicks applied for 900 fully-paid preference shares and 50 ordinary shares in the new company. These were allotted to him. The allotment contained the statement "payment satisfied by agreement of settlement." The promotion of the new company fell through and the old company was in liquidation. Mr. Hicks now applied that the register of shareholders of the above company be rectified by striking out his name as a shareholder, contending that the real bargain between him and the new company was that on the amalgamation being carried out he would become a shareholder in the new company which was the amalgamated company. The contract for the shares fell through because there was no amalgamation. The Defendants urged that Plaintiff may have a remedy against the company for damages owing to non-fulfilment of their obligation, but he had no right to have his name removed from the list of shareholders.

The learned Judge decided in Plaintiff's favour and directed the removal of his name.

*Mr. Younger, K. C., and Mr. Wright* for the Plaintiff.

*Mr. Stewart Smith* for the Defendant.

*Application granted.*

C. W. A.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### PRIVY COUNCIL.

[APPEAL FROM ALIAHABAD.]

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH

1901.

21st June.

BAHADUR SINGH and others,

Plaintiffs, Appellants,

v.

PERTAB SINGH and NUND LAL,  
Defendants, Respondents.

*Hindu widow's estate—Revision—Alienation—Custom—Weight of evidence.*

This was as an appeal from a decree of the High Court for the North-Western Provinces reversing that of the Sub-Judge of Dehra Dun.

In this case the Plaintiffs, claiming as the next-of-kin of one Mehr Singh, deceased, sued for the

ejection of the Defendants from the Galjwari jungle and claimed that they might be put in possession of the said jungle. The Defendant, Pertab Singh, died after the institution of the suit, and was now represented by his minor son Balbir Singh. Similarly Chetu, one of the original Plaintiffs, died and was represented by Hira Singh and Ranjit Singh, his brothers and heirs, who were already Plaintiffs.

The grounds on which the Plaintiffs based their suit are these. Their kinsman, Mehr Singh, died many years ago, leaving a widow Musammat Pritu, who eventually succeeded to the possession of his estate, whether directly after his death or after some interval, is not quite clear. The jungle of Galjwari now in dispute formed a portion of the estate which came into the widow's possession, and on the 29th November 1862 the widow gave out a cutting lease of the Galjwari jungle and of the Dulas and Gajawala jungles to Nund Lal and Ram Nath; Nund Lal being one of the Defendants in this case, and Ram Nath, a predecessor of the Defendants. The period of this lease expired on the 29th November 1892. The widow, Musammat Pritu, died in May of the same year.

After the expiry of the lease the Plaintiffs interfered with the Defendants' possession of the jungles which resulted in the Defendants' suing the Plaintiffs under sec. 9 of the Specific Relief Act. Defendants won their suit, and obtained a decree for possession of Galjwari, and are now in possession. The plaint denied that Defendants were, as they claimed to be, owners of the Galjwari jungle. The Plaintiffs' case was, therefore, that being the next-of-kin of Mehr Singh, now surviving, and being the reversioners of Mehr Singh's widow, Musammat Pritu, they were entitled to the property in dispute.

In reply the Defendants asserted that Musammat Pritu was the absolute owner of the estate, and did not occupy the position of an ordinary Hindu widow with respect to the estate. Further, they alleged that Mehr Singh was succeeded after his death by Musammat Nundo (his aunt) and Pritu did not succeed to the estate till Nundo's death. It was also pleaded that Musammat Pritu was excluded from family inheritance on account of misconduct, and that the possession she assumed was forcible and adverse to the Plaintiffs and their predecessors. Further, it was pleaded, that apart from the fact of Pritu's exclusion from inheritance, all transfers of property which she made were justifiable in view of the customary law of the Dun, by which Hindu widows used to be able to alienate their husbands' estate absolutely. Again, it was pleaded that after the grant of the lease already referred to, Musammat Pritu disposed of the proprietary rights in the jungles of Galjwari, Gajawala and Dulas to one Major Delane. Delane subsequently conveyed his right, title and interest to the Defendants. They plead that the transfer to Delane was further justified on the ground of necessity, and therefore the

Plaintiffs cannot succeed in upsetting the transfer. If Plaintiffs deny the sale to Delane, still the Defendants have acquired a prescriptive title on the ground of adverse possession for over 12 years. Lastly, they pleaded that as they purchased in good faith and for consideration, the Plaintiffs are not entitled to possession without giving compensation to Defendants for improvements and other expenses incurred by them.

By way of counter-reply Plaintiffs pleaded:—

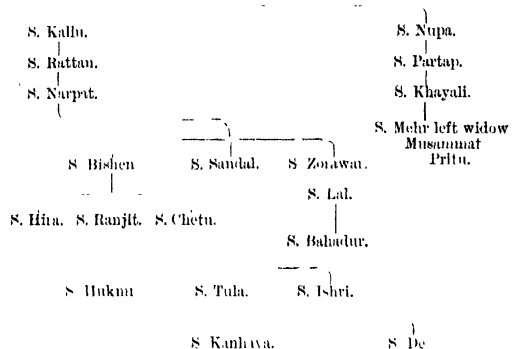
1. That Musammat Pritu made no transfer to Delane to their knowledge;

2. Even if made, it was made without lawful necessity, and is therefore void as against the reversioners.

3. That Plaintiffs were not aware of any transfer made by Delane to the Defendants.

The genealogical table is as follows:—

HUKMAT.



The Sub-Judge decided that there was no reason to doubt that the Plaintiffs' evidence made out their descent satisfactorily and after rejecting the suggestion of Pritu's misconduct and expulsion he said that he was satisfied that Pritu got possession of Mehr Singh's property as his widow; Nundo appeared to have looked after the estate, Pritu being then very young; on the death of Nundo, Pritu assumed the management. He held that Pritu had conveyed the jungles in dispute to Major Delane who had conveyed them to the Defendants. He decided that her alienation was not justified by any proved custom or for any legal necessity. And, lastly, he found that Defendants could claim no higher title than Delane's and that they had no equity to demand any compensation.

The High Court on Defendants' appeal dealt only with Plaintiffs' title which they considered was not made out.

Mr. Mayne for Appellant contended that the judgment of the High Court was against the weight of the evidence. The Appellants' title had been made out and the judgment of the first Court upon all points was correct.

Respondents were not represented.

C. W. A.

Judgment reserved.

# THE Calcutta Weekly Notes.

Vol. V.]

MONDAY, SEPTEMBER 16, 1901.

[No. 43]

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### REPORTS (See Index.)

AT ONE TIME WE WERE APPREHENSIVE THAT DEMOCRATIC laws and institutions might in course of time seriously interfere with individual liberty of action. Hence, we welcome the recent assurance given by their Lordships in the House of Lords (*Taff Vale* case 5 C. W. N., ante p. 291 and in *Quinn v. Leatham*, post p. 323) that law would not look upon coercion, annoyance, damages and wrong by a body of men, combined though they be for lawful purpose, with any more lenient eye than it does on similar acts of oppression by individuals. Tyranny by a community of men is not less galling and odious than is tyranny by an individual. We only echo the sentiments of the Lord Chancellor when we say that if any system of laws tolerated tyranny of either kind, it must be declared unfit for any civilized community. Lord Lindley's judgment has a ring of philosophy in it which we admire no less than his exposition of the law. We wish that the judgments in our Courts in India had more of such broad principles in them and less of hair-splitting.

WE NOTE THAT THE JUDGMENT OF MR. GEIDT IN *Express v. Sadak Ali* has been upheld by the High Court. This shows that Mr. Penell's judgment was substantially correct. With the irrelevant matters in the latter's judgment, whether they be the result of ill-health or of ill-treatment, we have but little concern. All the same it is a matter of great regret that the High Court did not evidently regard such matters with the same unconcern and all its errors of judgment in this connection can only be explained on that supposition alone. We pointed out at the time that the order for retrial by Ameer Ali and Pratt, JJ., was not warranted by law and our view, besides receiving general acceptance, may finally be said to have received support from the

result of the appeal of N. A. Subramanya Iyer to the Judicial Committee. The order for the retrial of Sadak Ali was fundamentally bad and what was still more unfortunate was, that the High Court should have thought it fit to give directions to the Court below as to the probable findings of fact. Now that the case has been finally determined, we do not feel any hesitation in saying that Mr. Geidt acted in an eminently judicial spirit in taking no notice of the unwarranted suggestions of the High Court and in directing the assessors to ignore them and to proceed with the trial with a fresh mind. That the views of two successive judges of the Court below, aided by two different sets of assessors, have finally been confirmed by the High Court, in supersession of its own, reflects credit on both. Mr. Geidt's view deserves special mention from another point of view. It is a time-honoured principle of the English criminal law that a man must not be put to the penalty of his life or limb more than once on one and the same charge. This is why English judges do not as a rule remand criminal cases. Mr. Geidt in loyalty to the Superior Court, no doubt, held a new trial but with the true instincts of an English judge refrained from making the prisoner pay the penalty with his life.

THE CASE OF *Gya Singh v. Mohamed Solomon*, reported in this issue at page 864, is suggestive of the evils of the present system under which our Magistrates play the part of a police officer at one time, and that of a judicial officer at another. So much has been said against the system and so little in its favour that it seems to be almost a superfluity to add to the literature on the subject. But when an authority like Mr. Pitt-Taylor in his well known treatise on the Law of Evidence embodies a warning why a policeman or an investigating officer's view should not be readily accepted and in doing so, the reasons he advances tell even more effectively against the system under which investigating officers are allowed in India to sit in judgment at criminal trials, we feel bound to point out that its very policy, in the opinion of experts, is opposed to the fundamental principles of the law of evidence. Speaking of circumstantial evidence and presumption of guilt the learned author enters into the following analysis as to how and why an investigating officer is apt to misjudge even innocent

words and actions of the accused (Taylor on Evidence, 9th Ed., Vol. I, pp. 67-68).

"Something, occurs to raise a suspicion against a particular party. Constables and police-officers are immediately on the alert, and with professional zeal ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine if possible to bag their game. Though both sportsman and policeman would be horrified at anything unfair or 'unsportsmanlike,' yet, as both start with this object in view, it is easy to unintentionally misrepresent innocent actions, to misunderstand innocent words, for men readily believe what they anxiously desire, and to be ever ready to construe the most harmless facts as confirmations of preconceived opinions."

The system at present in vogue in India has no support either in reason or in authority, and it is a matter of wonder to us why a Viceroy of such keen common sense should feel any hesitation about doing away with it. It is but natural that men who have been trained under the system should be opposed to any changes but that the Viceroy should allow such biased opinion to outweigh the clear dictates of reason is more than we can believe. If His Excellency should bring about the separation of the executive and judicial functions in our magistrates he will be remembered in India for this act alone. But should he leave India without giving effect to his original intentions it may be said that it was, perhaps, through the irritation caused by the unfortunate conduct of a particular officer that a great principle was sacrificed.

IN CONNECTION WITH THE QUESTION OF RESTRICTING appeals merely by money-value, we pointed out some time ago that it was a very unreliable standard for estimating the importance of appeals. We find the *English Law Journal* answering the letter of the last Surviving Member of the Judicature Commission to the *Times* on somewhat similar lines.

A plea for the restriction of the right of appeal is urged by 'The Surviving Member of the Judicature Commission,' in a lengthy letter which appeared in the *Times* a few days ago. 'It seems clear,' he writes, 'that there should not be the same unrestricted right of appeal to the highest tribunal in an action to recover 100l. as in an action to recover 100,000l.' We confess that the desirability of such a money limit in appeals to the House of Lords seems to us anything but clear. It is true that 'wealthy or unscrupulous' parties to small actions have sometimes abused the right of appeal to the highest Court in the land, but it is evident that an even larger measure of injustice might result from restricting the right to cases in which large sums are at stake. An action to recover 100l. may be a test one, and may affect far larger interests than an action to recover 100,000l. An appellate jurisdiction, based upon the theory that the pecuniary amount involved in an action is invariably the correct measure of its importance, would be both illogical and unjust.

#### PRESUMPTION AS TO PERMANENT TENANCY IN RESPECT OF HOMESTEAD LAND.

We report in our present issue two important judgments (5 C. W. N. at pages 846 and 858) deli-

vered by two Division Benches of the Calcutta High Court where the learned Judges have exhaustively gone into the question as to what circumstances would give rise to presumptions as to permanent tenancy in respect of homestead land and what not. In a large number of the earlier reported cases on the subject, it has been laid down that mere long possession or the mere construction of buildings on the land will not justify any presumption as regards the permanent nature of the tenant's leases. In other cases it has been presumed that interests of a tenant must be of a permanent nature where the circumstances pointed to the fact that the original grant must have been some kind of a building-grant or where the tenant had spent large sums of money in the erection of buildings of a substantial nature to the knowledge of and without objection on the part of the landlord. (See the cases collected in *Nabu v. Shabu*, I. L. R. 25 Cal. 896). In view of these somewhat conflicting views and the marked tendency of the later decisions favouring the view that when the origin of a tenancy and the circumstances attending the creation of a tenancy are known, evidence as to the mode of dealing with the land demised and of the acts and conduct of the parties is not sufficient to prove the nature of the tenancy (see *Ismail Khan Mahomed v. Joygoon Bibee*, 4 C. W. N. 210; s. c. 27 Cal. 570; *Caspersz v. Kedar Nath Sarbadhikari*, 5 C. W. N. 858; *Ismail Khan Mahomed v. L. P. D. Broughton*, 5 C. W. N. 846) it is as well that we should set out the limitations subject to which this proposition is to be accepted. Following the maxim *optimus interpres rerum usus*, the nature of the enjoyment of any immovable property may be shown by evidence where the root of the title or the origin of the grant is not clearly known, (see *Nidhee Kristo Boac v. Nistarinee Donsee*, 21 W. R. 386), but no parol evidence of custom and usage is admissible to nullify the express provisions of a written contract. But still the plea of acquiescence and estoppel has not unoften to be considered in this connection. The most recent exposition of the law on this subject is contained in a decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Beni Ram v. Kundan Lal* (2 C. W. N. 502; s. c. I. L. R. 21 All. 496; L. R. 26 Ind. App. 58). The word 'acquiescence,' as pointed out by Lord Cottenham in *Duke of Leeds v. Earl Amherst*, 2 Phillips 117, if used at all, must have attached to it a definite signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. In other words, if a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe

that he assents to its being committed, he cannot be afterwards heard to complain of the act. But when once the act is completed without the knowledge or assent on the part of the person whose right is infringed, very different legal considerations arise. (See the judgment of Thesiger, L. J., in *De Bussche v. Alt*, L. R. 8 Ch. D. 286; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Plimmer v. Mayor of Wellington*, L. R. 9 App. Cas. 699; *La Banque, &c. v. La Banque*, L. R. 13 App. Cas. 111; *Wilmott v. Barber*, L. R. 15 Ch. D. 96; *Kunhammed v. Narayan*, L. R. 12 Mad. 320; *Nawin Lal v. Rameshar*, L. R. 16 All. 328; *Jugmohan v. Pallonjee*, L. R. 23 Bom. 1, and *Ismail Khan v. Jaygoon*, 4 C. W. N. 210; s. c. 27 Cal. 570). To the authorities in the English and Indian Courts cited above, may perhaps be added the pronouncement of an eminent American Judge. In *Wendell v. Van Rensselaer*, 1 Johnson Chancery (N. Y.), Chancellor Kent says: "There is no principle better established in this Court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel." (See also 2 Pomeroy on Equity Jurisprudence, § 807). Lastly, it should be noted that acquiescence is not a question of fact but of legal inference from facts already found; and upon it the judgments of the Appellate Courts are not final. (See *Beni Ram v. Kundan Lal*, L. R. 21 All. 496 at p. 504; *Caspers v. Kedar Nath Sarbhadhikari*, 5 C. W. N. 858).

### English Notes.

HOUSE OF LORDS.—*QUINN v. LEATHAM*. Before the LORD CHANCELLOR, LORDS MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON and LINDLEY. 5th August 1901.

*Trades Unions—Combination to injure pursuit of lawful calling—Conspiracy—Exercise of one's right—Infringement of another's right or liberty—Actionable wrong.*

*ALLEN v. FLOOD distinguished. THE MOGUL STEAMSHIP case considered.*

This was another dispute relating to Trades Unions and followed closely after the decision in the *Taff Vale Railway* case reported in 5 C. W. N. pp. lviii and cxcxi. The law of conspiracy is considered in the judgments delivered. Lord Macnaghten's decision is principally based on it. Their Lordships distinguish this case from that of *Allen v. Flood* relied upon for the Appellants and reported in 1898,

A. C., p. 1. The *Mogul Steamship* case is considered and commented on (1892, A. C., p. 25).

The facts on which the decisions are based were as follows:—

The Plaintiff Leatham was a butcher at Lisburn near Belfast and had there for over 20 years carried on his trade. In his service were several hands at weekly wages. The Appellant Quinn is the treasurer and the other Defendants other officers of an Association established in 1893 under the Trades Union Acts 1871 and 1876, and known as the Belfast Journeyman, Butchers and Assistants Association. That society had formulated a regulation, not registered, whereby they purported to prohibit their members working with non-union men. The Plaintiff Leatham's men were of that class, non-union men, and did not consequently belong to the organization of which the Defendants were parties and officers. One of Leatham's customers was a butcher at Belfast named Robert Munce. Leatham had in his employ among others a married man with a large family who had served him faithfully for over 10 years, Leatham being desirous of keeping his servants in his employ tried unsuccessfully to conciliate the Defendants' demands. His efforts were rejected. The Defendants would not be satisfied with any terms less than the dismissal by Leatham of all his men and the replacing them by Union men. Leatham refused to comply with their request which would throw his servants on the streets. The Defendants then brought pressure to bear on Robert Munce and succeeded in alienating his custom from Leatham and the last named was placed in the "black list" of the Association and every effort was made to bring on the ruin and downfall of Leatham.

For such conspiracy Leatham commenced the present action and he obtained a verdict in the Irish Courts for damages from a jury. That verdict was upheld by the Irish Court of Appeal. Quinn alone of the Defendants now brought the matter to the House of Lords.

Their Lordships were unanimous in dismissing the appeal. The Lord Chancellor in delivering judgment said that if upon the facts of this case the Plaintiff had no remedy it could hardly be said that our jurisprudence was that of a civilized community. His Lordship accepted the judgment pronounced by Lords Brampton and Lindley.

The judgment of the last-named Lord, *inter alia*, stated as follows:—"In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Company* (1892, A. C., p. 45) that no action for conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen v. Flood* emphasizes the same doctrine. The principle was strikingly illustrated in the Scottish Co-operative Society (35

Scottish Law Reporter). In this case some butchers induced some salesmen not to sell meat to the Plaintiff. The means employed were to threaten the salesmen that if they continued to sell meat to the Plaintiff they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned Judge held that the Plaintiffs showed no cause of action, although the butchers' object was to prevent the Plaintiffs from buying from Co-operative Societies in competition with themselves, and the Defendants were acting in concert. The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the Plaintiffs, no one's right was infringed; no wrongful act was committed; whilst in the present case the coercion of the Plaintiffs' customers and servants and of the Plaintiff through them, was an infringement of their liberty as well as of his and was wrongful both to them and also to him. Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as it is now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks not only between individuals but between associations, and between them and individuals, is permissible provided no body's rights are infringed. The law is the same for all persons whatever their callings: it applies to masters as well as to men; the proviso however is all important, and it also applies to both, and limits the rights of those who combine to look out as well as the rights of those who strike. But coercion by threats open or disguised not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the persons coerced and in considering whether coercion has been applied or not numbers cannot be disregarded."

The learned Lord therefore held that the objection of the Appellant that the learned Judge in summing up to the jury did not distinguish between coercion to break contracts of service and break contracts of other kinds and coercion not to enter into contracts was untenable. The learned Lord next passed on to consider the 38 and 39 Victoria, c. 86, and arrived at the conclusion that a combination to annoy a person's customers so as to compel them to leave him unless he obeys the combination although not forbidden by sec. 7 is not permitted by sec. 3 (see *Lyons v. Wilkins*, 1896, 1 Ch. 811). The judgment concludes by stating that *Allen v. Flood* though a valuable decision should not be extended so as to destroy that individual liberty which our laws anxiously guard, it should not be held that boycotting by Trades Unions in one and its most objectionable forms is lawful and gives no cause of action to its victims; so to hold would be contrary to all principles of

English law and would be to do what is not yet authorized by any statute or legal decision.

Mr. Martin McGrath (Irish Bar), Mr. Vesey Knox and Mr. Fitzgerald-Murphy for the Appellant. Mr. Haldane, K. C., and Mr. F. Wall for the Respondents.

*Appeal dismissed with costs.*

C. W. A.

ADMIRALTY COURT.—THE OYSTER FISHERY COMPANY v. THE OWNERS OF THE BRIGANTINE SWIFT. Before the PRESIDENT. 29th March 1901.

*Admiralty Jurisdiction Act, 1861—Fisheries Act, 1868—Property in Oyster beds—Fera natura—Jurisdiction—Negligence in navigation.*

The Brigantine Swift belonging to Defendants grounded on Plaintiffs' Oyster beds on September 30th, 1900. She was a Swedish vessel bound from one of her own ports to Faversham. By grounding on Plaintiffs' Oyster beds she did considerable damage to the Oysters. This was an action to recover damages for such loss. Evidence was given for Plaintiffs to show that their beds were marked out and distinguishable, and the Swift as she approached was cautioned and her attention was drawn to the injury she would cause by if she did not keep aloof. The Defendants denied those allegations and contended that she touched the ground in the ordinary course of navigation. They also took exception to the jurisdiction of the Court.

The learned PRESIDENT referred to the *Mayor of Colchester v. Brooke* (decided in 1845, 7 A. and E. N. S. 339) and said that that even before the Fisheries Act of 1868 such an action would hold good. There was no doubt the Court had jurisdiction to entertain this action. Oysters which were being reared were the subject of possession and he thought not *fera natura*. Any doubt that there may have been on the matter has been removed by the said Fisheries Act. The damage complained of in this case came within the scope of the Admiralty Court Act, 1861, which permitted actions for such damage to be brought in *rem*. Plaintiffs' right to these beds was subject to the right of the public to pass over it in ships in the ordinary course of navigation, but it was on this that Defendants failed, for the grounding of their vessel did not take place in the ordinary course of navigation; the Trinity Masters had found that carelessness and negligence, had been proved in the navigation of the Swift, and not only should the navigators have known that this was a place where Oysters were likely to be, but they were warned off it but disregarded such intimation. To assess the damages the matter would be sent to the Registrar who was to be assisted by merchants.

Mr. Aspinall, K. C., and Mr. Nelson for the Plaintiffs.

Mr. Lang, K. C., and Mr. Stokes for the Defendants.  
C. W. A. *Judgment for Plaintiffs.*

# THE Calcutta Weekly Notes.

[Vol.-V.]

MONDAY, SEPTEMBER 23, 1901.

[No. 44]

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### REPORTS (See Index.)

TWO MOOT POINTS OF CRIMINAL PROCEDURE HAVE been settled by the Judicial Committee in the case of *Subramania Iyer* reported by us in this issue at p. 866. One is, to what extent, errors, omissions and irregularities in a trial are contemplated to be cured under sec. 537 of the Code of Criminal Procedure. We may incidentally mention here that a too frequent resort to this section for remedying all manners of irregularities once elicited a very witty remark from a junior pleader. In a certain case, the pleader was pointing out that the proceedings in the lower Court were not according to law, whereupon the Appellate Court enquired if that was not cured by sec. 537 of the Code. The pleader nodded assent and very deferentially observed "Yes, my Lord, that is a sort of Holway's pill that is supposed to cure all judicial distempers but we at the Bar put little faith in it." It is very gratifying, therefore, to observe that the Lord Chancellor has directed that such quack remedy is no longer to be availed of as an antidote for illegalities.

LEAVING ALONE THE LIGHTER SIDE OF THE FIRST question, viz., the curative power of sec. 537 and turning to its serious side we may mention that although *Abdur Rahman v. Empress* (4 C. W. N. 537; S. C. I. L. R. 27 Cal. 849) has been overruled by the Judicial Committee yet it is only by reference to the judgment and argument in that case that the full significance of the Lord Chancellor's judgment can be appreciated. The Lord Chancellor says that the disobedience of the express provisions of a statute as to the mode of trial cannot be regarded as a mere irregularity. Then his Lordship explains how misjoinder of charges may be fatal to the fair trial of the accused and naturally holds that the disregard of the procedure in this respect cannot

be contemplated to be covered by sec. 537. The judges who, in the case of *Abdur Rahman*, maintained that the section does so, relied on the illustration added to it in the Code of 1898. The illustration says that if a Magistrate is required by law to sign and he signs only by his initials, that will be a pure irregularity and will not affect the validity of the proceedings. The Lord Chancellor also relies on the illustration as showing what is meant by an irregularity. We must say that the illustration makes it clear that it is only errors and omissions in formal matters that are contemplated to be cured by sec. 537 and not any default in the essentials of a fair trial.

THIS IS THE VIEW THAT WAS ADOPTED IN THE CALCUTTA High Court by Petheram, C. J., and Boverley, J., in two cases and by Petheram, C. J., and Ghose, J., in another (see in the matter of *Luchmi Narain*, I. L. R. 14 Cal. 128, *Queen-Empress v. Nabadip*, I. L. R. 14 Cal. 395, *Raj Chandra v. Gour*, I. L. R. 22 Cal. 176). The Code of Criminal Procedure has been revised since and sec. 537 itself amended and we did not understand at the time that the Legislature had any intention of getting rid of these decisions. On the contrary, we understood Sir Henry Prinsep, who was in charge of the Code of 1898, to assure the Legislature that it would not be desirable to relax sec. 537 as that would be a direct encouragement to the subordinate judiciary to indulge in irregularities. So we do not quite appreciate the position of Sir Henry Prinsep as a member of the Full Bench going against his own views and declaring that he was only reverting to the practice previous to the cases in 14 Calcutta. We can, however, understand Ghose, J., being an assenting party to his being overruled by the Full Bench, having regard to the good old Bengali saying that "in company of ten, even the wisest heads are apt to turn." It is a matter of regret that references to the Full Bench and decisions thereupon are now-a-days not very encouraging. Some recent references have the appearance of being determined by votes rather than on legal considerations. As regards this particular one we were apprehensive that such lax interpretation of sec. 537 was likely to have a most demoralizing effect both on the subordinate and the superior Courts. To the former it was a direct encouragement to disregard

the requirements of the law and to the latter to save itself a great deal of trouble by a sweeping application of this one section. We must, therefore, congratulate ourselves on the salutary effect that the decision of the Judicial Committee is likely to have on our judiciary.

THE SECOND AND BY NO MEANS LESS IMPORTANT question that the Judicial Committee has settled is whether an Appellate Court can assume the functions of the jury. If a trial by a jury is vitiated by misdirection or illegalities, can the Appellate Court cancel the misdirection or sift the illegalities from the record and by reference to the rest maintain, alter or modify the verdict of the jury? The present Lord Chancellor, who is a great advocate of the jury system of trial, says that a Court cannot. This must not be regarded as a mere matter of sentiment but we shall presently see that it is perfectly sound as a proposition of law.

A DIFFERENCE OF OPINION HAS EXISTED IN THE CALCUTTA High Court in this respect since sometime past as we pointed out in these columns in Vol. IV, No 34, pp. 197-198. The conflict there noticed is that between the views of Banerjee and Beverley, JJ., in *Wafadar Khan v. Empress* (1. L. R. 21 Cal. 955) and those of Ameer Ali and Hill, JJ., in *Taju Pramanik v. Empress* (2 C. W. N. 369) and the doubts expressed by Maclean, C. J., and Macpherson, J., in *Sadhu Sheik v. Empress* (4 C. W. N. 576). In the case last-named, Maclean, C. J., questioned the powers of an Appellate Court to determine the case on facts after declaring the trial bad on the ground of misdirection. There too, sec. 537 was sought to be brought into requisition by the counsel for the Crown but his Lordship was not in favour of further extending it. It is also gratifying to notice that the views of the Chief Justice as expressed there, are in perfect unison with that of the Lord Chancellor on this very point. It will be noticed from our article referred to above that while we had little doubts as to the powers of the Appellate Court to finally dispose of a case on the ground of misdirection, we entertained serious doubts as to the powers of an Appellate Court to determine the case on the facts after declaring that there has been a misdirection. A Court of Appeal is certainly entitled to finally dispose of a case by the setting aside of the conviction on the ground of misdirection or illegality, as the Judicial Committee has done in the present case. But that an Appellate Court is competent to modify or alter or maintain the verdict by reference only to such facts as might have been properly put to the jury, is what the Judicial Committee deny! To gather the full import of the Lord Chancellor's judgment it is necessary to refer to the facts of the case and the argument at the Bar, both of which are fully set out in our report.

LONG BEFORE THIS MATTER WAS ARGUED AT THE PRIVY Council Bar we ventured to point out that it would never be proper on the part of a judge to remand a case for retrial by the jury after altering the verdict or, in other words, suggesting findings on facts. For that is none the less a misdirection because it is by a superior Court. The impropriety and inexpediency of such a course have since been laid bare in the case of *Sadak Ali*. That the case was remanded with altered findings for retrial with the aid of assessors makes no difference. The principle is the same. The Lord Chancellor says sufficiently clearly that it is no province of the Appellate Court to take the place of the jury or even to appropriate the findings of a vitiated trial to fit in with the original verdict. But still the Lord Chancellor does not discuss the question with special reference to the Code of Criminal Procedure. But this Sir Francis Maclean has done in the case of *Sadhu Sheik v. Empress* (4 C. W. N. 567). There the Chief Justice has taken a different view of sec. 423 from that taken by Ameer Ali, J., in *Taju Pramanik* (2 C. W. N. 369). Reference to cl. (d) of that section will shew that it only empowers an Appellate Court to alter or reverse the verdict of the jury on only two grounds, namely, misdirection by the judge or misapprehension of the law by the jury. The wording of the clause does not seem to warrant the view of Ameer Ali, J., that once the case is before the Appellate Court, the Court is competent to determine the case on the facts on record. Anyhow the opinion of the Judicial Committee ought to be final.

#### LAW AND LOGIC.

The concluding portion of the Lord Chancellor's judgment in *A. A. Subramania Iyer*, pointing out the illogicality of Sir Francis Maclean's judgment is hardly to be taken seriously and is meant as chaff. That this is so is evident from the Lord Chancellor having borrowed freely the very phrases and expressions in the judgment of *Abdur Rahman v. Empress* to controvert the proposition of law laid down there. That the Lord Chancellor was not serious about the logical discourse with which he concludes his judgment is apparent from his observations in a yet more recent and by no means a less important case. In *Quinn v. Leatham*, noticed by us lately, the Lord Chancellor evidently referring to *Allen v. Flood* observed "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must know that the law is not always logical at all."

The observation if seriously taken does not seem to show that the Lord Chancellor has any great regard for the science of reasoning, a supposed



departure from which he took occasion so recently to ridicule. But taking the Lord Chancellor at his word, with all due deference, we must say that we cannot accept his proposition. Even if law be not always logical, its interpretation at any rate ought to be so.

Then as regards the authority of cases, no doubt, where a case is on all fours with another it is of the greatest assistance in coming to a decision. But to say that if the circumstances in another case are somewhat different no logical conclusions can be drawn from any authoritative decision for its determination is more than we can concede even to the Lord Chancellor.

The reason for treating previous decisions of a superior or of co-ordinate Courts as authorities is obvious. It ensures uniformity in the administration of the law. It would create terrible confusion if the same law was interpreted or administered by different judges in a different manner. While every judge should endeavour to secure uniformity in the administration of the law still it is at the same time very desirable that judges should not blindly follow authorities but that they should only do so logically. If an authority is exactly in point and is founded on reason all Courts ought to conform to it. If it is not, it is the province of a superior Court or that of the Legislature to get rid of it. But a Subordinate Court can only follow or distinguish a case and in so doing has often to determine why and to what extent the conclusion in an analogous case might be different. This can only be done by a strictly logical process. So we must take it that the Lord Chancellor was not quite serious in his observations regarding the relationship between law and logic, which being strained in the case before the Privy Council he took the opportunity to ridicule but which being insisted on at the Bar of the House of Lords he met also with the same weapon. Such *obiter dicta* do not certainly affect the merits of the respective decisions, but still they might as well have been avoided without any detriment to either.

## Review.

CASE-NOTED CRIMINAL PROCEDURE CODE. By D. Swinhoe. Published by Thacker, Spink & Co., Calcutta. Price Rs. 10.

This is a handy little book, very well got up and the matter also very well arranged on a system which will surely be acceptable to the profession. The peculiarity of the system is that all the relevant cases have been carefully noted up in chronological order below each section and cross references also given. The size, get-up and notes make the work eminently useful to the practitioner. In these days when annotators give us books about ten times the size of the original Act, containing a mass of matter

which one must wade through before finding anything bearing on the point one has in view, it is a real relief to find a book which within moderate compass serves the purpose of a comprehensive digest of the whole of the case law on the subject.

HIGH COURT DECISIONS OF INDIAN RAILWAY CASES. By M. Ternunkata Chariar. Printed at the St. Joseph's College Press, Trichinopoly.

This is a collection of important decisions of the High Courts of India bearing upon the law relating to Railway as carriers, and contains an appendix containing all the Railway Acts, the Carriers Act and Act XIII of 1855. It is a valuable reprint of the cases and has been neatly got up and we have no doubt that it will be found useful and handy by the profession. The want of such a book has long been felt, and we are glad to find that the author has done his best to meet it.

## Notes of Cases.

(The important ones to be fully reported hereafter.)

### CALCUTTA HIGH COURT.

#### [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE  
No. 2160 of 1899.

MACLEAN, C. J.	}	SHEIKH NAIMUDDIN, Plaintiff,
BANERJEE, J.		Appellant,
1901.		"
23, August.	}	SRIMANTA GHOSH and others,
		Defendants, Respondents.

*Rent, decree for*—Sale in execution of decree obtained not by the entire body of landlords—*Rent due for four years, for two years of which all the Plaintiffs and for other two some of the Plaintiffs were entitled*—Sale, effect of—Right, title and interest of judgment-debtor or tenant, passing of—Splitting up of decree—Bengal Tenancy Act (VIII of 1885), secs. 65, 188.

This was an appeal preferred on the 20th November 1899, against the decree of Babu Karuna Das Bose, Subordinate Judge, 1st Court of Zillah 24-Pergunnahs, dated the 29th May 1899, modifying the decree of Babu Probha Chandra Singha, Munsif, 1st Court of Basirhat, dated the 25th February 1898.

This appeal arose out of a suit brought by the Plaintiff for a declaration of his title to and for possession of some property described in the plaint by ousting the Defendants Nos. 1 to 9.

The facts of the case material to this report were as follows:—

The admitted landlords obtained a decree in a suit for rent in 1890-1891 against Defendant No. 3, who admittedly held a *ganti jama* under them. In execution of this decree this *ganti* was sold and

purchased by the Plaintiff. The Plaintiff said that he granted a *dur-ganti* to Defendant No. 3, but Defendant No. 3 again defaulted in paying rent and Plaintiff sold off this *dur-ganti* and purchased it himself, but he was mainly resisted by Defendants Nos. 1 and 2; and he sued for recovery of possession of the *ganti* and *dur-ganti* by evicting the said Defendants, as also Defendants Nos. 4 to 9 who were sub-tenants on the land.

The Defendants Nos. 1 and 2 pleaded that the Defendant No. 3 had granted a *dur-ganti* to themselves and had also sold off a half share of the *ganti*; and hence the Defendants Nos. 1 and 2 were entitled to be in possession as *dur-gantidars* and as *part-gantidars*; they also contended that the original rent-decree in execution of which the Plaintiff had purchased was not obtained by the 16-anna landlords and hence the Plaintiff did not purchase the whole tenure free of encumbrances but only the right, title and interest of the judgment debtor; and therefore the purchase of the half share of the *ganti* by the Defendants Nos. 1 and 2 was to prevail. These Defendants also contended that the Plaintiff's purchase was not *bona fide*.

The defence of the other Defendants are not material to this report, inasmuch as the suit against them was not pressed in the lower Appellate Court.

The first Court decided against the Plaintiff on the question of *khas* possession but gave him a decree in part declaring his right and title to only eight annas of the *ganti* and giving him possession as landlord entitled to receive rent from their immediate subordinate tenants.

The Plaintiff preferred an appeal against that decree, and the Subordinate Judge on appeal held on the question whether the rent-decree was obtained by the 16-anna landlords as follows:—

"The very persons, who obtained this rent-decree, were at one time entitled to the 16-anna rent, and the first portion of the rent-suit is for the 16-anna rent, but the second portion is for rent of a period at which the landlords had ceased to be 16-anna proprietors; that is at the date when the rent-suit was filed, the landlords were merely fractional co-sharers, and hence they had no right to sell the entire tenure: Plaintiff therefore acquired his rights, as on a sale under the Code of Civil Procedure, and if the Defendants Nos. 1 and 2 had in good faith purchased a half share of the *ganti*, the Plaintiff was not entitled to it: on this point I agree with the first Court that the Defendants Nos. 1 and 2 had purchased to repay another decretal debt of the Defendant No. 3; it was pointed out by the Plaintiff, that the price, which the Defendants Nos. 1 and 2 are said to have paid for the half share, are disproportionately high, if the profits secured to them are considered, but it may be that there were other facts which have not been brought to light in this case; the matter is apparently suspicious, but when the Defendants Nos. 1 and 2 had paid off the debts of Defendant No. 3,

I cannot say that the purchase was colorable; and hence the Defendants Nos. 1 and 2 will be maintained in possession of a half share of the *ganti jamai*."

On the question as to the *dur-ganti* the Subordinate Judge held that the *dur-ganti* rent-decree was a colorable transaction and that there existed no real *dur-ganti* of the Defendants Nos. 1 and 2, and he therefore gave a decree affirming the first Court's decree except that it was further declared that the Defendants Nos. 1 and 2 had no *dur-ganti* right whatsoever and were not entitled to hold any lands as *dur-gantidars* and the Defendants Nos. 1 and 2 should be evicted from their alleged *dur-ganti* right, and that the Plaintiff therefore should get rent of an undivided half share of the *ganti* from Defendants Nos. 4 to 9 or from other under-tenants.

Thereupon the Plaintiff preferred this present appeal, and the only question that arose in this appeal was "whether the sale of a tenure in execution of a decree for rent obtained by certain persons who did not constitute the entire body of landlords at the date of the suit and of the decree, and who were not the entire body of landlords also at the date at which part of the claim for which the rent-suit was brought accrued due, would pass the entire tenure, or merely the right, title and interest of the judgment-debtors in the tenure at the date of the sale."

*Held*—That the words "the tenure or holding shall be liable to sale in execution of a decree for the rents thereof" in sec. 65 of the Bengal Tenancy Act presupposes a suit and decree under the Act, that is, a decree made in a suit in which all the landlord co-sharers are Plaintiffs and not merely some of them, that is, fractional co-sharers. *Beni Madhab Roy v. Joud Lal Sarkar* (I. L. R. 17 Cal. 390, F. B.) referred to.

That the sale that took place in execution of decree taken as a whole, and if it was bad as regards part of the decree as it is impossible to divide the properties sold into two parts, one covered by the sale in satisfaction of one part of the claim and the other, covered by the sale in satisfaction of the other part, the whole sale must be held to have been a sale under the ordinary law, that is, the Code of Civil Procedure and not carrying with it the incidents of a sale under the Bengal Tenancy Act.

That if at the time the suit was brought and decree obtained and enforced by the sale of the tenure the decree-holders did not constitute the entire body of landlords, the sale could not be treated as a sale of the tenure in execution of a rent-decree under the Bengal Tenancy Act.

*Hem Chandra Bhunjoo v. Mon Mohini Das* (3 C. W. N. 604) referred to.

*Dr. Ashutosh Mukherjee and Babu Sarat Chandra Ghose* for the Appellant.

*Babu Sarat Chandra Roy Chowdhuri* for the Respondents.

H. P. C.

*Appeal dismissed.*

# THE Calcutta Weekly Notes.

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## REPORTS (See Index.)

## JURISDICTION IN SUITS FOR RESTITUTION OF CONJUGAL RIGHTS.

Are Munsifs entitled to try suits for restitution of conjugal rights is a question that has been raised and answered by a learned Munsiff in a manner which clearly points to the necessity of framing some rule by the High Court under sec. 9 of the Suits Valuation Act (VII of 1887) for the conferment of jurisdiction on Munsifs in such suits. In the suit of *Golam Rahim v. Putima Bibi* (I. L. R. 13 Cal. 232) for restitution of conjugal rights, the High Court held that such suits are not capable of any money-valuation. But our Legislature, which has always been somewhat zealous in the cause of public revenue, does not seem to believe that anything that can give rise to difference or dispute between individuals is not capable of money-valuation. After providing for the valuation of every conceivable cause of dispute, the Suits Valuation Act by sec. 9 provides in effect that even where suits of any class are incapable of being expressed in money-value the High Court may, with the sanction of Local Government, fix thereon such money-value as it pleases. Accordingly in *Mowla Newaz v. Sajidun-nisa Bibi* (I. L. R. 18 Cal. 378), the High Court expressed an opinion that a suit for conjugal rights is a suit contemplated by the Legislature to be dealt with under sec. 9 of the Suits Valuation Act.

But it has not apparently pleased the High Court yet to solve the problem as to how conjugal felicity or its want may be adequately expressed in money-value. The consequence of it, however, seems to be somewhat serious to those who may be either anxious to get back a recalcitrant spouse who may have asserted her independence, or for the return of a dutiful wife who may have been unduly detained under parental authority.

The rural population within the jurisdiction of every Munsif is mostly married and the chances of difference between married people are by no means rare. It is very desirable, therefore, that Munsifs should have jurisdiction of settling, so far as practicable, such differences.

Unfortunately, however, the Bengal Civil Courts Act, (XII of 1887) did not consider such contingencies when defining the jurisdiction of Munsifs. Under sec. 19 of this Act a Munsif is ordinarily empowered to try a suit, the value of which does not exceed one thousand rupees, but the law provides that he may be especially empowered to try suits up to the value of Rs. 2,000. All other suits are triable by either a District or a Subordinate Judge. Necessarily, suits for the restitution of conjugal rights would seem to be only triable by either a District or a Subordinate or an Additional Judge.

It is hard, however, on a man slighted by his wife to have to undertake a long journey with a heavy heart to the head-quarters of a district or to go in search of a Subordinate Judge in some other locality. It would be far more equitable if he could get such relief as he may, from the Munsif nearest to his cheerless home. The simplest means by which these capable officers may now be empowered to do what they may, for the distressed husbands is, for the High Court to fix some money-value on the "subject-matter" of suits for the restitution of conjugal rights under sec. 9 of the Suits Valuation Act.

But the Government receipts from court-fee stamps are already very high, and it would in every sense be opposed to public policy to set a very high value on the right to claim conjugal duties, specially, having regard to the fact as to whether a neglectful or refractory wife is worth having at any price and further, in view of the uncertainty of the relief that may be given by Courts of law in such suits. The fixing of a nominal value, however, will confer jurisdiction on Munsifs and that is all that concerns us for the present.

## Review.

THE LAW OF TRADE MARKS, &C. By D. M. Kerly, M. A., LL. B.—2nd Edition by the author and F. G. Underhay, M. A. Published by Sweet and Maxwell, Ltd., 3, Chancery Lane, 1901.

This is the second edition of a book well-known in the profession. The bulk and shape of which

have become larger, some parts of it having been re-written and the whole of the section of the chapter headed, the Action for "passing off," dealing with the right of a trader to use his own name, having been added. We find that the author has extended the Appendix by the addition of a number of forms and official notices including the Consolidated General Orders of the Custom House under the Merchandise Marks Acts. The book also contains a summary of Foreign and Colonial Laws of Trade. The cases have been brought down to the Whitsun vacation, 1901. Unfortunately our country is not sufficiently advanced in commerce and trade to require an exhaustive work like the one under review. In this country people more frequently rush into the Criminal Court in cases of infringement of trade and property marks than to the Civil Court, which is always to be regretted. The subject is not well understood in India and it would be difficult to find professional people who have made a study of it. An elaborate set of rules and statutes with innumerable decisions on all possible points help to confuse one, and we quite agree with the author that as things stand, the task of advising at what point, the wide advertisement and extensive use of, say, a descriptive word by a trader on a larger scale enables him to debar his smaller rivals from making use of it, is becoming more and more difficult. Some of the cases afford amusing reading. When learned Judges have to decide what words are not fancy words and which of them are invented and also to determine the standard of invention to be applied to them, the decisions are sometimes not without an element of the ludicrous. It is not always easy to understand why *Borrl* is a non-descriptive word, but a good "fancy-word," where as *Priticumina* (derived from *Pritium*, what) cannot be classed in the same way as the other. One is apt to look somewhat askance if the law is, as stated by Mr. Justice Kekewich in *Cash v. Cash* (82 L. T. 655), that a man may sometimes be restrained from using his own name and that not upon any ground of fraud. The exigencies of competition land one at strange places. If certain persons have for some years carried on business under the name of Cash, in Coventry, a real Mr. Cash unfortunately carrying on business in Coventry may apparently be called upon by a competent Court to change his name and find some other name less offensive to a rival trader. Man is inventive, specially a trading man and when he can easily change "jute" into "silken" and paper into "leatherette," he ought not to complain if the law occasionally requires him to change his appellation. We consider the present work, a very valuable addition to the literature on the subject and strongly recommend its use by the profession in India as containing, and embodying a vast amount of research and learning.

PRINCIPLES OF THE LAW OF REAL PROPERTY. By Joshua Williams, 19th Edition, re-arranged and partly re-written by his son, T. Cyprian Williams. Published by Sweet and Maxwell, Ltd, 3 Chancery Lane, 1901.

That this very valuable work has reached its nineteenth edition is enough testimony to the fact that it is greatly appreciated as such. Since the last edition the Land Transfer Act of 1897 and the Land Charges Act of 1900 have come into operation, making considerable changes in the law relating to the devolution of real estate to executors or administrators. Although chiefly intended for students, members of the profession have always found it of great value. The principles are clearly enunciated; the illustrations are appropriate and concise and the references copious throughout the work. It is hardly too much to say that the man who knows "Williams on Real Property" knows the law on the subject.

We have heard of a desire on the part of some persons in this country endeavouring to create an Estate Tail with the help of the Legislature. We would recommend to them the following passage taken from the work under review: "The policy of the law is now in favour of the free disposition of all kinds of property: and as it allows Estates Tail to be barred, so it will not permit the object of an entail to be accomplished by other means, any further than can be done by giving estates to the unborn children of living persons. Thus an estate given, after the death of an unborn child to his children would be absolutely void. The desire of individuals to keep their name in memory has often been opposed to this rule of law, and many shifts and devices have from time to time been tried to keep up a perpetual entail, or something that might answer the same end. But such contrivances have invariably been defeated: and no plan can be now adopted by which lands can with certainty be tied up, or fixed as to their future destinations for a longer period than the lives of existing person, and a term of twenty one years after their decease."

Besides giving the present law of England the work contains brief notices of the history of the process by which the law came to be settled to what it is to-day and these are none the less interesting and instructive. Reference may again be made, to the chequered history of Estates Tail and especially that of barring them, by those who are anxious to introduce this past anomaly of the English law amongst us.

### English Notes.

CHANCERY DIVISION.—SEPTIMAS PARSONAGE v. THE BRIGHTON HOTELS LD. Before MR. JUSTICE WRIGHT. 20th March 1901.

*Compulsory winding up.*

The Petitioner in this case was a debenture holder











